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National Reporter System.—State Series.

THE
SOUTHEASTERN REPORTER,
VOLUME 39,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST
VIRGINIA, AND SUPREME COURTS OF NORTH
CAROLINA, SOUTH CAROLINA, GEORGIA.

PERMANENT EDITION.

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SOUTHEASTERN REPORTER, VOLUME 39.

JUDGES

OF THE

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First Division.

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WILLIAM A. LITTLE.

ANDREW J. COBB.

Second Division.

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MARMADUKE H. DENT.

H. C. McWHORTER.

GEORGE POFFENBARGER.

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RULES OF PRACTICE.

SUPREME COURT OF NORTH CAROLINA.

Revised and Adopted at February Term, 1901.

APPLICANTS FOR LICENSE.

1. When examined.

Applicants for license to practice law will be examined on the first Monday of each term, and at no other time. All examinations will be in writing.

2. Requirements and course of study.

Each applicant must have attained the age of twenty-one years, and must have studied:

Dwell's Essentials, 3 volumes.
Clark on Corporations.
Clark's Code of Civil Procedure.
Schouler on Executors.
Bispham's Equity.
Code of North Carolina, volume 1.
Sharswood's Legal Ethics.

Each applicant must have read law for two years at least, and shall file with the clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this court.

3. Deposit.

Each applicant shall deposit with the clerk a sum of money sufficient to pay the license fee before he shall be examined; and if, upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

APPEALS—WHEN HEARD.

4. Docketing.

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the clerk.

5. When heard.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order. The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this court may be filed at such term or at the

next succeeding term. If filed seven days before the court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless, by consent, it is submitted upon printed argument under rule 10; but appeals in criminal actions shall each be heard at the term at which it is docketed, unless for cause or by consent it is continued: Provided, however, that a cause from the First, Second, and Third districts, which is tried between January 1st and the first Monday in February, and between August 1st and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

6. Appeals in criminal actions.

Appeals in criminal cases, docketed seven days before the call of the docket for their district, shall be heard before the appeals in civil cases from said district. Criminal appeals docketed after the time above stated, shall be called immediately at the close of argument of appeals from the Sixteenth district, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. Call of each judicial district.

Causes from each of the districts will be called on Tuesday of the week for said district, as follows:

From the 1st district, on Tuesday of the first week.

From the 2d district, on Tuesday of the second week.

From the 3d district, on Tuesday of the third week.

From the 4th district, on Tuesday of the fourth week.

From the 5th district, on Tuesday of the fifth week.

From the 6th district, on Tuesday of the sixth week.

From the 7th district, on Tuesday of the seventh week.

From the 8th district, on Tuesday of the eighth week.

From the 9th district, on Tuesday of the ninth week.

From the 10th district, on Tuesday of the tenth week.

From the 11th district, on Tuesday of the eleventh week.

From the 12th district, on Tuesday of the twelfth week.

From the 13th district, on Tuesday of the thirteenth week.

From the 14th district, on Tuesday of the fourteenth week.

From the 15th district, on Tuesday of the fifteenth week.

From the 16th district, on Tuesday of the sixteenth week.

8. End of docket.

The call of causes not reached and disposed of during the period allotted to each district, and those put to the foot of the docket, shall begin at the close of argument of appeals from the Sixteenth district, and each cause, in its order, tried or continued, subject to rule 6.

9. Call of the docket.

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise the first call shall be peremptory; or at the first term of the court in the year a cause may, by consent of the court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the court shall otherwise direct. The appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. Submission on printed argument.

When, by consent of counsel, it is desired to submit a case without oral argument, the court will receive printed arguments, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket, but the court, notwithstanding, can direct an oral argument to be made, if it shall deem best.

11. If orally argued.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. If brief filed by either party.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there

were an appearance by counsel. When a printed brief is filed, a copy thereof shall be served on the opposite counsel, if any is in attendance on the court, at least twenty-four hours before the cause is called for argument, and if default is made herein, the costs of printing shall not be taxed in favor of the defaulting party, though he should be successful in the action.

13. Cases heard out of their order.

In cases where the state is concerned, involving or affecting some matter of general public interest, the court may, upon motion of the attorney general, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the court, at the instance of the party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, may make the like assignment in respect to it.

14. Cases heard together.

Two or more cases involving the same question may, by leave of the court, be heard together, but they must be argued as one case, the court directing, when the counsel disagree, the course of the argument.

WHEN DISMISSED.

15. If appeal not prosecuted.

Cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. Motion to dismiss.

A motion to dismiss an appeal for non-compliance with the requirements of the statute in perfecting an appeal, must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing, signed by the appellee or his counsel, to that effect, or unless the court shall allow appropriate amendments.

17. Dismissed by appellee.

If the appellant in a civil action shall fail to bring up and file a transcript of the record seven days before the court begins the call of causes from the district from which it comes at the term of this court at which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal

comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, and filing said certificate or certified transcript of the record in this court, may have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

18. When appeal dismissed.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

TRANSCRIPTS.

19. Transcript of record.

(1) The Record. In every record of an action brought to this court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable.

(2) Pages Numbered. The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject-matter contained therein.

(3) Index. On some paper attached to the record, there shall be an index thereto, in the following or some equivalent form:

Summons—Date	page 1
Complaint—First cause of action	page 2
Complaint—Second cause of action	page 3
Affidavit for attachment, etc.	page 4

20. Insufficient transcript.

If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the clerk, or some other person, to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

21. Marginal references.

A case will not be heard until there shall be put in the margin of the record, as required in rule 19 (2), brief references to such parts of the text as are necessary to be considered in a decision of a case.

22. Unnecessary records.

The cost of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions or errors assigned, and not constituting a part of the record of the action of the court taken during the progress of the cause, shall, in all cases, be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

PLEADINGS.

23. Memoranda of.

Memoranda of pleadings will not be received or recognized in the supreme court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. Assigning two or more causes of action.

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. When scandalous.

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the court to be stricken from the record, or reformed, and for this purpose the court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

26. Amendments.

The court may "amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the court may deem it necessary and proper for the purpose of justice, and on such terms as the court may prescribe." Code, § 965.

EXCEPTIONS.

27. How assigned.

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the clerk's office. No exception not thus set out, or filed and made a part of the case or record, shall be considered by this court, other than exceptions to

the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment.

PRINTING RECORDS.

28. What to be printed.

Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals. In these latter, the clerk of the court shall make five typewritten copies of such parts of the record as present the exceptions. Should the appellant gain the appeal, the cost of such typewritten copies shall be taxed against the appellee as part of the costs on appeal. The printed transcript shall be in the order required by rule 19 (1), and shall contain the marginal references and index required by rule 19 (2) and 19 (3). Though, for economy, the marginal references in the manuscript may be printed as subheads in the body of the record, and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up ready printed, and one copy of the printed transcript (or of the typewritten copies in pauper appeals) and a copy of each printed brief shall be sent to each member of the court by the clerk of this court at least twenty-four hours before each case is called for argument.

29. How printed.

The transcript on appeal shall be printed under the direction of the clerk of this court, and in the same type and style, and pages of same size, as the Reports of this court, unless it is printed below in the required style and manner. If it is to be printed here, the party sending up an appeal shall send therewith a deposit in cash, for that purpose, to the clerk of this court, of sixty cents (which includes ten cents for the clerk) for each printed page,—said cash deposit to be estimated at fifty cents for each page of the transcript of the record.

30. If not printed.

If the transcript on appeal (except in pauper appeals) shall not be printed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed when called in its regular order (as set out in rule 5), the appeal shall, on motion of appellee, be dismissed; but the court may, on motion of appellant, after five days' notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

31. Costs of printing.

The actual cost of printing the transcript on appeal shall be allowed to the successful

party, not to exceed, however, fifty cents per page of one copy of the printed transcript, and not exceeding fifty pages of the above specified size and type, unless otherwise specially ordered by the court; and the clerk of this court shall be allowed ten cents additional for each such page for making copy for the printer, unless the appellant shall send up a duplicate manuscript or typewritten copy for that purpose, or shall have the copies printed below.

Judges and counsel should not incur the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that such unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motion for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

32. Printing briefs.

While briefs are not yet required to be printed, they are desirable in all cases which can be deemed of sufficient importance to be brought to this court. Such briefs may be printed under supervision of counsel or of the clerk of this court, but must be of the size and style prescribed by rule 29 for the transcript on appeal. If to be printed here, the deposit therefor must be made as specified in rule 29.

ARGUMENT.

33. Oral arguments.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) The counsel for the appellant may be heard for one hour, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour.

(4) The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5) The time for argument may be extended by the court in a case requiring such extension, but application for extension must be made before the argument begins. The court, however, may direct the argument of

such points as it may see fit outside of the time limited.

(6) Any number of counsel may be heard on either side within the limit of the time above specified; but, if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the court, so as to avoid tedious and useless repetition.

34. Printed arguments or briefs.

When the cause is submitted on printed argument under rule 10, or a brief is filed, whether counsel appear or not, such brief or argument, if of appellant, shall set forth a brief statement of the case, embracing so much and such parts of the record as may be necessary to understand the case; the several grounds of exceptions and assignments of error relied upon by the appellant; the authorities relied upon classified under each assignment, and if statutes are material, the same shall be cited by the book, chapter and section; but this shall not be understood to prevent a citation of other authorities in the argument.

35. Copies of brief to be furnished.

Fifteen copies shall be delivered to the clerk of the court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel.

36. Brief of appellee.

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner.

37. Cost of briefs.

The actual cost of printing his brief, not exceeding fifty (50) cents per page of the size of the pages in the North Carolina Reports, and not exceeding ten pages, shall be allowed to the successful party, to be taxed in the bill of costs.

38. Reargument.

The court will, of its own motion, direct a reargument before deciding any case, if, in its judgment, it is desirable.

39. Agreement of counsel.

The court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this court.

40. Entry of appearance.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be

general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the court.

CERTIORARI AND SUPERSEDEAS.

41. When applied for.

Generally the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this court next after the judgment complained of was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

42. How applied for.

The writs of certiorari and supersedeas shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases, the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

43. Notice of.

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the court may, for just cause shown, shorten the time for such notice.

ADDITIONAL ISSUES.

44. If other issues necessary.

If, pending the consideration of an appeal, the supreme court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the court, and certified to the superior court for trial, and the case will be retained for that purpose.

MOTIONS.

45. In writing.

All motions made to the court shall be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the session of the court.

ABATEMENT AND REVIVOR.

46. Death of party.

Whenever, pending an appeal to this court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the

case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes, and, if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the court: Provided, such order shall be served upon the opposing party.

47. When appeal abates.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.

48. When certified down.

"The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the superior courts, certificates of the decisions of the supreme court, which shall have been on file ten days, in cases sent from said court." Acts 1887, c. 41.

THE JUDGMENT DOCKET.

49. How kept.

The judgment docket of this court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the clerk of the court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXECUTIONS.

50. Tests of executions.

When an appeal shall be taken after the commencement of a term of this court, the judgment and tests of the execution shall

have effect from the time of the filing of the appeal.

51. Issuing and return of.

Executions issuing from this court may be directed to the proper officers of any county in the state. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this court next ensuing its tests. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the superior court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said superior court, and, when satisfied, the fact shall be certified to this court, to the end that an entry to this effect be made here.

PETITION TO REHEAR.

52. When filed.

A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the justice to whom it is submitted under rule 53, such justice may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined.

53. What to contain.

The petition must assign the alleged error of the law complained of; or the matter overlooked; or the newly-discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this court, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The petition shall be sent to the clerk of this court, who shall indorse thereon the time when it was received, and deliver the same to the justice designated by the petitioner, who shall be a justice who did not dissent from the opinion; but the opinion shall not be docketed unless such justice shall indorse thereon that the case is a proper one to be reheard; and notice of the action had shall be given to the petitioner by the clerk of this

court, and if docketed, to the opposite party also.

The rehearing may be granted as to the whole case, or restricted to specified points, as may be directed by the justice who grants the application.

54. Notice of.

Before applying for an order to restrain the issuing of an execution, or the collection and payment of the same, written notice must be given the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor. The court may, however, grant a temporary restraining order without notice.

CLERK AND COMMISSIONERS.

55. Report of funds in hands of.

The clerk and every commissioner of this court who, by virtue or under color of any order, judgment or decree of the supreme court, in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said court held next after the first day of January in each year, report to the court a statement of said fund, setting forth the title and number of the action or matter, the term of the court at which the order or orders under which the clerk or such commissioner professes to act was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. Report recorded.

The reports required by the preceding paragraph shall be examined by the court, or some member thereof, and their or his approval indorsed shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the supreme court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. Books taken out.

No book belonging to the supreme court library shall be taken therefrom except into the supreme court chamber, unless by the justices of the court, the governor, the attorney general, or the head of some department of the executive branch of the state government, without the special permission of the marshal of the court, and then only upon the application in writing of a judge of a superior court holding court or hearing some matter in the

city of Raleigh, the president of the senate, the speaker of the house of representatives, or the chairman of the several committees of the general assembly; and in such cases the marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

CLERK.

58. Minute book.

The clerk shall keep a permanent minute book, containing a brief summary of the proceedings of this court in each appeal disposed of.

59. Clerk to have opinions typewritten and sent to judges.

After the court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the court, to the end that the same may be carefully examined, and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the court and ordered to be filed.

LIBRARIAN.

60. Reports by him.

The librarian shall keep a correct catalogue of all books, periodicals and pamphlets in the library of the supreme court, and report to the court on the first day of the spring term of each year, what books have been added during the next year preceding his report to the library, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. Sittings of the court.

The court will sit daily, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. Citation of reports.

Inasmuch as many volumes of Reports prior to the 63d have been reprinted by the state, with the number of the Reports instead of the name of the reporter, and all the other volumes will be reprinted and numbered in like manner, counsel will cite the volumes prior to the 63d as follows:

1 & 2 Martin	as 1 N. C.	3 Hawks,	as 10 N. C.
Taylor & Conf.	" 2 "	4 " "	" 11 "
1 Haywood,	" 3 "	1 Devereux, Law,	" 12 "
2 " "	" 4 "	2 " "	" 13 "
1 & 2 Car. Law	" 5 "	3 " "	" 14 "
Repository, N.	" 6 "	4 " "	" 15 "
C. Term,	" 7 "	1 " Eq.	" 16 "
Murphy,	" 8 "	2 " "	" 17 "
2 " "	" 9 "	1 Dev. & Bat. Law,	" 18 "
3 " "	" 10 "	2 " "	" 19 "
1 Hawks,	" 11 "	3 & 4 " "	" 20 "
2 " "	" 12 "	1 " Eq.	" 21 "

2 Dev. & Bat. Eq. as 23 N. C.	1 Iredell, Eq. as 36 N. C.	5 Jones, Law, as 50 N. C.	4 Jones, Eq. as 57 N. C.
1 Iredell, Law, " 23 "	2 " " " 37 "	6 " " " 51 "	5 " " " 53 "
2 " " " 24 "	3 " " " 38 "	7 " " " 52 "	6 " " " 54 "
3 " " " 25 "	4 " " " 39 "	8 " " " 53 "	1 & 2 Winston, " 60 "
4 " " " 26 "	5 " " " 40 "	1 " Eq. " 54 "	Phillips, Law, " 61 "
5 " " " 27 "	6 " " " 41 "	2 " " " 55 "	" Equity, " 62 "
6 " " " 28 "	7 " " " 42 "	3 " " " 56 "	
7 " " " 29 "	8 " " " 43 "		
8 " " " 30 "	Busbee, Law, " 44 "		
9 " " " 31 "	Eq. " 45 "		
10 " " " 32 "	1 Jones, Law, as 46 "		
11 " " " 33 "	2 " " " 47 "		
12 " " " 34 "	3 " " " 48 "		
13 " " " 35 "	4 " " " 49 "		

☞ In quoting from the REPRINTED Reports counsel will cite always the marginal (i. e. the original) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

SUPERIOR COURTS OF NORTH CAROLINA.

1. Entries on records.

No entry shall be made on the records of the superior courts (the summons docket excepted) by any other person, than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on prosecution bond and bail.

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several superior courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace.

3. Opening and conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. Examination of witnesses.

When several counsel are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit,

the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

(The above rules substantially prescribed by the supreme court at January term, 1815.)

6. Decision of right to conclude not appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, the court shall decide who is so entitled, and, except in the cases mentioned in rule 3, its decision shall be final and not reviewable.

7. Issues.

Issues shall be made up as provided and directed in Code, §§ 895, 896.

8. Judgments.

Judgments shall be docketed as provided and directed in Code, § 433.

9. Transcript of judgment.

Clerks of the superior courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing magistrates' judgments.

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the superior court shall be furnished to applicants at the same time after such rendition of judgment, and, if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to supreme court.

In every case of appeal to the supreme court, or in which a case is taken to the supreme court by means of the writ of certiorari as a substitute for an appeal, it shall

be the duty of the clerk of the superior court, in preparing the transcript of the record for the supreme court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same.

On some paper attached to the transcript of the record, there shall be an index to the record in the following or some equivalent form:

Summons—Datepage 1
Complaint—First cause of action....page 2
Complaint—Second cause of action...page 3
Affidavit of attachment.....page 4

and so on to the end.

12. Transcript on appeal—When sent up.

Transcripts on appeal to the supreme court shall be forwarded to that court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the superior court. Code, § 551.

13. Reports of clerks and commissioners.

Every clerk of the superior court, and every commissioner appointed by such court, who, by virtue of or under color of any order, judgment or decree of the court in any action or proceedings pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the judge of the superior court holding the first term of the court in each and every year, who shall examine, or cause the same to be examined and, if found correct, and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The superior court shall grant the writ of recordari only upon the petition of the party applying for it, specifying particularly the

grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of supersedeas, if prayed for as required by Code, § 545. In such case, the writ shall be made returnable to the term of the superior court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the superior court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of certiorari in like manner, except that in case of the suggestion of a diminution of the record if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to require bonds to be filed.

In no case shall the court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next friend—How appointed.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. Guardian ad litem—How appointed.

All motions for a guardian ad litem shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be ap-

pointed, and such guardian must file an answer in every case.

18. Cases put at foot of docket.

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When opinion is certified.

When the opinion of the supreme court in any cause which has been appealed to that court has been certified to the superior court, such cause shall stand on docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Acts 1887, c. 192, § 3.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court, or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases set for a day certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. Calendar under control of court.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Non-jury cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals from justices of the peace.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. On consent continuance—Judgment for costs.

When civil actions shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to file pleadings—How computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. Counsel not sent for.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal dockets.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue. Second. All warrants upon which parties have been held to answer at that term. Third. All presentments made at preceding terms, undisposed of. Fourth. All cases wherein judgments nisi have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the state.

29. Civil and criminal dockets—What to contain.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties. Second. The nature of the action. Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth. A blank space for the entries of the term.

30. Books.

The clerks of the superior courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

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**CRIMINAL LAW—SHOOTING INTO RAILROAD
TRAIN—INSTRUCTIONS—CONSTITUTION.**

1. On a prosecution for shooting into a railway train, a witness testified as to indentation marks in the top of the car made by a bullet. The court, in charging as to the force of circumstantial evidence, used the illustration that, if a man saw a bullet hole in a tree, his conclusion would be that some one at some time shot into the tree. *Held*, that the charge was not erroneous, as violating Const. art. 5, § 28, providing that the court shall not charge in regard to matters of fact, as the illustration did not refer to the facts in the case at bar.

2. A conviction will not be disturbed where there is evidence to support it.

Appeal from general sessions circuit court of Hampton county; O. W. Buchanan, Judge.

Jeff Godfrey was convicted of shooting into a railway train, and he appeals. Affirmed.

J. P. Youmans, for appellant. U. X. Gunter, Asst. Atty. Gen., for the State.

GARY, A. J. The appellant was indicted, convicted, and sentenced for shooting into a railroad train. He appealed upon exceptions, the first of which assigns error as follows: "First. That his honor the circuit judge presiding at the trial invaded the province of the jury, in violation of section 28 of article 5 of the constitution of this state, by charging in respect to matters of fact in the following particulars: (1) In using two illustrations of circumstantial evidence, to wit, the instance of tracks being found in the snow, and that of a man finding shot holes in a tree, and in such illustrations giving the jury advice as to how circumstantial evidence and certain circumstances named should be reasoned upon, and what weight, force, and effect the jury might allow the same to have with them. (2) In stating what might be concluded from imprints appearing to be tracks in snow, in the following language: 'Well, it is as certain as certain can be that it was a man, because who can make the tracks of a man, but a

man?' (3) In saying to the jury: 'A man goes into the woods. He looks in the bark of a tree, and sees several shots. * * * He never heard the gun fire, * * * yet there is the shot. * * * Now, isn't it certain that somebody at some time fired the shot that went into the tree?'—thus probably making it appear to the jury that he was referring to or had in mind the testimony of a witness in this case who testified that there was a point or indentation in the top of the car which appeared to have been made by a shot, and that his conclusion was that a shot had been fired into the train, and which was, in effect, not only a consideration and a weighing of the facts in this case, but an announcement of a conclusion of fact." The words quoted from the charge of his honor the presiding judge were a part of the language used by him, by way of illustration, in pointing out the distinction between positive and circumstantial evidence. He did not refer to the facts in this case, nor were his illustrations such as to show his opinion upon the facts of the case then being tried. It was not a charge "in respect to matters of fact," and this exception is overruled.

The second exception is as follows: "Second. That his honor the circuit judge erred in refusing to grant a new trial on the ground that there was no testimony upon which to convict the defendant for the alleged crime." This exception was not argued by the appellant's attorney. It, however, cannot be sustained, as there was testimony to support the verdict. It is the judgment of this court that the judgment of the circuit court be affirmed.

(60 S. C. 500)

STATE v. GIBBES.

(Supreme Court of South Carolina. June 4,
1901.)

**MISDEMEANORS—MUNICIPAL ORDINANCES—
CONSTITUTIONALITY.**

Gen. Ord. Charleston, § 619, providing that any person guilty of disorderly conduct, clamorous noises, drunkenness, etc., shall be subject to a fine or imprisonment, is not void

because relating to more than one subject, in derogation of Const. art. 3, § 17, providing that every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title, since this provision has no application to ordinances of municipal corporations.

Appeal from general sessions circuit court of Orangeburg county; O. W. Buchanan, Judge.

John Gibbes was convicted of drunkenness and disorderly conduct, and he appeals. Affirmed.

Glaze & Herbert, for appellant. U. X. Gunter, Asst. Atty. Gen., for the State.

GARY, A. J. The appellant was tried, convicted, and sentenced before the recorder of the city of Charleston for being drunk and disorderly, under section 619 of the General Ordinances of the City of Charleston, which is as follows: "If any person shall appear in a public place in a state of nudity, or in a dress not becoming his or her sex, or shall make any indecent exposure of his or her person, or be guilty of any disorderly, lewd or indecent conduct, cursing and swearing, clamorous noises, drunkenness, quarreling, fighting, scurrilous, obscene, indecent or profane writing, pictures, marks or figures on any walls, fences, houses or structures, or shall print, engrave, make, exhibit, sell or offer to sell any indecent or lewd book, picture or any other thing, or shall throw from any house or window water, offal or other matter, upon the sidewalks, shall be subject to a fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days." He appealed to the circuit court, but his appeal was dismissed, whereupon he appealed to this court upon the following exception: "That his honor, the circuit judge, erred in dismissing the appeal upon the ground that section 619 of the General Ordinances of the City of Charleston relates to more than one subject, and, as such, is in derogation of article 3, § 17, of the constitution of the state, and is therefore void." The caption of article 3 is "Legislative Department." Section 17 thereof is as follows: "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." We fail to see wherein this provision has any application whatsoever to an ordinance of a municipal corporation. It is the judgment of this court that the judgment of the circuit court be affirmed.

(60 S. C. 509)

STATE v. BROWNFIELD.

(Supreme Court of South Carolina. June 4, 1901.)

HOMICIDE—APPEAL—AGREED CASE—TESTIMONY—INSTRUCTIONS—OMISSION—EFFECT—INDICTMENT—JURIES—EXCLUSION ON ACCOUNT OF RACE OR COLOR—INSTRUCTIONS.

1. Where an agreed case on appeal contained the words, "(Insert testimony)," but no testi-

mony was set out, the testimony was no part of the agreed case.

2. Where an agreed case contained the words, "The judge's charge was as follows: (Insert judge's charge),"—but the charge was not inserted, it was not a part of the agreed case.

3. Refusal to quash an indictment, or to sustain a challenge to the array of grand and petit jurors, because no member of the race to which defendant belonged was on the grand jury which found the bill of indictment, is not error, no discrimination against defendant's race being shown.

4. Where an offer to introduce testimony to support the allegations in a motion to quash an indictment, unsupported by any other offer than one included in the motion itself, was the only evidence offered to sustain the facts alleged in the motion, the motion to quash was properly denied.

5. An instruction that "an arrest, even if lawful, made in such a menacing manner as to threaten death or bodily harm, is held to justify resistance, even to the killing of an officer," is erroneous, since it eliminates the conduct of defendant in resisting the arrest.

6. An instruction in a murder case stated that, "if the testimony shows that deceased assaulted defendant with a pistol in such a manner as to produce the belief that he was about to take defendant's life, or inflict on him great bodily harm, at the time he fired the fatal shot, it makes no difference whether deceased intended to take defendant's life or to do him bodily harm or not, the shooting was justifiable, the killing excusable, and defendant should be acquitted," held erroneous, as a charge on the facts, and as failing to take into consideration the conduct of defendant.

Appeal from common pleas circuit court of Georgetown county; Ernest Gary, Judge.

John Brownfield was convicted of murder, and he appeals. Affirmed.

J. L. Mitchell and W. J. Whipper, for appellant. John S. Wilson, for the State.

GARY, A. J. The defendant was indicted, tried, and convicted of murder at the November, 1900, term of the court of general sessions for Georgetown county, in said state, and sentenced to be hanged on the 28th day of December, 1900. Upon his arraignment, the defendant's attorneys made a motion to quash the indictment on the following grounds: "[Caption.] And now comes the defendant, John Brownfield, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no person or persons of color, or of African descent, known as 'negroes,' to serve on said grand jury, but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons, or persons of African descent, known as 'negroes,' because of their race and color, and that said grand jury was composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as 'negroes,' although consisting of and constituting about four-fifths of the population and of the registered voters in said city and county of George-

town, and although otherwise qualified to serve as such grand jurors, were excluded therefrom, on account of their race and color, and have been so excluded from serving on any jury in said court of general sessions for Georgetown county for a considerable time back, which is a discrimination against the defendant, since he is a person of color, and of African descent, known as a 'negro'; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the constitution and laws of the United States; all of which the defendant is ready to verify. John Brownfield. [L. S.] Sworn to before me this 15th day of Nov., A. D. 1900. J. B. Edwards, Notary Public, S. C." This motion was overruled, and thereupon the defendant's attorneys excepted.

The defendant's attorneys then challenged the array of grand and petit jurors upon the same grounds as were submitted on the motion to quash the indictment. This motion was also overruled, and to this ruling the defendant's attorneys likewise excepted. The defendant thereupon pleaded not guilty.

The testimony is not set out in the agreed "case" upon which the appeal was heard by this court, but under the word "testimony" are the words, "(Insert testimony)." This, however, did not make the testimony a part of the agreed case. In re Estate of Perry, 42 S. C. 183, 20 S. E. 84; Moore v. Perry, 42 S. C. 369, 20 S. E. 200.

In the agreed case are also the words: "The judge's charge was as follows: (Insert judge's charge)." The charge was not inserted, and, under the authorities just cited, was not a part of the agreed case.

The defendant appealed upon five exceptions, the fifth of which was withdrawn. The first exception is as follows: (1) "Because his honor, Judge Gary, the presiding judge, erred in refusing defendant's motion to quash the indictment, on the ground that there was no member of the race to which the defendant belongs on the grand jury that found the said bill of indictment." The only question raised by this exception is whether his honor, the presiding judge, erred in refusing to quash the indictment simply because no member of the race to which the defendant belongs was on the grand jury that found the bill of indictment. In the first place, there is no provision of the constitution of South Carolina, nor any of its statutes or laws, to the effect that a person on trial can move to quash an indictment on the ground that there was no member of the race to which he belongs on the grand jury that found the bill of indictment against him. The constitution, statutes, and laws of South Carolina apply alike to the white and colored races, as to the qualifications of jurors, without any discrimination whatever on account of race, color, or previous condition of servitude. The provisions of the constitution relative to the qualifications of ju-

rors were construed in *Mew v. Railway Co.*, 55 S. C. 90, 32 S. E. 828, affirmed in *State v. Rafe*, 56 S. C. 379, 34 S. E. 660, and other cases thereafter decided. In the second place, the fact that there was no member of the race to which the defendant belongs on the grand jury that found the bill of indictment against him was not violative of the constitution, statutes, or laws of the United States, unless there was a discrimination against his race by the constitution, statutes, or laws of South Carolina, or in the administration thereof, on account of race, color, or previous condition of servitude. In the case of *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075, Mr. Justice Harlan, voicing the opinion of the court, after quoting the provision of the statute that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified from service, as grand or petit juror, in any court of the United States, or of any state, on account of race, color, or previous conditions of servitude," says: "While a state, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury is not, within the meaning of the constitution, always or absolutely necessary to the enjoyment of equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury, yet a denial to citizens of the African race, because of their color, of the right or privilege, accorded to white citizens, of participating, as jurors, in the administration of justice, would be a discrimination against the former, inconsistent with the amendment, and within the power of congress, by appropriate legislation, to prevent." This exception is overruled.

The second exception is as follows: (2) "Because his honor, Judge Gary, the presiding judge, erred in refusing the challenge to the array of grand and petit jurors on same ground." This exception is disposed of by what was said in considering the first exception. While the question was not properly made by the exceptions, this court will, nevertheless, in *favorem vite*, consider whether his honor, the presiding judge, erred in overruling the motion to quash the indictment, and in refusing to sustain the challenge to the array of grand and petit jurors on the ground that there was no testimony to sustain the facts therein alleged. In order to determine this question, it will be necessary to state the facts that appear in the agreed case. It seems that a difference arose between the respective attorneys of record as to the facts of the case, whereupon they signed the following agreement, to wit: "We hereby agree that his honor, Judge Gary,

make a statement as to his rulings upon the motion to quash the indictment, and also as to the motion to challenge the arrays of grand and petit jurors in the case, and also as to requests to charge, and such statement shall be the agreed statement, for the purposes of this appeal. J. L. Mitchell and W. J. Whipper, Attorneys for Defendant (Appellant). John S. Wilson, Solicitor for State (Respondent)." Statement of Judge Gary: "On motion to quash the venire, I overruled the same on two grounds: (1) Because the statement of facts set out in the grounds for quashing the same did not appear from the records or otherwise; that, not being personally acquainted with the jurors selected, I could not assume the facts to be as alleged. (2) Because the constitution of this state prescribed the qualifications of a juror in section 22 of article 5, in the following words: 'Each juror must be a qualified elector under the provisions of this constitution, between the ages of twenty-one and sixty-five years, and of good moral character.' I then suggested that counsel could examine each juror on his voir dire, and ascertain if he was qualified, and, in the absence of any showing to the contrary, I was bound to assume that the jury commissioners had done their duty in the premises. As to the sixteenth request, I have no recollection, as I marked the requests presented, and turned them over to the stenographer. May 4, 1901. Ernest Gary, Presiding Judge." The last line in the agreed case is: "Above signed with relation to case as settled by judge." It is true the words, "The defendant offered to introduce testimony to support these grounds," appear in the record just after the statement that, "the motion being overruled by the court, the defendant's counsel excepted"; but they evidently refer to the offer in the motion to quash the indictment, and not thereafter, as the said words are inconsistent with the statement made by his honor, the presiding judge, in pursuance of the agreement of counsel hereinbefore mentioned. Furthermore, it was not contended by the appellant's attorney, upon the hearing of the appeal herein, that there was any offer to introduce testimony to support the allegations in the motion to quash, other than the offer therein made. We will therefore consider this question in the light of the fact just mentioned, that the appellant did not offer testimony to sustain the allegations in the motion to quash, further than the mere offer alleged in said motion. In *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839, the court says: "When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken either by plea in abatement or by motion to quash the indictment before pleading in bar. *U. S. v. Gale*, 109 U. S. 65, 67, 3 Sup. Ct. 1, 27 L. Ed. 357. The motion to quash on such ground

being based on allegations of fact not appearing in the record, those allegations, if controverted by the attorney for the state must be supported by evidence on the part of the defendant."—citing *Smith v. Mississippi*, 162 U. S. 592, 601, 16 Sup. Ct. 900, 40 L. Ed. 1082; *Williams v. Mississippi*, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012. In *Smith v. Mississippi* the court uses this language: "No evidence was offered in support of the motion by the accused to quash the indictment, unless the facts set out in the written motion to quash, verified to the best of his knowledge and belief, can be regarded as evidence in support of the motion. We are of opinion that it could not properly be so regarded. The case differs from *Neal v. Delaware*, 103 U. S. 370, 394, 396, 26 L. Ed. 567." The court then proceeds to show wherein the difference consisted. Proceeding, the court says: "The facts stated in the written motion to quash, although that motion was verified by the affidavit of the accused, could not be used as evidence to establish those facts, except with the consent of the state prosecutor or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence, introduced or offered to be introduced by the accused. He could not of right insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was therefore unsupported by any competent evidence; consequently it cannot be held to have been erroneously denied." These authorities are conclusive of the question under consideration.

The third exception is as follows: (3) "Because his honor, the presiding judge, erred in refusing to charge the jury, as requested by defendant's attorneys, as the eighth proposition, that 'an arrest, even if lawful, made in such a menacing manner as to threaten death or bodily harm, is held to justify resistance, even to the killing of an officer.' 2 Am. & Eng. Enc. Law (2d Ed.) 980." This request was erroneous, in that it eliminated from the consideration of the jury the conduct of the defendant, and was therefore properly refused. This exception is overruled.

The fourth exception is as follows: (4) "Because his honor, the presiding judge, erred in refusing to charge the jury in the above-entitled cause, as requested by defendant's attorneys, as the ninth proposition, that 'if the testimony shows that the deceased, J. C. Scurry, assaulted the defendant, John Brownfield, with a pistol, in such a manner as to produce the belief that he was about to take the defendant's life, or inflict upon him great bodily harm, at the time that he fired the fatal shot, it makes no difference whether deceased intended to take the defendant's life or to do him bodily

harm or not, the shooting was justifiable, the killing excusable, and the defendant should be acquitted.' Whart. Hom. 215-217, 219; State v. Jackson, 32 S. C. 27, 10 S. E. 769; State v. Symmes, 40 S. C. 383, 19 S. E. 16." This exception does not specify in what particular there was error on the part of his honor, the presiding judge; but, waiving this objection, the request was erroneous, as it failed to take into consideration the conduct of the defendant, and, furthermore, would have been a charge on the facts. It was therefore properly refused, and the exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed, and the case remanded to that court, for the purpose of having another day assigned for the execution of the sentence of the court.

(60 S. C. 501)

NANCE, Probate Judge, v. ANDERSON COUNTY.

(Supreme Court of South Carolina. June 4, 1901.)

CONSTITUTIONAL LAW—SALARY OF PROBATE JUDGE—STATUTES.

Act Feb. 19, 1900 (23 St. at Large, p. 293), fixes the salaries of the county officers in certain counties in lieu of fees, and expressly exempts from its operation certain designated counties. *Held*, that as the act was not general in its provision throughout the state, and as the compensation of officers in the exempt counties was not graded in proportion to population and the services required, the act was unconstitutional, as special legislation, and hence plaintiff, an officer of a county in which a salary was fixed, was entitled to recover the fees of his office.

Appeal from common pleas circuit court of Anderson county; W. C. Benet, Judge.

Action by R. Y. H. Nance, probate judge for Anderson county, against Anderson county. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

Breazensle & Rucker, for appellant. Tribble & Prince and E. G. McAdams, for respondent.

GARY, A. J. The facts out of which this controversy arose are set forth in the order of his honor, the circuit judge, which is as follows: "The above cause came up before me on appeal at this the March term of court, 1901, on exceptions to the action of the county commissioners. It appears that the appellant is probate judge for Anderson county, and filed with the board of county commissioners an account for the sum of five dollars, for proceedings in lunacy, to be audited and approved by said board. The board rejected said claim, on the ground that the probate judge for said county was put on a salary by virtue of 'An act relating to fees and salaries of the county officers of the several counties of this state,' approved February 19, 1900 (23 St. at Large, p. 293), in lieu of costs and fees. The appellant, by

his exceptions, attacks the constitutionality of said act, and contends that said act is local and special legislation, which is contrary to section 34, art. 3, subds. 10, 11, 12. After argument of the counsel, and an inspection of the said act, it appears to the court that said act is unconstitutional." The act to which he refers contains the following provisions: "That the officers of the several counties in this state herein named shall receive the following compensation: * * * Anderson County.—The county officers shall receive salaries as follows: * * * Probate judge, twelve hundred dollars. * * *" Section 5: "This act shall not apply to the counties of Oconee, Greenville, Clarendon, Dorchester, Horry, Hampton, Georgetown, Kershaw, Greenwood, Pickens, Cherokee, Chesterfield, Darlington, Edgefield, Bamberg, Spartanburg, Union, Lexington, Aiken, Richland, Florence, Saluda, Marlboro, Chester, Williamsburg, Lancaster, York, Barnwell, and Sumter, nor in Abbeville county except as herein provided. * * *" In some of the counties mentioned in said act the officers are to receive fees as compensation, while in others they are to be paid salaries. Section 34, art. 3, of the constitution contains the following provision: "The general assembly of this state shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit: * * * (10) To fix the amount or manner of compensation to be paid to any county officer, except that the laws may be so made as to grade the compensation in proportion to the population and necessary service required. (11) In all other cases, where a general law can be made applicable no special law shall be enacted. (12) The general assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operations: provided, that nothing contained in this section shall prohibit the general assembly from enacting special provisions in general laws." In the case of *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226, this court, in construing the foregoing provisions of the constitution, uses this language: "The copulative conjunction is used in the constitution, and shows that in grading the compensation it must not only be in proportion to the necessary service required, but also in proportion to the population." The court also says: "It is also contended that the act of 1896 falls under the proviso in subdivision 12, hereinbefore mentioned, which is as follows: 'Provided, that nothing contained in this section shall prohibit the general assembly from enacting special provisions in general laws.' It is manifest, from even a casual reading of the constitution, that 'local or special laws,' and 'special provisions in general laws,' do not mean the same thing, and that they were intended to be construed in such a manner that neither would practically destroy

the force of the other. Furthermore, as the act of 1896 was not a 'general law,' it did not come within the purview of the said proviso. In order that a law may be general, it must be of force in every county in the state, and, while it may contain special provisions making its effect different in certain counties, those counties cannot be exempt from its entire operation." An act fixing the amount or manner of compensation to be paid to county officers must either be general in its provisions throughout the state, or, if it is intended to exempt certain counties from its operation, it must appear upon the face thereof that the compensation in those counties so exempt is graded in proportion to population and the necessary service required, so that its provisions may be applicable to all counties in which like conditions exist. The act under consideration failed to comply with these requirements, and was therefore unconstitutional. The judgment of the circuit court is affirmed.

(60 S. C. 516)

STATE v. HEAD.

(Supreme Court of South Carolina. June 4, 1901.)

MANSLAUGHTER—DYING DECLARATIONS—ADMISSIBILITY—EVIDENCE—HOSTILE WITNESS.

1. A physician testified that when he saw deceased he was suffering from a gunshot wound, and was under a great shock therefrom; that he lived 30 hours thereafter, and died from the wound. Deceased said he "was going to die," "had not very long to live," and that he would like to have a preacher before he died; that "it was not worth while for the doctor to hold out any hopes for him"; that he knew his wound would result in death. The statement was made about 11 o'clock at night, and the same thing was said about 11 o'clock the next day. He died about 14 hours after making the last statement. *Held*, that death was imminent, and known to be so by deceased at the time of the statement, so as to entitle it to admission in evidence as a dying declaration.

2. Where defendant's attorneys had full opportunity to cross-examine a witness for the prosecution, there was no abuse of discretion in not granting a new trial on the ground that the testimony of the witness showed him to be hostile to defendant, and that such testimony was wholly at variance with affidavits made by him as to the whole of the dying declarations of deceased.

Appeal from general sessions circuit court of Pickens county; R. O. Watts, Judge.

Wesley Head was convicted of manslaughter, and he appeals. Affirmed.

Morgan & Blassingame, for appellant. U. X. Gunter, Asst. Atty. Gen., for the State.

GARY, A. J. The appellant was convicted of manslaughter, and appealed from the sentence of the court on the following exceptions: "(1) His honor erred in permitting the witness Dr. Robert Kirksey to testify to alleged dying declarations of the deceased; there being no sufficient evidence to show that at the time of the making of them the

declarant was in extremis, and fully conscious of his impending dissolution. (2) His honor erred in admitting in evidence the alleged dying declaration of the deceased; there being nothing to show more than that he believed he was about to die, and nothing to show that he was in extremis, but, even if so, nothing to show, in addition thereto, that they were made under a sense of impending death, both of which conditions, we submit, are necessary. (3) His honor erred in admitting in evidence the written statement purporting to be the dying declaration of deceased, when the witness Dr. Kirksey had detailed an alleged statement made to him by the deceased at 11 o'clock on the night previous, and by his testimony showed that the statement admitted in evidence was written twelve hours after the detailed conversation of the day before, and that it is shown from the witness that the deceased said 'about the same thing' on the day the statement was written. Nothing, therefore, to show, what was the sense and condition of the deceased at the time of the statement was written,—whether in extremis, and, further, whether under a sense of immediate dissolution,—both of which conditions, we submit, were necessary to make competent the written statement. (4) His honor erred in admitting the written statement purporting to be the dying declaration of the deceased, because such statement does not show the deceased to be in extremis, nor does it contain a word or syllable as to the death of the deceased, proximate or remote, thereby falling short of the third requirement for admission as such testimony. (5) His honor abused his discretion in refusing to grant the defendant a new trial upon the motion and affidavits submitted therein, in that testimony as given by Dr. Kirksey shows him to have been hostile towards the defendant, and, when viewed in the light of the affidavits, is wholly at variance with what he testified to as being the whole of the dying declaration of the deceased; that, having admitted in his testimony that the written statement was all that the deceased said with reference to the difficulty, it was, in the subsequent light of the character of such witness, the duty of the circuit judge to have granted a new trial, because it was then apparent to him that such important testimony, always having great weight with a jury, was incomplete, unfair, and wholly at variance with the true facts of the difficulty as detailed by said Dr. Robert Kirksey as being dying declarations of the deceased, and, while there is nothing to show the verdict of the jury would have been different, it is a fact that the testimony of the defendant is corroborated by the statement of the witness Dr. Kirksey, set forth in the affidavits."

Dr. Kirksey testified as follows: "Q. Where do you live? A. Pickens county. Q. Were you called upon to make a post mortem examination upon the person of Joe Kelly?

A. Yes, sir; I saw him before and after his death. Q. Tell all about it. A. On the 16th of December, 1899, at 8 o'clock at night, I was called to see Joe Kelly; and I found him at his house, about eighteen miles from here, and about eight miles from my house. He lives near Keowee river, and he had a shotgun wound, and he was under a great shock from the wound he had received. Q. Where was the wound? A. It was on the body, here, about four inches from the hip bone, and about six inches from the median line, here [indicating], and it ranged back here, and struck the backbone. Q. Did it come out back there? A. No, sir. Q. Was there any other wound about the person? A. No, sir. Q. How long did he live? A. Thirty hours. Q. What caused his death? A. That gunshot wound. Q. Did you know anything of the facts of the case? A. Not until just before he died,—a while before. Q. What did he say about his dying? A. He asked me did I have any hopes of him, and I told that as long as there was life there was hope. Q. Did he express anything else than that? A. He said that he was going to die, and that he would like to make a statement to me before he died, with reference to the difficulty; and he said that he would like to get a preacher there before he died, and, if I saw one, to be sure to send him to him, and that he was going to die, and that he was not going to be long about dying. Q. Did he say anything about— (Mr. Morgan objects to leading the witness.) By the Court: How long was that statement made before he died? A. That statement was made that night about 11 o'clock, and the next morning about 11 o'clock he said about the same thing. He just said that he was going to die, and there was not worth while for me to to hold out any hopes for him; that he knew the condition of his wound, and that he knew that he was going to die; and I told that as long as there was life there was hope, and he said that there was no hope for him, and I ought not to hold out hopes to him. By the Court: When did he make that statement? A. He made that statement that night about 11 o'clock, and the next morning about 11 o'clock he said the same thing. The Court: I think that is sufficient to let the statement in. (Mr. Morgan objects on the ground that the death of the deceased must be shown to be imminent at the time of the making of the statement. Objection overruled. Mr. Morgan excepts.) Q. What did he say about the difficulty? A. I wrote down exactly what he said to me, and I will just read it to you: '17th December, 1899, Sunday. I had been to Pickens, and in coming back met some one. Drove close up to them before I saw them. I called out, "Who are you?" and got out. Went out to where they was, and found it to be Wesley Head. I asked him why he did not tell me his name. He answered it was none of my God-damn business, and shot me

as he finished speaking. He then got in his buggy with Marcus Ellenburg and drove off. My aunt, Dock Kelly, Oscar Galloway—He was out of the buggy when I got to the front of the team.'" Cross-examined by Mr. Morgan: "Q. Whose handwriting is that? A. J. K. Kirksey's. Q. I thought you said you wrote it down? A. My father wrote it down while I was there, and I saw him write it. I was looking over his shoulder, and saw him write it. Q. Who else was in the room? A. His father, and I think two women. Q. What time was it? A. As well as I remember, it was about 11 o'clock on Sunday. Q. And he died when? A. About 1 o'clock the same night. Q. About fourteen hours after he made the statement, he died? A. Yes, sir; I would have wrote that myself, but I had on my overcoat, and could not well."

The appellant's attorney interposed only two objections to the foregoing testimony: (1) To leading the witness; and (2) "on the ground that the death of the deceased must be shown to be imminent at the time of the making of the statement." All other objections that might have been urged against the admissibility of the testimony were waived. The foregoing testimony shows that the death of the deceased was imminent at the time said statement was made, and what we have said shows that the first, second, third, and fourth exceptions must be overruled.

We will next consider the fifth exception: When Dr. Kirksey was on the stand as a witness the appellant's attorneys had the opportunity of cross-examining him fully as to the facts of the case, and we fail to discover any abuse of discretion on the part of his honor the presiding judge in refusing the motion for a new trial. It is the judgment of this court that the judgment of the circuit court be affirmed.

(60 S. C. 504)

SIREs v. MOSELEY.

(Supreme Court of South Carolina. June 4, 1901.)

EJECTMENT—TRESPASSER—SUMMARY PROCEEDING—ORDER TO SHOW CAUSE—NOTICE—DESCRIPTION.

1. Plaintiff made affidavit before a justice that defendant had gone into possession of certain lands of plaintiff without his consent or warrant of law, and refused to yield possession. The magistrate issued an order reciting the affidavit, and requiring defendant to show cause at the magistrate's office, at a time stated, why defendant should not be ejected from the premises. *Held*, under Rev. St. 1893, § 2432, providing that, if any person shall go into possession of any lands of another without his consent or without warrant of law, the owner of the land may apply to any trial justice to serve notice on such trespasser to quit, that such order was sufficient as notice to defendant to quit, and that so much of the order as required defendant to show cause should be treated as surplusage.

2. Under Rev. St. 1893, § 2432, providing that a trial justice, on application of a land-

owner, shall serve notice on a trespasser on such owner's land to quit the premises, and that if, after the expiration of five days from the personal service of such notice, such trespasser refuses or neglects to quit, or within such five days show to the magistrate that he has bona fide color of claim to possession, the magistrate shall issue his warrant of ejectment, a notice to quit "within five days" is not required.

3. Where, in a proceeding under Rev. St. 1893, § 2432, providing that, if any person shall go into possession of any land or tenements of another without his consent or without warrant of law, he may be ejected therefrom, the plaintiff filed an affidavit with a justice showing that the land was plaintiff's, and was situated in the county of which the justice was a magistrate, and was in possession of the defendant, such description was sufficient to give the justice jurisdiction.

Appeal from common pleas circuit court of Dorchester county.

Action by O. C. Sires against Norman Moseley. From a judgment for plaintiff, defendant appeals. Affirmed.

Legare & Holman and T. R. Tighe, for appellant. Samuel H. Stanland, for respondent.

GARY, A. J. This proceeding was commenced by affidavit which was as follows:

"[Caption.] Personally appeared before me, Jennings W. Perry, Esq., magistrate in and for said county, in the said state, O. C. Sires, who, being duly sworn, says that Norman Moseley has gone into possession of certain lands and tenements of him, the said O. C. Sires, situate in the county and state aforesaid, without his consent and without authority or warrant of law, and refuses to yield possession of the same. Sworn to before me this 3d day of April, 1899. O. C. Sires.

"Jennings W. Perry, Magistrate."

Whereupon the magistrate issued the following notice:

"[Caption.] Whereas, O. C. Sires has this 3d day of April, A. D. 1899, made oath before me that you are in possession of tenements of him, the said O. C. Sires, without warrant or authority of law, and that you refuse to yield possession of same, you are hereby required to show cause before me at my office at Summerville, S. C., on the 10th day of April, A. D. 1899, at 10 o'clock a. m., why you should not be ejected from the premises aforesaid. Witness my hand and seal this 3d day of April, A. D. 1899. Jennings W. Perry, Magistrate. [Seal.]"

The record contains the following, in which the magistrate states the proceedings before him, to wit:

"[Caption.] This case having been called for a hearing, defendant made a motion to dismiss the proceedings on the ground that the magistrate had no jurisdiction, as the proceedings were issued contrary to the provisions of the act of 1883, and upon the further ground that no notice was served upon defendant to quit within five days, as therein prescribed, and upon the further grounds

that no lands or tenements are described in the affidavit. The above objections are overruled, and the case ordered on for a hearing, and the plaintiff then was sworn and offered a deed in evidence. To this the defendant objected to the introduction of a deed upon ground that the execution of same was not proven. And the magistrate rules that plaintiff is not required to introduce any evidence of his ownership of land. Jennings W. Perry, Magistrate.

"Magistrate decides as follows, to wit: That defendant having failed to satisfy him that he has a bona fide color of claim to said premises, and to enter into bond as required by section 2432, 1 Rev. St. 1893, that after the expiration of five (5) days he will issue his warrant of ejectment, unless he be restrained. J. W. Perry, Magistrate.

"April 13, 1899.

"Samuel H. Stanland."

The defendant gave notice of appeal, and his honor Judge Benet granted an order enjoining the magistrate in the meantime from issuing his warrant of ejectment. The defendant appealed to the circuit court from the decision of the magistrate. The appeal was dismissed, and he appealed to this court upon exceptions, which it will not be necessary to consider in detail.

The first objection which the appellant interposed to the jurisdiction of the magistrate was that the proceedings herein were issued contrary to the provisions of the act of 1883. The first exception specifies that the rule to show cause issued by the magistrate was contrary to the provisions of said act, in that it makes no provision for a rule to show cause, but requires that a notice to quit shall be served in such cases. Section 1 of the said act, incorporated in 1 Rev. St. 1893, as section 2432, is as follows: "(1) If any person shall have gone into or shall hereafter go into possession of any lands or tenements of another without his consent, or without warrant of law, it shall be lawful for the owner of the land trespassed upon to apply to any trial justice to serve a notice on such trespasser to quit the premises, and if after the expiration of five days from the personal service of such notice, such trespasser refuses or neglects to quit, it shall then be the duty of such trial justice to issue his warrant to any sheriff or constable, requiring him forthwith to eject such trespasser, using such force as may be necessary: provided, however, that if the person in possession shall before the expiration of the said five days, appear before such trial justice and satisfy him that he has a bona fide color of claim to the possession of such premises, and enter into bond to the person claiming the land, with good and sufficient security, to be approved by the trial justice, conditioned for the payment of all such costs and expenses as the person claiming to be the owner of the land may incur in the successful establishment of his claim by

any of the modes of proceeding now provided by law, the said trial justice shall not issue his warrant as aforesaid." The only notice which the statute requires shall be served upon the defendant is to quit the premises, and, while the notice herein contains other requirements, it may nevertheless be regarded as a notice to quit the premises, and the requirement to show cause as therein stated may be regarded as surplusage. The mention of the time in the notice when the defendant was required to show cause did not deprive him of the right which he had under the statute to appear before the magistrate during the five days therein mentioned. Furthermore, as the statute provides that if, after the expiration of five days from the personal service of such notice, such trespasser refuses or neglects to quit, it shall then be the duty of such magistrate to issue his warrant to any sheriff or constable, requiring him forthwith to eject such trespasser, unless the person in possession shall before the expiration of said five days appear before such magistrate and satisfy him that he has a bona fide color of claim to the possession of such premises, we fail to see wherein the defendant was prejudiced by extending to him further time than he was entitled to under the statute. This ground is overruled.

The second objection to the jurisdiction of the magistrate was that no notice was served upon defendant to quit within five days, as therein prescribed. By reference to the act it will be seen that it does not require notice to be served on the defendant to quit within five days. It simply provides that a notice be served on the defendant "to quit the premises, and if after the expiration of five days from the personal service of such notice such trespasser refuses or neglects to quit it shall then be the duty of such trial justice to issue his warrant to any sheriff or constable requiring him forthwith to eject such trespasser." The proviso to said act authorizes the defendant to appear before the magistrate within five days for the purposes therein mentioned, but, as hereinbefore stated, there is no requirement that a notice be served on the defendant to quit within five days. This objection to the jurisdiction of the magistrate is likewise overruled.

The last ground of objection to the jurisdiction of the magistrate was that no lands or tenements are described in the affidavit. The affidavit shows that the land is situate in the county of which Jennings W. Perry is a magistrate, and that the land was in the possession of the defendant. Even if this description was not as particular as it should have been, it was not such a failure to comply with the statutory requirements as to deprive the magistrate of jurisdiction in the premises. This objection is also overruled. It is the judgment of this court that the order of the circuit court be affirmed.

(60 S. C. 521)

HAWKINS v. WOOD.

(Supreme Court of South Carolina. June 4, 1901.)

APPEAL—PLEADING—COMPLAINT—CAUSES OF ACTION—MOTION TO MAKE MORE CERTAIN—INTERMEDIATE ORDERS.

Since an order denying a motion to require plaintiff to make definite and certain his complaint in an action based on a breach of warranty of title, by stating two alleged causes of action in separate paragraphs, does not affect a substantial right, in that it does not go to the merits of the case, and is not within Code Civ. Proc. § 11, subd. 2, declaring that the supreme court shall have exclusive jurisdiction to review orders affecting a substantial right made in an action, where such orders determine the action, and prevent a judgment from which an appeal might be taken, or strike out an answer, or any part thereof, or any pleading in an action, it is not appealable.

Appeal from common pleas circuit court of Cherokee county; G. W. Gage, Judge.

Action by Ransom A. Hawkins against A. N. Wood. From an order refusing defendant's motion to require plaintiff to make his complaint more certain, defendant appeals. Dismissed.

J. C. Jefferies and H. K. Osborne, for appellant. Duncan, Sanders & Hall, for respondent.

GARY, A. J. The appeal herein is from an order refusing a motion to require the plaintiff to make his complaint definite and certain by stating the cause of action separately. It will be necessary to refer to the complaint, which is as follows: "(1) That on or about the 3d day of August, 1889, the defendant in this action and one J. V. Whelchel entered into a contract in which the defendant bound himself to the said Whelchel to execute to him a deed of conveyance to a certain tract of land, herein-after described, upon the payment to the defendant by the said Whelchel of the sum of nine hundred and ten dollars. (2) That on or about the 12th day of December, 1889, the said bond above mentioned was assigned by the said J. V. Whelchel to the plaintiff, who took upon himself all the obligations set out in said contract and bond. (3) That, pursuant to the terms of said bond and contract, the defendant, on or about the 1st day of January, 1897, executed and delivered to the plaintiff a deed of conveyance, with full covenants of warranty, to the above-mentioned tract of land, which is described as follows: All that certain tract or parcel of land, * * * containing 115.75 acres, more or less. * * * (4) That, after the execution of and delivery of the said deed to the plaintiff by the defendant, plaintiff ascertained that a certain portion of said tract conveyed to him by the defendant, containing nine and one-fourth acres, more or less, was claimed by, and in the possession of, one T. J. Campbell, who refused to surrender the same to plaintiff, said nine and one-

fourth acres having the following courses and distances, and being described as follows, to wit: * * *. (5) That the plaintiff immediately complained of the matter above stated to the defendant, and demanded that he make good his covenant of warranty; whereupon the defendant requested and directed that the plaintiff enter suit against said Campbell for the recovery of the said portion of said tract of land, agreeing that, in the event of plaintiff's losing in said suit, defendant would pay all costs, and make good all loss, incurred by the plaintiff. (6) That following the requests and directions of the defendant, and relying upon his agreement as above stated, and upon the covenant of warranty in his deed, plaintiff brought suit against said Campbell for the recovery of said portion of land, and that a trial was held in the court of common pleas for Cherokee county, October 10, 1899, the result of which was a verdict for said Campbell, and judgment was entered up against plaintiff in favor of said Campbell for the recovery of the possession of said nine and one-fourth acres of land, of the value of sixty-nine dollars, and for costs of said action, amounting to seventy-three and $\frac{15}{100}$ dollars. (7) That the covenant of defendant's warranty in said deed has been breached by reason of the loss of said nine and one-fourth acres of land, of the value of sixty-nine dollars, and plaintiff has been damaged thereby in the said sum of sixty-nine dollars, and that the other losses sustained by the plaintiff by reason of said suit, and for which defendant is liable according to the terms of said contract, are as follows: For surveying, \$6.50; for taxes paid on said $9\frac{1}{4}$ acres of land, \$7.50; interest on purchase price of said land from December 12, 1899, \$53.13; attorney's fee, \$30.00. (8) That no part of the above has been paid by the defendant, and he refuses to pay the same, and to make good his covenant of warranty, although the same has been demanded by the plaintiff."

The particulars in which the defendant made the motion to require the plaintiff to make the complaint definite and certain are as follows: "First. By setting out the different causes of action stated therein more definitely and certain, to wit, by requiring you to set your cause of action for defective acreage alleged in your complaint in one cause of action, and your alleged cause of action for damages sustained by the plaintiff by reason of the alleged request and direction of defendant to enter suit in the said cause in another cause of action; second, by requiring you to state in different causes of action the alleged damages for the alleged breach of covenant of warranty in the number of acres and the alleged damages arising from such breach of warranty, not connected with the alleged defective acreage; third, by requiring you to state in different causes of action the alleged dam-

ages of the plaintiff for the defective acreage, and the alleged damages for surveying, taxes, interests, and attorney's fees; fourth, and for further time for answering." His honor, the circuit judge, refused the motion, and allowed the defendant to answer the complaint within 10 days after the filing of said order. The defendant appeals from said order.

Upon the call of the case for hearing in the supreme court, the plaintiff interposed an objection to the jurisdiction of the court on the ground that the order was not appealable. Section 11 of the Code of Civil Procedure contains the following provisions: "The supreme court shall have exclusive jurisdiction to review upon appeal: (1) Any intermediate * * * order * * * involving the merits: * * * Provided, if no appeal be taken until final judgment is entered, the court may, upon appeal from such final judgment, review any intermediate order * * * necessarily affecting the judgment not before appealed from. (2) An order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial, or when such order strikes out an answer or any part thereof, or any pleading in an action. * * *" Section 181 of the Code of Civil Procedure is as follows: "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain, that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." Section 188, Id., provides that the causes of action which may be united in one complaint must be separately stated. If a motion is made to require the plaintiff to make his complaint definite and certain by stating the causes of action separately, when the allegations of the complaint are appropriate to two or more causes of action, the refusal of such motion necessarily involves the merits. *Blakely v. Frazier*, 11 S. C. 122. It is therefore necessary to determine whether two or more causes of action are united in the complaint.

It is apparent that the complaint is based upon a breach of the covenant of warranty, and the particulars in which the plaintiff alleges he was damaged by such breach are set out in the complaint. In 1824 a statute was enacted providing "that in any action or suit at law or in equity, for reimbursement or damages upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of alienation, with legal interest." This statute was incorporated in the Revised Statutes of 1873 (page 562), and was amended in 1879 by adding the words, "from the

time of alienation." As amended, it is set forth in the Revised Statutes of 1893 (section 1962). Section 2567, *Id.*, allows costs to deputy surveyors, and the item of \$6.50 for surveying may have been taxed in accordance with the provisions of the statute. If so, it was recoverable in this action. In the case of *Jeter v. Glenn*, 9 Rich. Law, 374, the court says: "As to the costs, he is right. He must recover what was recovered against him,—the sum assessed, and costs, with interest thereon. * * * In all recoveries upon warranty, where there has been eviction, and the law has prescribed the purchase money and interest as the measure of damages, the taxed costs of the eviction are added. See *Furman v. Elmore*, 2 Nott & McC. 190, 199. But there is no authority for including counsel fees in the damages recoverable upon contracts." When the breach of the covenant of warranty is only partial, the measure of damages is the proportion of the purchase money which the land recovered bore to the whole tract, with interest from the time of eviction. *Alken v. McDonald*, 43 S. C. 29, 20 S. E. 796, 49 Am. St. Rep. 817, and cases therein cited. In the case of *Jeter v. Glenn*, it is shown that the item for taxes is recoverable if it should appear that they were an incumbrance on the land at the time it was purchased by the plaintiff. The cases just mentioned show that all the foregoing items may be recovered in an action for a breach of the covenant of warranty, except the item for attorney's fee. It is apparent from an inspection of the complaint that the only cause of action intended to be set forth was for a breach of the covenant of warranty, and that the item for attorney's fee was alleged as constituting a part of the damages recoverable under the statute. The alleged agreement, "that in the event of plaintiff's losing in said suit defendant would pay all costs and make good all loss incurred by the plaintiff," shows that the defendant intended to bind himself to make good only such loss and to pay such costs as were recoverable according to law.

In disposing of the item for attorney's fee, this court merely construes the pleadings, and is not to be understood as deciding that the plaintiff may not recover the same under proper allegations. As the order herein does not involve the merits, and is not embraced within the provisions of subdivision 2 of section 11 of the Code of Civil Procedure, it is not appealable. It is the judgment of this court that the appeal be dismissed.

(113 Ga. 643)

SELLERS et al. v. MANN.

(Supreme Court of Georgia. May 27, 1901.)

SUPREME COURT—JURISDICTION—ERROR
FROM CITY COURT—VERDICT.

1. The supreme court has jurisdiction of writs of error from the city court of Baxley.

2. A finding by a jury, expressed in the words, "We, the jury, find for the plaintiff nominal damages," without naming any amount, is not a lawful verdict.

Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Baxley; T. A. Parker, Judge.

Action by J. T. Sellers and others against W. J. Mann. Judgment for plaintiffs for nominal damages, and they bring error. Reversed.

C. H. Parker and Bennett & Bennett, for plaintiffs in error. J. H. Thomas and G. J. Holton & Son, for defendant in error.

LEWIS, J. 1. On the call of this case a motion was made to dismiss the writ of error on the ground that this court has no jurisdiction over writs of error from the city court of Baxley, it having, according to the last United States census, a population of less than 600. This motion presents the precise question dealt with by this court in the case of *Heard v. State*, 113 Ga. 444, 39 S. E. 118. According to the ruling there made, this court has jurisdiction over the present writ, and the motion of the defendant in error must therefore be overruled.

2. The plaintiffs below brought an action against the defendant for damages for an alleged breach of contract. After the introduction of evidence and the charge of the court, the jury returned a finding in the following words: "We, the jury, find for the plaintiffs nominal damages." The plaintiffs moved for a new trial on numerous grounds, of which it is now necessary to consider only one, wherein complaint is made that the verdict was illegal for the reason that, while it purports to find for the plaintiffs "nominal damages," no amount is named. We think that this position is correct, and should have been sustained by the court below. "A substantial requisite of a verdict is the element of certainty; not absolute certainty, but, as it has been described, certainty to a common or reasonable intent." 28 Am. & Eng. Enc. Law (1st Ed.) 294. The term "nominal damages," like "exemplary damages," is purely relative, and carries with it no suggestion of certainty as to amount. This is shown by the definition given the expression in the recognized authorities. In 2 Bowv. Law Dict. 504, it is defined as "a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained." "Nominal damages" have also been described as "a trivial sum awarded where a mere breach of duty or infraction of right is shown, with no serious loss sustained." And. Law Dict. 307. It is apparent that this "trivial sum" might, according to the circumstances of each particular case, vary almost indefinitely. In some cases, a very small amount might constitute the trivial sum contemplated by the term "nominal

damages"; in others, a much larger amount might measure down to the same standard of triviality. It would depend largely upon the vastness of the amount involved what sum would be considered trivial. In the case of *Jackson v. Jackson*, 40 Ga. 150, is to be found the following headnote: "When there were three credits on the note sued on, one of which was uncertain and doubtful as to the amount and date thereof, and the jury found a verdict for the plaintiff for principal, interest, and costs, held, that the verdict was not sufficiently certain, according to the facts in this case, to authorize a judgment to be entered thereon for any definite sum." Taking that case as a precedent, we are bound to hold that the finding of the jury in the case at bar was void for uncertainty; for it is very plain that no judgment could properly be rendered for any definite sum upon a verdict for "nominal damages" which states no amount at which the damages are to be fixed. We must therefore reverse the judgment overruling the motion for a new trial for the reasons herein set forth. Judgment reversed. All the justices concurring, except LITTLE, J., dissenting.

LITTLE, J. (dissenting). For the reasons set forth in the opinion which I filed in the case of *Weslosky Co. v. Wolf*, 112 Ga. 169, 37 S. E. 395, and in my dissenting opinion in the case of *Heard v. State*, supra, this day decided, I cannot concur in the correctness of the proposition laid down in the first of the foregoing headnotes.

(113 Ga. 431)

ATLANTA RY. & POWER CO. v. ATLANTA RAPID-TRANSIT CO.

(Supreme Court of Georgia. May 20, 1901.)

APPEAL — ASSIGNMENT OF ERROR — STREET RAILROADS—INTERFERENCE WITH TRACKS —INJUNCTION—CITY ORDINANCE—MOTION TO RECONSIDER.

1. An assignment of error upon an order denying an application for injunction, made in the following words: "To which order the plaintiff excepted, and now excepts, and assigns the same as error, in that it is contrary to the law and the evidence in the case,"—is good. The motion to dismiss the writ of error for insufficient assignment of error is overruled.

2. A street-railway company which has constructed, and is legally operating, a line of railway in the streets of a city, is possessed of such a property interest as gives it a legal right to maintain an application to restrain a similar company from interfering with its line of tracks already laid, and from constructing a line of road over its private property without authority of law. To such an application the city is not a necessary party defendant.

3. Notice of a motion to reconsider the passage of an ordinance by a legislative body of a municipal government, which requires the approval of the mayor to give it force, has no other effect than to prevent the immediate transmission of such ordinance to the mayor for action thereon. If the motion to reconsider is not made at the next regular meeting, the notice is functus officio, and the ordinance so passed stands as the action of the body which passed it, and, on the adjournment of such meet-

ing, should be transmitted. (a) The action of the general council of the city of Atlanta, in fixing January 7, 1901, as a day for the regular meeting of the aldermanic board, was, under its rules, had by a two-thirds vote. (b) The ordinance in controversy, granting a franchise to construct and operate a line of street railroad in certain streets, having been legally passed by the two legislative bodies of the city of Atlanta, and approved by the mayor in due time, it operates as a legal and valid consent of the city to the exercise of the powers conferred by law on the Atlanta Rapid-Transit Company, upon the terms incorporated in such ordinance.

4. Under the evidence, the trial judge was fully warranted in ruling that Cherokee avenue was one of the public streets of the city of Atlanta.

5. Under the terms of the contract made by the two parties at interest, a connecting track of a street railway, to be made by one of them at Hunter street, with the tracks of the street railway on Whitehall street, which was authorized by the municipal authorities, is not in violation of any legal right of the other owner of an equal interest in, and right to use, such tracks.

6. No error was committed in refusing the application for injunction.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Atlanta Railway & Power Company against the Atlanta Rapid-Transit Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Payne & Tye, King & Anderson, and L. W. Thomas, for plaintiff in error. Brandon & Arkwright, Rosser & Carter, J. L. Hopkins & Sons, and King & Spalding, for defendant in error.

LITTLE, J. The Atlanta Railway & Power Company, a corporation which maintains and operates lines of a street railway in the city of Atlanta, presented its petition to the judge of the superior court of Fulton county, in effect praying that a certain other corporation, the Atlanta Rapid-Transit Company, which also operates lines of a street railway therein, be enjoined from constructing, in whole or in part, a particular line of railway in the streets of said city, which the transit company claims it has the legal right to construct and operate under the laws of the state and the ordinances of the city of Atlanta; and also from in any manner interfering with the railway of petitioner, already laid in the streets of the city, and the appropriation of certain private property of petitioner to the uses of the defendant in connection with its proposed new line. It was conceded that the question as to whether the construction sought to be enjoined was authorized by law depended, in a large measure, on the validity of a certain ordinance of the city of Atlanta, which, by its terms, purported to grant to the Atlanta Rapid-Transit Company, under certain conditions, authority "to construct, electrically equip, and operate a line of single or double track street railway over the following route, viz.: Commencing on Atlanta avenue, at a point south

of about the middle of Grant Park; running thence west to Cherokee avenue; thence, along Cherokee avenue and Thomas street, to Woodward avenue; thence west, along Woodward avenue, to Hill street; along Hill street to Hunter street; and along Hunter street to Whitehall street,—with the right to move the tracks of the Atlanta Railway & Power Company on Hunter street, between Frazer and Pryor streets, to one side of the center of the street, so as to permit the building of a single track on the other side of the center of the street between these points." It was contended by the plaintiff that the ordinance was void because it was not legally adopted; that what is described in it as Cherokee avenue is not a public street, but is the private property of the plaintiff; that the construction of the apparently authorized line would conflict with the plaintiff's rights under a contract between it and the defendant as to the use of the street-railway tracks on Whitehall street, from Hunter to Alabama street, and with its rights as to its tracks on Hunter street between Frazer and Pryor streets.

The brief of evidence is voluminous. Such parts of it as may be necessary will be hereafter referred to in considering the several issues which arise in the case. The defendant demurred to the petition, and answered, insisting that the ordinance was legally adopted; that Cherokee avenue was one of the public streets of the city of Atlanta, and that there was nothing in the contract between the plaintiff and defendant which rendered the authority to connect with the Whitehall tracks illegal, or an encroachment of the rights of the plaintiff at Whitehall street or elsewhere. The judge, after hearing evidence, refused an injunction, and held that the ordinance in question was not void on the grounds alleged; that the plaintiff was not entitled to an injunction on the ground of its alleged ownership of the land on Cherokee avenue; and that there is nothing in the contract between the parties, as to the Whitehall street tracks, which would prevent the use of these tracks in connection with this franchise. To the refusal to grant the injunction the Atlanta Railway & Power Company excepted, and such refusal is the error which is assigned for our consideration.

1. On the call of the case a motion was made to dismiss the writ of error on the ground that the bill of exceptions does not plainly and specifically set forth the errors alleged to have been committed, and that it does not contain any special assignment of error. This must be overruled. After reciting the fact that the judge passed an order on a given date denying the injunction prayed for, the bill of exceptions recites the following: "To which order the plaintiff excepted, and now excepts, and assigns the same as error, in that it is contrary to the law and the evidence in the case." This ex-

ception and assignment of error fully complies with the law.

2. The points made by the demurrer were ruled on by the judge in rendering the opinion under which the injunction was refused. The first of these is that petitioner had no right to have an injunction restraining the defendant from building its tracks in the streets of the city of Atlanta under any circumstances, and that the only party having the right to object to such building is the city of Atlanta. The second ground is that the city of Atlanta is a necessary party defendant to the case made by petitioner. Each of these grounds was overruled, the judge saying, in reference to the latter, that, "as I have just decided that plaintiff is entitled to no injunction in respect to Cherokee avenue, this contention of defendant is immaterial at this time. * * * So far as this interlocutory hearing is concerned, I would incline to hold that the city need not be before the court. Certainly, it is immaterial, under the ruling made." We agree with the trial judge that the city of Atlanta was not a necessary party to this case in passing on the application of the plaintiff to restrain the defendant as prayed for under the allegations made, and we also agree with the ruling made by him that, under the pleadings and evidence, plaintiff had such an interest as authorized it to prosecute an application to restrain the defendant from constructing the line of railway for the want of legal authority. As a general proposition, the right to construct a railway in the streets of a city must rest upon legislative authority so to do. Primarily, the right of control of streets is in the general assembly, whether as a matter of fact the fee of the land on which the street is located is in the state, the city, or a private person. This is so because the only legitimate use which can be made of a street is a public use. Not in the sense of being public to the inhabitants of the city in which it is located, but to the people at large, and of this public the general assembly of the state is the only representative. The power which a municipal government may lawfully exercise over a street is that conferred on it by the general assembly, either expressly or by implication, and the right primarily to grant authority to an individual or a corporation to occupy a street with cars operated by steam or electric power, although for the convenience of the citizens, does not rest in the municipal government. While this is true, care has been taken by the framers of our organic law, as well as by our legislators, not to authorize the construction of a railway in the streets of a city against the wishes of the municipal authorities. Our constitution, in paragraph 20, § 7, art. 3, declares that the general assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city without the consent of the corporate

authorities. But when a corporation to duly construct such a railway has been created, and the right to do so conferred, it is within the power of the corporate authorities of the city, in whose streets it is proposed to be constructed, to refuse it admission altogether, as well as to confine it to certain streets and routes, and to impose, as a condition precedent to such construction, such reasonable terms as the corporate authorities, looking to the interests of the citizens, may deem best. But when such consent has been given, and the railway constructed, then the corporation maintaining and operating it is possessed of certain rights, for the enforcement of which it may, of its own accord, seek the protection of the law, both state and municipal; and one of these rights is to exercise the powers given to it without molestation or hindrance. An allegation of the petition is that another duly-incorporated company is undertaking, without legal consent of the corporate authorities, to change the constructed line of railway of the petitioner. If this allegation be true, and the petitioner is about to suffer damage, then it would seem that petitioner, without complaining against the city or any one else, has the right to invoke the interposition of the courts to prevent the damage about to be inflicted upon it. It may be, and doubtless is, true that in the final adjudication of a case which involves the rights and power of the city, as well as those of plaintiff and defendant, in order to bind it by the adjudication, the city should be a party. But, for the purposes of an interlocutory injunction, it is our opinion that the city was not a necessary party, under the allegations made in the petition.

3. Aside from the minor points which the record presents, the main question to be determined is whether the ordinance which granted to the transit company the rights and powers named therein is a valid and legal ordinance of the city of Atlanta; for, from its validity or invalidity, it must be ascertained whether the city of Atlanta has given its consent that the transit company should occupy the streets named in the ordinance with a line of railway. Inasmuch as the powers which a city government may lawfully exercise must be derived from its charter or the general laws of the state, it is necessary to ascertain what powers have been conferred on the municipal government of the city of Atlanta in certain respects. By an act approved February 23, 1874 (Acts 1874, p. 116), a new charter was established for the city of Atlanta. By this act, the legislative department of the city was vested in a mayor, board of aldermen, and board of councilmen. The mayor and board of councilmen are styled the "mayor and council," and these, acting with the board of aldermen, are styled the "mayor and general council." The term of office of the mayor is fixed at two years, but it is provided that he shall hold his office until his successor is

elected and qualified. Councilmen are elected from the different wards of the city, for a term of two years. The term of an alderman is fixed at three years, and it is prescribed that each member of these two boards composing the general council shall hold his office until his successor is elected and qualified. The time of the regular sessions of the mayor and general council are fixed by the charter on the first and third Mondays in each month. By an amendment of the charter, approved December 23, 1896 (Acts 1896, p. 110), it was provided that the councilmen representing the different wards, and the aldermen representing the city at large, should act as separate and distinct legislative bodies in considering certain resolutions and ordinances, and that "no vote, resolution or ordinance having for its object * * * the granting of franchises for street railroads * * * shall be voted, until the same shall have received a majority of each of those legislative bodies separately cast." The charter further provides that any one alderman or any two councilmen may give notice of a motion to reconsider, which notice, in either event, shall have the effect of delaying the consideration of the question to be acted on until the next meeting. The mayor presiding over the meeting could have no vote except in case of a tie. It is further provided that the mayor shall have the revision of all ordinances and resolutions passed by the general council, and that the mayor, or, in his absence, the mayor pro tem., shall have four days after the meeting at which the general council voted, or after which the board of aldermen voted thereon, in which to file with the clerk, in writing, his approval or veto.

It was provided in the rules for the government of the mayor and general council established by that body that, in all cases of a tie, the mayor or presiding officer shall cast the deciding vote, but at no other time, or under no other circumstances, shall he be permitted to vote, and that no alteration or suspension of any rule shall take place without the consent of two-thirds of the members present. It appears from the rules adopted by the aldermanic board that regular meetings of that body should be held on Thursdays following the regular meetings of the mayor and council. In relation to the passage of the ordinance, the validity of which is under consideration, it appears from the evidence that the transit company on November 19, 1900, filed a petition asking for the right to construct and operate by electricity the line of railway named, with the right to move the tracks of the power company on Hunter street, between Frazer and Pryor, to one side of the street, so as to permit the construction of a track on the other side of the center of the street. This petition was referred to the proper committee, which reported that it be granted, with certain conditions. After having been adopt

ed by the council, a reconsideration was had, and the ordinance again referred to a committee, but was finally adopted on December 21, 1900, by the council acting separately from the board of aldermen. At a meeting of the latter board, sitting separately, on December 22, 1900, the ordinance was passed by that board, and notice given by one of the aldermen that he would, at the next meeting, submit a motion to reconsider the action in passing the ordinance. A meeting of the board was held January 7, 1901, at which the alderman who had previously given notice of a motion to reconsider refused to make the motion. The mayor pro tem. presiding then ruled that the notice of the motion to reconsider had expired, and directed that the ordinance be transmitted to the mayor for his action, and on the same day it was approved by the mayor. It is claimed that the meeting of the aldermanic board held on January 7, 1901, was not a regular meeting of that body, and it had therefore no jurisdiction to reconsider any action taken at the previous meeting. That meeting, it is alleged, occurred under the following circumstances: The mayor and general council held a meeting on that day, all of the aldermen, and all save one of the councilmen, being present. The ordinance committee presented to the meeting for adoption a resolution in terms as follows: "Resolved, that a rule, additional to those now in force for the government of the mayor and general council of the city of Atlanta, be, and the same is hereby, adopted, to be known as 'Aldermanic Board Rule Number Three,' to wit: The regular meeting of the board of aldermen of each retiring general council, sitting as a separate body, shall convene on the first Monday in January each year, immediately upon the taking of the first recess of the regular meeting held on that day by said retiring general council, sitting as a body." This resolution was adopted, three aldermen and nine councilmen voting for it, and two aldermen and four councilmen against it; the resolution being approved by the mayor on the same day. It was further shown that when the resolution was put on its passage, and the vote taken, there were twelve votes in its favor, and six against its passage, the presiding officer not voting; and that a meeting of the board of aldermen, under the authority of the resolution, was accordingly had during the recess taken by the general council on the same day. After this recess the general council reassembled, together with the newly-elected mayor and general council, and, after the newly-elected officers were installed, the outgoing mayor and council retired. It appears, also, that a custom had existed in the city of Atlanta for a number of years, under which the newly-elected mayor, aldermen, and councilmen did not qualify and enter upon the discharge of their duties until after a meeting was held by the retiring

mayor and general council, on the first Monday in January of the term for which the new officers had been elected.

Under these facts, the contention of counsel for plaintiff in error is that, although the ordinance was passed originally with due formality and regularity, both by the board of aldermen and councilmen, it never became a legal ordinance, because, at the meeting when the aldermen voted upon it, a notice of a motion to reconsider was given, and that notice had the effect of preventing the ordinance from ever becoming a legal act on the part of the city government, because the board of aldermen could not thereafter hold a regular meeting during their term of office, inasmuch as the day for holding such regular meeting, under the rules, came at a time when the terms of the old board had expired, and the new board of aldermen was in office, and the meeting of the board of aldermen of January 7th was not a regular meeting, and the motion to reconsider could not then have properly been made. We do not assent to this conclusion. When the ordinance was passed with due formality and regularity by the council, and the action of that body had been concurred in by the board of aldermen, the ordinance thus acted on, for the time being, at least so far as the two boards could make it so, became an enacted measure. The only effect that notice of a motion to reconsider could have had on the measure thus adopted was to postpone its transmission to the mayor for his action, and to hold it up until the next regular meeting, pending the right of the aldermanic board to reconsider its action in passing it, if it saw fit. It did not otherwise affect its legality, and, unless the action which had been had was reconsidered at the next meeting, the measure thereafter stood as the action of the board of aldermen on that subject. If the contention of counsel be correct, it is possible that a notice of a motion to reconsider the action of a deliberative body can render nugatory the solemn affirmative action of that body. We apprehend that under no conceivable circumstances can such a notice have such effect. Ordinarily, when notice of a motion to reconsider is given in a body which has regular meetings, the time of making such motions is limited to the next regular meeting, and usually after the reading of the minutes of that body. We understand the rule, further, to be that a reconsideration may be had, and a motion therefor made, at any time after the action sought to be reconsidered has been had, in a body which will not regularly meet again. A simple notice of a motion to reconsider in a body which will not have another regular meeting has, of itself, no force, and the action taken will stand. However this may be, the charter of the city of Atlanta does not recognize any cessation of the life of the board of aldermen as a part of the municipal government. On the contrary,

while the personnel of the board is changed at regular intervals, its legal existence is continuous. Consequently, when notice of a motion to reconsider is given at the meeting of the board which took the action sought to be reconsidered, under the charter that notice delayed the transmission of the ordinance until the next regular meeting of the board, without regard to its personnel. If, when that meeting was had, the board of aldermen, as then constituted, could not act upon the reconsideration, the action already taken on the matter was a finality, and after the adjournment of that meeting was in no way affected by the notice. If at the next regular meeting it had jurisdiction to reconsider the former action, and no motion to reconsider was made, the notice of the intention to so move was *functus officio*, the former action stood, and it was in order for the measure to be transmitted as the action of the body. Applying this reasoning, which is based on the rules of parliamentary law, to the case in hand, it becomes immaterial—perfectly so, so far as regards the validity of the ordinance in question—whether the mayor and general council could, or did, make a valid rule for a meeting of the (old) aldermanic board on January 7, 1901. The charter of the city fixes a meeting of the legislative body for that day. It was the next meeting after the notice of a motion to reconsider the action in passing the ordinance had been given. If the meeting of the old board held on that day was a regular, legal meeting of the board, and a motion to reconsider was not made, the privilege of reconsideration passed with the adjournment. If, on the contrary, it was not a legal regular meeting, and if the new board held a meeting on that day, notwithstanding the change of its constituent members, it was the legal board of aldermen, and its meeting a regular one. If such new board had no jurisdiction to reconsider this action of the former board, the effect of the notice nevertheless expired with its adjournment, and no body was in existence which could so reconsider. The failure to take notice of this effect at the time the notice was given cannot inure to the hurt of the ordinance, for it was not then a pending measure, but a measure which had been passed; and, instead of giving a notice of a motion to reconsider, the motion itself was then in order to have been made, because a notice could not thereafter be effectual to bring about the motion. A motion for reconsideration is a weapon which a minority can frequently use with great effect, but never sufficiently so to defeat the wishes of a resisting majority. We may say, in passing, that, in our opinion, the rule adopted by the general council, fixing the first Monday in January as a day for the regular meeting of the retiring aldermanic board, was legally adopted, under the rule prescribed for the government of that body, which declares that the presiding officer shall

under no circumstances vote, except in the case of a tie, if he was prohibited by the rule from voting. Certainly, the rule would not require him to be counted among the voters. Our conclusion is that the ordinance received a legal vote adopting it, separately, in each of the boards; that the notice of a motion to reconsider it had no effect on the action of the aldermanic board, other than to prevent its transmission to the mayor until the subsequent regular meeting of that board, held on January 7, 1901, and, even if the meeting of the aldermanic board provided for by the general council on January 7th was not a legal meeting, yet, as the ordinance has never been reconsidered by the aldermanic board at any regular meeting, and the time for its reconsideration having lapsed with the adjournment of such regular meeting, and having been approved by the mayor, it became, on such approval, valid and legal, and entitled to full effect. Under admissions of counsel made in the argument of the case in this court, it is not necessary to pass separately on the question of the right of the transit company to remove existing track of the plaintiff on Hunter street, as authorized by such ordinance.

4. It is further urged that the ordinance, in that it confers upon the rapid-transit company the right to construct its line along and upon Cherokee avenue, is invalid, because it is not such a public street as that, even with the consent of the city authorities, the defendant may lay its track thereon, and use it in the operation of a street railway. It is not necessary to make any detailed statement of the evidence contained in the record as to the status of Cherokee avenue as a public street. It is claimed by the plaintiff that the Metropolitan Street-Railroad Company, its predecessor in title, obtained from the then owners a strip of land 25 feet in width on the east portion of what is now known as "Cherokee Avenue," for the construction of its track and stations in the operation of a street railroad. It is not questioned but that, at the time the Metropolitan Company obtained whatever rights were conferred on it by the owner, no such street as Cherokee avenue existed. Nor can it be controverted that such a street now exists, and that it is paved, lighted, has sidewalks, and many persons have erected dwellings fronting on such street. It is conceded that Cherokee avenue is 50 feet wide, consisting of the 25 feet originally conveyed by the owner to the Metropolitan Street-Railroad Company, and 25 feet additional on the west of that strip, which was purchased by the city. Nor is the fact denied that the track of the plaintiff company has been removed, from where it was originally placed and operated, at the request of the city. It is claimed by the plaintiff in error that it was not its purpose to dedicate any portion of the land it occupied or was entitled to as a public street, but that, the public authori-

ties being unable to construct a driveway for pleasure vehicles in Grant Park, to which it is adjacent, it consented to the opening, paving, lighting, and improvement which was made by the city and county in the belief that the same would be used as a driveway, and not that its own land and that added would be transformed into one of the public streets of the city, and that all that was done by it from which a dedication could be inferred was done under such belief. Section 3591 of the Civil Code declares that "if the owner of lands either expressly or by his acts, dedicates the same to the public use, and the same is so used for such a length of time that the public accommodation or private rights might be materially affected by an interruption of the enjoyment, he cannot afterwards appropriate it to private purposes." This rule is but a reiteration of the common-law rule. The first time that the doctrine of dedication was expounded by this court was in the case of *Mayor, etc., v. Franklin*, 12 Ga. 239, in which case Judge Nisbet (as he uniformly did in other cases) delivered an exhaustive and instructive opinion. The court there ruled that a dedication to a public use is effected when one, being the owner of lands, consents, either expressly or by his action, that it may be used by the public for a particular purpose. Since the date of that decision, which has stood as the leading case in Georgia on this subject, numerous cases have invoked confirmatory rulings by this court on the points there decided. See *Parsons v. University*, 44 Ga. 529; *Chapman v. Floyd*, 68 Ga. 457; *Railroad Co. v. Mitchell*, 69 Ga. 123; *City Council of Augusta v. Burum*, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340, and cases there cited. There is evidence in the record tending to show that the officers of the plaintiff had full knowledge that the city of Atlanta had located Cherokee avenue as a public street; that the engineer of the company moved the track of plaintiff and supervised the whole work; that the city formally ordered it opened as a street, and that it bought 25 feet of land to be added to the strip originally occupied by the plaintiff to make a street; that it spent money for sewers, curbing, etc.; and, lastly, that it had been continuously used as a street. An examination of the record in the case discloses that the officers of the plaintiff believed that Cherokee avenue was originally intended to be opened as a pleasure drive contiguous to the park, yet when this use, which was consented to, became enlarged into all the general uses of a street, as some of the evidence shows, they should have interposed, and have asserted any rights the company had. If they permitted the city of Atlanta to declare and open it, together with other land contiguous to it, as a public street, to spend sums of money improving the whole as a street, and these acts induced persons to believe it to be a

public street, and, acting on such belief, to erect houses fronting thereon, all of which appears to have been done without a protest, and the further fact appears that the whole of said land has been continuously so used by the public as one of the streets of the city that its discontinuance at its present width and location would work inconvenience to the public, the conclusion is inevitable that the trial judge was fully warranted in ruling that Cherokee avenue should be properly deemed and held as one of the streets of the city of Atlanta. Being so, like they could in any other of its streets, the municipal authorities had the right to grant the defendant company the privilege of laying its tracks on that avenue, and operating street cars thereon for the benefit of the public.

5. The remaining question for determination is the right of the transit company to enter the track laid on Whitehall street by means of a connection with its Hunter street line. Whether this right exists depends upon a construction of the contract between the parties. It is claimed by plaintiff in error that the transit company has no right, under this contract, to cut into the Whitehall street track, and make additional connections and turnouts with it, even though the inconvenience sustained by the power company by such connections and turnouts will be limited, and that such connection can in no event be made without the consent of the power company. It appears that a contract was entered into between the parties on November 13, 1900, which contains a number of stipulations. That one which bears on the question under consideration is in the following language: "The Atlanta Rapid-Transit Company should have the immediate right to operate its cars over Whitehall street, from Mitchell to Alabama street, upon paying the amount which had been awarded by the assessors in condemnation proceedings. Upon doing so, it should acquire an equal interest in the tracks and other property of the Atlanta Railway & Power Company, situated on Whitehall street between said points. That the Atlanta Rapid-Transit Company should move the single track of the Atlanta Railway & Power Company, on Whitehall street from Alabama to Hunter street, to a proper position on the east side of the street, and should construct its own additional track from Hunter to Alabama street, on the west side of Whitehall street, so as to make double tracks for the joint use of both roads. It should put in two way switches and curves at the corner of Whitehall and Hunter streets, so as to connect the single track of the Atlanta Railway & Power Company on Hunter street with both the tracks on Whitehall street, and should put in switches and the curves at the corner of Alabama and Whitehall streets connecting the two tracks of the Atlanta Railway & Power Company on Alabama

street with both tracks on Whitehall street, both companies to be thereafter equally interested in the double tracks on Whitehall street from Mitchell to Alabama streets." The plaintiff in error contends that it is not the right of either party under this agreement to enter these tracks at a different point than that specified in the agreement, nor to put any additional curves and switches which would operate to delay the cars passing over such track without the consent of the other. To this contention it may be replied that, by a natural construction of the terms of the contract, a right seems to have been given to the transit company to operate its cars over the Whitehall tracks (between points named) for a consideration paid, and that such payment should give the transit company an equal interest in the tracks on Whitehall street between the designated points. The fact that the transit company, under the agreement, was to put in certain switches and curves at Whitehall and Hunter streets, so as to connect the power company's track on Hunter with the tracks on Whitehall, and switches at the corner of Alabama and Whitehall, so as to connect the tracks of the power company on Alabama with the tracks on Whitehall, does not, in our judgment, in the absence of appropriate terms of limitation, restrict the power of the transit company to make a connection between the tracks on Whitehall with its line on Hunter street. The contract does not limit the right of the transit company to the operation of any particular cars, or cars from any particular connection, over the Whitehall tracks. Necessarily, the contemplation of each of the parties in the execution of the contract was to facilitate its business,—that of the operation of street passenger cars,—and it could not have been in contemplation that the use to be made of the Whitehall street tracks by the transit company was simply the operation of cars over the tracks in which it acquired an interest as a line. Necessarily, as it seems to us, the cars contemplated to be moved on this limited length of track were to be brought over other lines to this central part of the city. The provisions in the contract specifying what immediate connections by switches should be made at Whitehall and Hunter streets, and Whitehall and Alabama streets, for the benefit of the power company, were required for present use, and when it stipulated that after payment of a sum awarded, and making certain specified connections, both companies should thereafter be equally interested in the tracks on Whitehall from Mitchell to Alabama streets, the contract, by the terms employed, conferred on the transit company full right, in our opinion, to make the proposed connection at Hunter street. To say that the transit company had an equal interest in, and an equal right to operate its cars over, the Whitehall street tracks with the power com-

pany, without any limitations of the number of cars, and without any restriction as to connections, and to deny the right of connection, by which alone its cars could be brought to the Whitehall street tracks, is, in our judgment, an inconsistency not contemplated by the terms of the contract. Such a use would have been a limited one, which is not expressed in the contract, nor naturally deducible from its terms. In our opinion, no error was committed in refusing to grant the injunction. Judgment affirmed. All the justices concurring.

(129 N. C. 553)

COMMISSIONERS OF BEAUFORT COUNTY v. OLD DOMINION S. S. CO.

(Supreme Court of North Carolina. June 7, 1901.)

TAXATION—ASSESSMENT—FOREIGN CORPORATIONS—STEAMBOAT LINES—CAPITAL STOCK—APPEAL.

1. Where a tax is laid on the capital stock of a nonresident steamboat corporation operating within a state, such proportion of the whole value of its capital stock as the value of its tangible property within the state bears to the value of all its tangible property can be taxed as capital stock within the state.

2. Under Laws 1899, c. 15, § 39, providing that the corporation commissioners shall constitute a board of appraisers and assessors for railroad, telegraph, canal, and steamboat lines, an assessment of taxes on the capital stock of a steamboat company by the county commissioners was void.

3. Where the act levying a tax provided that the corporation commissioners should assess the same, and the assessment was made by the county commissioners, the court on appeal would take notice of the defect of its own motion, though the question was neither raised by exception at the trial nor by motion on appeal.

Appeal from superior court, Beaufort county; McNeill, Judge.

Action by the commissioners of Beaufort county against the Old Dominion Steamship Company. From judgment for defendant, plaintiff appeals. Affirmed.

W. B. Rodman, for appellant. Gilliam & Gilliam, for appellee.

CLARK, J. The defendant having "domesticated" under the Carlg law (Laws 1899, c. 62) the question here presented is how much of its capital stock should be taxed in this state. Upon the facts agreed, the capital stock is \$1,250,000 in all listed for taxation in Delaware. The defendant does business in several states, and the value of its tangible property in this state,—steamers, warehouses, etc.,—is \$62,000, all of which is listed for taxation. It has no separate capital stock as a domesticated corporation, its business and property here being part of the general corporation, chartered and doing business in several states. In *Durham Co. Com'rs v. Blackwell Durham Tobacco Co.*, 116 N. C. 441, 21 S. E. 423, it is held that "capital stock" is a distinct subject of tax-

ation from "shares" of capital stock, the former belonging to the corporation and the latter to the individual stockholders. It was held, following the uniform decisions here and elsewhere which are cited, that it was "within the legislative power, in respect to corporations, to levy any two or more of the following taxes simultaneously: (1) On the franchise (including dividends); (2) on the capital stock; (3) on the tangible property of the corporation; and (4) on the shares of the capital stock in the hands of the stockholders,—taxation on the last two being imperative under the constitution. Under section 39, c. 15, Laws 1899, the assessed value of the real and personal property of the corporation is directed to be deducted from the aggregate value of the shares of stock, and the difference, if any, to be listed for taxation; the object being evidently to avoid double taxation, though the legislature could authorize it. *Durham Co. Com'rs v. Blackwell Durham Tobacco Co.*, supra. The defendant, having no separate capital stock as a North Carolina corporation, contends that it cannot be taxed here, because it is a nonresident corporation. It is settled that it is a domestic corporation (*Debnam v. Telegraph Co.*, 126 N. C. 831, 36 S. E. 269), so far as jurisdiction is concerned. As to matters affecting taxation, it makes no difference whether it is a North Carolina corporation or not. Whether domesticated here or not, the business and operations here are practically a part of the larger corporation doing business in several states (2 *Mor. Priv. Corp.* §§ 994, 996); and therefore, as repeatedly held in the United States supreme court, whenever a tax upon the capital stock of corporations is laid, "such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of its lines anywhere" can be taxed as capital stock in this state. *Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49. As our statute directs the value of its tangible property to be deducted, the sum of \$62,000, the value of the defendant's tangible property in this state, should be deducted from the proportion of the valuation of the whole capital stock, which, by above rule, should be proportioned to this state, and the difference should be taxed in this state as capital stock. The above rule was reaffirmed in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, and *Same v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960. Upon a rehearing of the former case (*Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965), the point was most elaborately and ably argued, as may be seen from the briefs, and the above doctrine again repeated, and conclusively, in an opinion in a unanimous court, by Mr. Justice Brewer. In that case it is held: "Whatever property is worth for the purpose of income and sale, it is worth for the pur-

poses of taxation; and when, as in the case of the express company, the tangible property of the corporation is scattered through different states, by means of which its business is transacted in each, the situs of this intangible property is not simply where its home office is, but is distributed wherever its tangible property is located and its work is done." It was also held that "ne finespun theories about situs should interfere to enable those large corporations whose business is of necessity carried on through many states from bearing in each state such burden of taxation as a fair distribution of the actual value of the property among those states requires." Hence, in the Ohio case, a tax on \$533,095.85 of capital stock was sustained, though the corporation had only \$42,065 of real and personal property in that state. In the Kentucky case a tax on \$1,463,040 as the fair proportion of its capital stock taxable in the state was sustained, though the corporation had only \$36,614.53 of tangible property within that state. 166 U. S., bottom of page 172, 17 Sup. Ct. 527, 41 L. Ed. 960. Where the legislature arbitrarily fixed the proportion of the capital stock of a corporation operating in several states which should pay taxes in that state, it was upheld. *Minot v. Railroad Co.*, 18 Wall. 206, 21 L. Ed. 888. Under our statute the assessment of the capital stock should be made by the corporation commissioners, and not by the county commissioners. This objection is not made by exception below nor by motion here, but it is a defect of which we can take notice *ex mero motu*. While, therefore, we must dismiss the action, we have passed upon the point, as the party interested desires us to do by not having objected, and it is a matter of public interest. *Milling Co. v. Finlay*, 110 N. C. 411, 15 S. E. 4; *State v. Wylde*, 110 N. C. 500, 15 S. E. 5. Action dismissed.

DOUGLAS, J. (concurring in result). I concur in the conclusion of the court, and I am inclined to think that the method of taxation indicated in its opinion would be correct if imposed by the proper authority; but I cannot concur, as now advised, in the statement founded upon the case of *Durham Co. Com'rs v. Blackwell Durham Tobacco Co.*, 116 N. C. 441, 21 S. E. 423, that it is "within the legislative power in respect to corporations to levy any two or more of the [four] following taxes simultaneously." I think that a corporation should be taxed once on all its tangible and intangible property. This would include not only what is generally known as "property," but also its franchise, and in fact whatever goes to make up the actual or market value of its stock and bonds. I also think that its shares of stock may properly be taxed in the hands of its shareholders, because it then assumes a new form as personal property, following the domicile of its owner. If I have not fully paid for my house, I am still assessed on its

full value, while my note is assessed as a solvent credit in the hands of him who holds it. This is, in one sense, double taxation, inasmuch as it is based upon the same piece of tangible property; but the same individual is not doubly taxed. I am referring now only to ad valorem taxation, and not to license taxes, which are entirely different in their nature. It seems to me that, as far as circumstances will permit, the same rule should be applied to the corporation and to the individual, both of whom should be made to bear their just proportion of the burdens of government without favoritism upon the one hand or oppression upon the other. So far as lies within my power, I shall hold corporations to the fullest measure of responsibility, but they must be given an equal measure of justice. I have given much consideration to the matter of corporate taxation, and shall continue to do so, as it is a question which I fear will ultimately tax to the utmost the powers of the legislative, and perhaps of the judicial, departments of the government; but I am not prepared, nor would it be proper, to express any opinion as to the extent or limitation of these powers. All I wish to do at present is to withhold my assent from a former opinion of this court in which I took no part, and which, I regret to say, as I am now advised, enunciates a proposition in which neither my judgment of the law nor my sense of justice will permit me to concur.

(128 N. C. 529)

BROADFOOT v. CITY OF FAYETTEVILLE.

(Supreme Court of North Carolina. June 7, 1901.)

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—BONDS—INTEREST.

Const. art. 7, § 7, provides that no municipal corporation shall contract any debt, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein. Laws 1874-75, c. 248, enabled the town authorities to fund the then bonded indebtedness of the town, and to execute and deliver new bonds for like amounts in payment of the outstanding bonds, with interest not to exceed 8 per cent., the outstanding bonds having been issued under Laws 1852, c. 207, and carried interest at 6 per cent. The town, acting under Laws 1875 issued bonds to plaintiff with interest at 7 per cent., but no election was held on the question of authorizing the issue of the bonds. Held, that that part of the act increasing the rate of interest was contrary to the constitution, and hence the whole interest would fail.

Appeal from superior court, Cumberland county; Moore, Judge.

Action by C. W. Broadfoot against the city of Fayetteville to recover a debt represented by certain bonds of the town of Fayetteville. From a judgment in favor of plaintiff for the amount of the bonds and interest at the rate of 7 per cent., both parties appeal. Modified.

Geo. M. Rose and Hinsdale & Lawrence, for plaintiff. Busbee & Busbee and D. T. Oates, for defendant.

Defendant's Appeal.

MONTGOMERY, J. The general assembly, on the 22d of March, 1875, enacted a law (Laws 1875, c. 248) enabling the proper authorities of the town of Fayetteville to fund the then bonded indebtedness of the town contracted for subscription to stock of the Western Railroad Company, and to execute and deliver new bonds for like amounts in payment of and in exchange for the outstanding bonds, which had been issued under an act of the general assembly in December, 1852 (Laws 1852, c. 207), for the payment of the stock of the Western Railroad Company. The rate of interest named in the bonds issued under the act of 1852 was 6 per cent., and the rate provided for by the act of 1875 was to be not more than 8 per cent. The proper officers of the town of Fayetteville, under the authority of the act of 1875, issued to the plaintiff on the 1st day of January, 1876, the bonds which are the subject of this action, bearing 7 per cent. interest, and the plaintiff surrendered to the mayor and commissioners a like number of bonds and for like amount of principal which had been issued under the act of 1852. No election was held in the town of Fayetteville upon the question of authorizing the issue of the bonds which were to be issued under the act of 1875. The question for decision, as we see it, is whether or not the loss of the entire interest follows the action of the mayor and commissioners under the act of 1875 on account of a failure to submit the question of the increase in the rate of interest to the qualified voters of the town, under article 7, § 7, of the constitution. The contention of the plaintiff is that the debt has not been changed; that the principal amounts of the bonds are of "like sums" (the words of the act) as the principal in the bonds issued in 1852; that interest is a mere incident of a debt, and that a change in the rate of interest is, therefore, no change in the debt, and, as a consequence, that it was not necessary to have submitted that increase to a popular vote. The defendant insists that interest is an integral part of a debt; that an increase in the rate of interest is an increase in the debt itself; and therefore that the increase in the debt, not having been submitted to a vote of the people under article 7, § 7, of the constitution, the whole issue of the bonds, principal and interest, is void. There is no doubt that, in cases where interest is contracted for, the interest is an integral part of the debt. In cases where it is recoverable as damages for breach of contract to pay money, or where it is allowed in recoveries in tort, it is a mere incident of the debt. The meaning of which is that if, on a contract for the payment of money, in which interest is provided

for, the debtor should make a payment of the principal sum, the interest would yet be afterwards collectible as a part of the debt; while the other rule would prevail if the contract made no provision for the payment of interest. *King v. Phillips*, 95 N. C. 245; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771. Notwithstanding that interest is an integral part of the debt in the sense in which it is described in the cases just cited, yet interest is still a separate thing from the principal sum, and is always distinguished from the principal in the decisions and in the textbooks. In the case before us the interest was provided for in the face of the bonds. It was a part of the debt, but to be distinguished still from the principal of the debt. That part of the act of 1874-75, c. 248, as to the principal amount of the bonds, was not contrary to the requirement of article 7, § 7, of the constitution. The general assembly, however, undertook to give the town authorities of Fayetteville the power to increase the rate of interest from 6 per cent. to as much as 8 per cent., in their discretion. That much of the act—the power to increase the rate of interest—was repugnant to the feature of the constitution which we have cited. A part of an act of the general assembly can be constitutional and a part unconstitutional. *McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99. What, then, is the effect of the unconstitutional part of the act? Does the whole interest fail, or only the difference between 6 per cent., the amount provided for in the original bond, and the 7 per cent., allowed in the new bonds? We think the whole interest fails, for the one and simple reason that, as the rate agreed on was, in its effect, contrary to the provision of the constitution which we have pointed out, we cannot, by judicial decree, fix upon either 6 per cent. or any other rate. We cannot make a contract for the parties. That part of the judgment below is erroneous in so far as 6 per cent. interest is allowed on the bonds, as only the principal sum of the bonds can be collected, with interest from the time of the maturity of the bonds. The judgment below is modified as in this opinion set out, and affirmed except as to the modification. Modified and affirmed.

Plaintiff's Appeal.

MONTGOMERY, J. There was no error against the plaintiff in the ruling and judgment of the court below. No error.

(128 N. C. 563)

COLLINS et al. v. ASHEVILLE LAND CO.
(Supreme Court of North Carolina. June 7, 1901.)

LAND COMPANIES—PLATS—IRREVOCABLE DEDICATION OF STREETS.

Where an improvement company laid off land into numbered city lots and streets, making a plat thereof, and sold lots as marked and numbered on the plat, with reference thereto

in the deeds, such acts constituted an irrevocable dedication of the streets in favor of purchasers of the lots against the improvement company's successors in interest, who had notice of the plats and sales made thereunder, though no registration of the plat was made.

Douglas, J., dissenting.

Appeal from superior court, Buncombe county; Allen, Judge.

Action by H. T. Collins and others against the Asheville Land Company to enjoin the closing of certain streets. From a judgment for plaintiffs, defendant appeals. Affirmed.

Zebulon Weaver, for appellant. Bourne & Parker, for appellees.

MONTGOMERY, J. The Southern Improvement Company, a duly-organized corporation, received a deed in February, 1888, from J. M. Tierman, to a certain piece of land adjoining the city of Asheville, and at once executed a mortgage upon the land to the Central Trust Company of New York as security for certain bonds. A sale was provided for in the mortgage in case of default in the payment of interest or principal of the bonds; and it was further provided that until default the Southern Improvement Company should have the full right to contract for the sale or lease, subject to the lien of the mortgage, of any of the lands at such prices and upon such terms as that company might deem fair and reasonable, and upon such sales the Central Trust Company would sufficiently convey by deed or deeds of release the lands so sold from the operation of the mortgage, so that the purchaser might get a title free from incumbrance, the proceeds of the sale to be paid to the trust company, and to be used in purchasing the bonds at par, with the accrued interest, and to retire the same. After the execution of the mortgage, and in the same year, the improvement company had the land laid off into city lots (numbered) and streets, and a plat thereof made, upon which certain portions were platted and distinguished as streets, and others as lots. Afterwards the improvement company offered the lots, exhibiting the plat at the same time, for sale, and did sell to various persons lots marked and numbered on the plat; and in the deeds the grantors made special reference to the plat, and the lots were described as abutting on certain named streets, and as being of certain numbers corresponding with the plat. The trust company, according to the agreement in the mortgage, executed releases to the improvement company for the lots so sold, with recitals in each as to the mortgage, the agreement to release, and describing the lots in the releases in the same words as those in the deeds from the improvement company. In 1892, the improvement company executed a second mortgage upon the unsold part of the same land to George S. Scott and Harris C. Fahnestock

for the security of certain bonds; and in 1896, in a consolidated suit, the trust company and Scott and Fahnestock joining as plaintiffs, a decree of foreclosure was entered for the sale of the property except those parts which had been sold off; the lots which had been sold to the plaintiffs in this action being among those excepted in the decree. Fahnestock, who was a director of the improvement company, purchased at the foreclosure sale, and the sale was confirmed by the court. Fahnestock, after selling some of the lots represented on the plat and described as abutting on streets named on the plat, sold and conveyed to T. L. Durham all the property except the lots which had been sold off, and excepting also certain streets shown on the plat which he had made at the time of the sale to Durham. Durham afterwards conveyed the property to its present owner, the Asheville Land Company, defendant in this suit. Durham and the Asheville Land Company knew at the time of their purchases of the existence of the plat made by the Southern Improvement Company, and of the sales made thereunder.

The principle of law involved in this case is, we think, the same as that in *Conrad v. Land Co.*, 126 N. C. 776, 36 S. E. 282. The inconvenience and loss which may arise here from the enforcement of that principle of law will be greater than it was in that case, but that argument would not be allowed to influence us in our decision. The courts of the states in which the question before us has been presented and decided are divided. In some jurisdictions it has been held that, where lots have been sold by reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, like the one before us, the purchaser of a lot does not acquire a right of way over every street laid down upon the plat. *Pearson v. Allen*, 151 Mass. 79, 23 N. E. 731. There the court said in support of its position: "In *Regan v. Gaslight Co.*, 137 Mass. 37, it was held that the defendant could close a whole series of streets on the plat, leaving open the private ways adjoining the plaintiff's lots to the highway in one direction, and to the next side street in the other." In other courts it is held that a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat or map kept open. This view is so well and clearly stated in *Elliott, Roads & S.* § 120, that we quote it: "It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of a street or road, but, where streets and roads are marked on a plat, and lots are bought and sold with reference to

the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right to all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all the lots embraced in the general plan or scheme. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land to public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication." In *Conrad v. Land Co.*, supra, this court adopted the view that the purchaser had a right of way over all the streets designated on the plat, and that each and all of such streets must be kept open; and cited a case from each of the states of New Jersey and Oregon in which the same principle had been adopted. We are not disposed, after careful consideration, to alter the decision made in that case. The matter of registration of the plat in *Conrad v. Land Co.* was mentioned, but we are satisfied that registration of the plat is not essential. Registration is only a means of publication of the plan or scheme, and is not such an instrument as is required to be registered by the laws of this state. It is the offer of sale by the plat and the sale in accordance therewith that is the material thing which determines the rights of the parties. The defendant, the Asheville Land Company, had actual notice of the plat and sales thereunder made by the improvement company, and is therefore fixed with notice of the dedication of the streets. Besides, it had notice from the registration of the deeds from the improvement company to purchasers. There is no error in the judgment of the court below, and the same is affirmed.

DOUGLAS, J. (dissenting). I cannot concur in the opinion of the court upon any principle of settled law or public policy. I readily agree that, if a person lays out a tract of land into lots and streets, and sells lots upon the faith of the plat, he cannot close up any of the streets if it works a substantial injury to such a purchaser. But the opinion of the court does not stop here. It lays down the broad doctrine that, if the owner of land divides it into lots and streets on paper, and sells a single lot by the foot, he can never close a single street, even if it has never been opened, is never used by the purchaser of the lot, and does not affect in any way the value of his property. In other words, if a man owning two or three thousand acres of land, in a moment of public craze, such as we have recently had, makes a plat of it showing a hundred streets

that have never had and never will have any actual or potential existence outside of the fertile imagination of a land boomer, and sells a single quarter-acre lot to a man to whom he happened to show the plat, he can never close a single one of the hundred paper streets; it makes no difference that the lot sold is on the extreme corner of the plat, and is not affected in value in the slightest degree by the opening or closing of back streets miles away from it, and that its purchaser has no use for the streets, which can never be used by him or any one else for any practical purpose. In spite of these facts, all these hundred streets must be kept open forever, not to subserve his convenience, for they add nothing to that, but simply to gratify his whim, or to enable him to force the vendor to buy his peace at any price he may ask. It is said there is a legal presumption of injury, but in this I cannot concur in the face of adverse facts. The boomer may fail, as he usually does, and some innocent purchaser may buy the land under mortgage or execution sale. What right would he acquire? Suppose he should build a large factory, and inadvertently locate it in the middle of Pennsylvania avenue or Broadway, whose existence neither he nor any one else had suspected, could the purchaser of that solitary lot compel him to tear down his building? It may be said that this is *reductio ad absurdum*. Even so; it is a result that may follow from the opinion of the court. We know that during the recent boom thousands of acres of old fields were platted into lots and streets, which by the inexorable logic of events, have long since been turned back into old fields. I know one tract of about a thousand acres, the quiet enjoyment of which may be seriously endangered by the opinion of the court. We know that it may result in great hardship. If it does no good, then why risk the danger of so much harm? I readily admit that the purchaser is entitled to the use of all such streets as are necessary to the reasonable enjoyment of the lot he has purchased; and I do not think that anything more was ever contemplated by either party to the contract. It may be that the opinion of the court is not intended to go as far as I apprehend; but, if so, it should be made to say so. If we do not place the line of demarkation at the point where the purchaser ceases to suffer any substantial injury, where will we stop? This opinion is founded upon the case of *Conrad v. Land Co.*, 126 N. C. 776, 36 S. E. 282, and yet it goes far beyond it. In *Conrad's Case* the opinion states that: "Afterwards the plaintiffs each purchased from the defendant company one of the lots so laid off, lying along the southern edge of Fourth street as it ran along Grace Court." That is, I suppose, that the lots purchased were opposite to Grace Court on the same street. Again,

that opinion says: "This action was brought for a perpetual injunction restraining the defendant Hotel & Land Co. from disposing of the court, or any part thereof, for private purposes, or from otherwise depriving the plaintiffs of their enjoyment of the court as a public open ground, and from narrowing or closing up the streets surrounding the same." Surely, that does not support the opinion in the case at bar, nor do the cases cited in *Conrad's Case*. In *Meier v. Railway Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856, the plaintiff was seeking to recover a street along which a street-car line was in actual operation. Then certainly some one would have been damaged. In *Grogan v. Town of Haywood* (C. C.) 4 Fed. 164, the plaintiff was suing the town, also seeking to recover a street apparently in common use. In *Church v. City of Portland* (Or.) 22 Pac. 528, 6 L. R. A. 259 (erroneously cited in 126 N. C. as 659), the plaintiff was seeking to prevent the erection of a public building in a public square. In *Price v. Inhabitants of Plainfield*, 40 N. J. Law, 606, the bone of contention was a public square. In *State v. Fisher*, 117 N. C. 733, 23 S. E. 153, this court thus lays down the rule (on page 740, 117 N. C., and page 159, 23 S. E.): "When the defendant opened up the street, then outside of the confines of the city of Greensboro, if * * * he had sold a single one of the lots abutting on this apparent extension of North Elm street, he and those claiming under him would have been estopped from denying the right of such purchaser and those in privity with him to use the street as laid down in the plat and called for as his boundary line in the deed conveying it to him." There is no suggestion that the purchaser would have been entitled to the use of any other street laid out by Fisher. I regret that the extreme pressure of work incident to the closing days of the term prevents me from giving this case the attention it deserves, or the research necessary to properly present it. I will cite but one case,—*Pearson v. Allen*, 151 Mass. 79, 23 N. E. 731,—also cited by the court. But, suppose that the plaintiff should have some theoretical right to the use of streets that he never expects to use, how can he enforce it? This infringement would be *injuria sine damno*, which the law will not seek to redress. It is well settled that all such implied dedications operate by way of estoppel in pais, and it seems equally well settled that there can be no estoppel where there is no actual injury. Neither is he entitled to injunction, for equity will grant an injunction only to prevent irreparable injury that cannot be compensated in damages. In what I have said I have not referred so much to the facts of the case as to the scope of the opinion from which I must respectfully dissent.

(128 N. C. 218)

PEEBLES v. GRAHAM.

(Supreme Court of North Carolina. May 7, 1901.)

DEVISE—PROPERTY INCLUDED—QUESTION FOR JURY.

1. A devise giving "all the lands included under the name of the Arnold, the Geer, and the Jones lands, all east of the R. * * * road," passes no part of the Arnold land west of said road.

2. Where plaintiff in ejectment claims under a devise of all the lands included under certain names, "all east" of a certain road, it is error to submit to the jury whether he owns certain land west of the road.

Appeal from superior court, Durham county; Moore, Judge.

Action by R. B. Peebles, trustee, against George M. Graham. Judgment for plaintiff. Defendant appeals. Reversed.

Manning & Foushee and Graham & Graham, for appellant. Winston & Fuller, Shepherd & Shepherd, and R. B. Peebles, for appellee.

FURCHES, C. J. This is an action of ejectment to recover possession of a triangular piece of land lying on the west side of the Raleigh and Roxboro road. Both parties claim under the will of Paul C. Cameron,—the plaintiff, under item 11, which is as follows: "I also give, devise, and bequeath to R. B. Peebles, as trustee aforesaid, all the lands included under the name of the Arnold, the Geer, and the Jones lands, all east of the Raleigh and Roxboro road and south of Neuse river, in Durham county, and the title papers, all with my sister Margaret's papers in the Citizens' Bank at Raleigh;" and defendant, under item 9, which is as follows: "I also give and devise to John W. Graham, as trustee aforesaid, for his son George M. Graham, all the lands known and called as the 'Leathers,' 'Briggs,' 'Reavis,' and 'Southernland,' on the south side of Eno, and on the Raleigh and Roxboro and Hillsboro and Fish-Dam roads, and all now in Durham county, and all title deeds registered in Orange, and containing between 1,500 and 1,700 acres,—to George and his heirs an inheritance in fee simple when he comes of age." The plaintiff claims the land in dispute as a part of the Arnold land, and the defendant claims it as a part of the Briggs land. Upon the trial it appeared that the Geer land, the Jones land, and the greater part of the Arnold land were on the east side of the Raleigh and Roxboro road. But there was evidence tending to show that the triangular piece claimed by the plaintiff was a part of the Arnold tract; and the court submitted this question to the jury, and instructed them, if they found from the evidence that the 64 acres in dispute was a part of the Arnold tract, to find for the plaintiff. The first issue was as follows: "Are the plaintiffs the owners and entitled to the possession of the lands claimed by them, as de-

scribed in the complaint, or any part thereof, and, if so, what part?" And the jury answered this issue, "Yes; 64½ acres, triangle west of the R. & R., as shown on the plat." In this submission and instruction there was error. In matters of location it is the duty of the court to instruct the jury what are the boundaries, and it is the duty of the jury to find and locate them. There being no dispute as to the Raleigh and Roxboro road, and it being admitted that the 64½ acres claimed by the plaintiff were on the west side of the road, and it being admitted that plaintiff had no claim to this 64½ acres, except under the eleventh section of Paul C. Cameron's will, quoted above, it became a question of law for the court. If the description had closed with, "all the lands included under the name of the Arnold, the Geer, and the Jones lands," and there being a dispute as to whether the 64½ acres were a part of the Arnold land, it would have been proper for the court to submit that question to the jury. But the description did not stop here. It added, "all east of the Raleigh and Roxboro road." This qualification must mean something. It would not have been added if it did not. The description, without this qualifying clause, would undoubtedly have given the plaintiff all the Arnold land, including the 64½ acres, as the jury have found that to be a part of the Arnold land. So it could not have been added to enlarge the gift, nor to explain the devise; for, if it was the intention of the testator to give the whole of the Arnold land to the plaintiff, he had done so without the additional qualifying words, "all on the east side of the Raleigh and Roxboro road." As to this language, according to all rules of interpretation, the only meaning it can have is to restrict the gift to the east side of the road. *Carter v. White*, 101 N. C. 30, 7 S. E. 473; *Branch v. Hunter*, 61 N. C. 3. We think the testator intended to give the plaintiff the Geer land, the Jones land, and all the Arnold land east of the Raleigh and Roxboro road. Putting this construction upon the devise to plaintiff, he had no title to the 64½ acres on the west side of the Raleigh and Roxboro road, and, being the plaintiff, he could not recover, whether the defendant was the owner of the 64½ acres or not. The view we have taken of this case, it seems to us, is sustained by *Midgett v. Twiford*, 120 N. C. 4, 26 S. E. 626, and many other cases, while we do not think it is in conflict with *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108, nor *Procter v. Pool*, 15 N. C. 374, nor any other case cited by plaintiff. The plaintiff having failed to show any title to the 64½ acres which lies on the west side of the road, there was error in the court's submitting that question to the jury. Error.

CLARK, J., did not sit on the hearing of this case.

(128 N. C. 222)

PEEBLES v. GRAHAM.

(Supreme Court of North Carolina. May 7, 1901.)

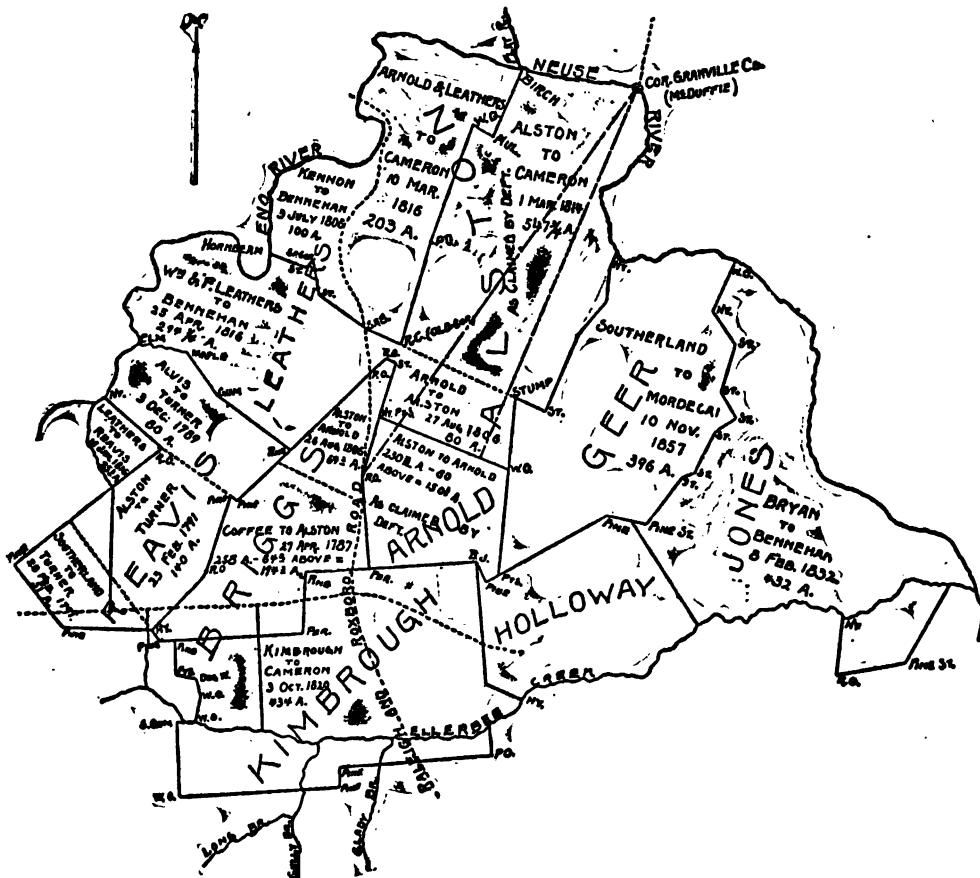
DEVISE—DESCRIPTION—LAND INCLUDED.

Where testator devised "all the lands known and called as the 'Leathers,' 'Briggs,' 'Reavis,' and 'Southerland,' on the south side of Eno, and on" certain roads, and "all now in D. county, and all title deeds registered in O., and containing between 1,500 and 1,700 acres," held that, the testator having owned no land known as "Southerland," this description should be rejected, and land otherwise within the description, not otherwise devised, and necessary to make up the amount called for, should be held to be within the devise.

Appeal from superior court, Durham county; Moore, Judge.

Action by R. B. Peebles, trustee, against George M. Graham. Judgment for defendant on a cross action. Plaintiff appeals. Affirmed.

The following is the map referred to in the opinion:



Winston & Fuller, Shepherd & Shepherd, and R. B. Peebles, for appellant. Manning & Foushee and Graham & Graham, for appellee.

FURCHES, C. J. This is an action of ejectment. A part of the lands involved in

this appeal were not embraced in the plaintiff's complaint, but were brought into the controversy by the defendant's answer, in the nature of a cross action. The contentions of the parties grow out of devises in the will of Paul C. Cameron, and are the same sections that were set out in defendant's appeal. But, for convenience, and to prevent the necessity of referring to the other opinion, we quote them again: The devise to the plaintiff is contained in the eleventh item, and is as follows: "I also give, devise, and bequeath to R. B. Peebles, as trustee aforesaid, all the lands included under the name of the Arnold, the Geer, and the Jones land, all east of the Raleigh and Roxboro road, and south of Neuse river, in Durham county, and the title papers, all with my sister Margaret's papers in the Citizens' Bank at Raleigh." That under which the defendant claims is included in item 9, and is as follows: "I also give and devise to John W. Graham, as trustee aforesaid, for

his son George M. Graham, all the lands known and called as the 'Leathers,' 'Briggs,' 'Reavis,' and 'Southerland,' on the south side of Eno, and on the Raleigh and Roxboro and the Hillsboro and Fish-Dam roads, and all now in Durham county, and all title deeds registered in Orange, and containing be-

tween 1,500 and 1,700 acres,—to George and his heirs an inheritance in fee simple when he comes of age." While this is an action of ejectment, the land involved in this appeal was not included in the plaintiff's complaint, but brought in by the defendant's answer, in the nature of a cross action, in which the defendant asks affirmative relief. Therefore, while the principle is preserved, the general rule is reversed, and the burden is thrown on the defendant to show title in himself, and it was so stated in the charge of the court. The controversy is as to the 203 acres, the 547½ acres, and the 80 acres, as will be seen by the map which will be published. The plaintiff claims that it appears from the map that the 80-acre tract and the 203-acre tract were Arnold lands (that is, that they had at one time belonged to people by the name of Arnold); and he says, that being so, he has offered evidence tending to show that the 547½-acre tract was used in connection with these tracts, and that they are all known and called the "Arnold Lands," and that he is entitled to them under the name of "Arnold Lands." And he says they were never owned by any one named Southerland, nor were they ever called by that name, while it appears by the map that the testator owned a tract of 51 acres at the southwest corner of the map, adjoining the Reavis tract, that was known as "Southerland Land." The defendant denies that the testator ever owned the 51 acres called on the map "Southerland Lands," and says that the testator's father, Duncan Cameron, did own this small tract of land at one time, but that he sold it before his death, and that the testator, Paul Cameron, never owned it. And defendant offered evidence tending to sustain this contention,—that the testator, Paul, never owned this 51-acre tract. The defendant also denies that the 80-acre tract, the 203-acre tract, or the 547½-acre tract was ever called or known as the Arnold lands. He says that all these lands at one time belonged to the Alstons, and were sold off by them at different times and to different persons, and in that way some of them acquired different names, but that the 547½-acre tract was conveyed directly from the Alstons to the Camerons, and never acquired any other name than the "Alston Lands." The defendant contends that the word "Southerland" was a slip,—an inadvertence,—but, however made, the defendant contends it should be rejected as a description of any lands devised by the testator. And the defendant contends that, this being done, there is still sufficient description left to identify this land as a part of the devise to the defendant; that it will stand with this description,—that it is on "the south of the Eno river," and "on the Raleigh and Roxboro road, the title deeds registered in Orange county,"—and with the Reavis and Briggs lands, which are on the Fish-Dam road, and the Leathers land, on the Raleigh and Roxboro road, making in all

about 1,640 acres, while the other tracts conceded by plaintiff to have passed by the will only contain a little over 800 acres. The plaintiff contends that the word "Southerland" was not put in the will by inadvertence or mistake; that there is no evidence that it was, and there is no reason for rejecting it. He further contends that if it were rejected,—considered as not in the will,—there is not sufficient description left to identify the 203 acres or the 547½ acres or the 80 acres as a part of the land devised to the defendant.

It is a presumption of fact that every man that makes a will intends to dispose of all of his estate. *Blue v. Ritter*, 118 N. C. 580, 24 S. E. 350; *Jones v. Perry*, 38 N. C. 200. This presumption may be rebutted, but it stands until it is rebutted. It is therefore presumed that Mr. Cameron did not intend to die intestate as to this large body of land, amounting to some 800 acres. And, besides this presumption the law makes, we have other evidence in the will tending to show that he did not intend to die intestate as to any part of his estate. We find that in the sixteenth item of his will he says: "And, to provide for any omissions, I name my daughter Mildred the residuary legatee;" but she is to have her full share, and not to account for anything she may receive under this residuary clause. And we can hardly think that he omitted to dispose of so large a body of land as this, when it is admitted that he disposed of all his lands adjoining it. He must have intended to give it to some one, and, if he did, it was either the plaintiff or the defendant. It lies on the "south side" of the Eno river, which is one of the descriptions. It is true that all of it is not directly south of the Eno, taking the meridian. But it is on the "south side" of the Eno. It is on the Raleigh and Roxboro road, which is another part of the description. It is all in Durham county, and the title deeds are registered in Orange county. This is so as to the 203 acres and the 547½ acres. The land devised contains "about 1,500 or 1,700 acres," and, if the 203 acres, the 547½ acres, in which the 80 acres are included, this is so; but, to exclude them, the devise only contains a little more than 850 acres. Suppose the will had said, "I devise to the defendant the Briggs tract, the Reavis tract, the Leathers tract, and the land on the south side of the Eno and on the Raleigh and Roxboro road, lying in Durham county, the title deeds all registered in Orange county, making in all 1,500 or 1,700 acres," and we find the Briggs land and the Reavis land and the Leathers land as described, and we find the 203-acre tract, the 547½-acre tract, including the 80-acre tract belonging to the testator lying on the south side of the Eno, on the Raleigh and Roxboro road, in Durham county, the title deeds registered in Orange county, and adjoining the other land admitted to be devised to the defendant, making in all about

1,600 or 1,700 acres, the amount specified, and not disposed of, unless it be to the defendant, and without these three last-named tracts the devise only covered about 800 acres; could it be said there was no description in the will tending to identify this land as a part of the devise? Of course, if the testator owned land on the Raleigh and Roxboro road known or called by the name of the "Southerland Land," it would be presumed that the word "Southerland" was intended to identify that land, and it could not be considered an error in the testator. And the word "Southerland" would have to be made to apply to that land. But this question was specifically submitted to the jury in the charge of the judge, in the following instructions: "Understand, gentlemen, in the first place, if you find that the testator owned Southerland land, then only Southerland land can pass under this description, and land known by the name of 'Alston Land' cannot pass; but, if you find that he did not, then Southerland is a misdescription, and then you should proceed to inquire whether, in the first place, this land was devised to any one else or not." And, as the jury found for the defendant, they must necessarily have found that the testator owned no land known or called "Southerland Land." And, this being so, the word "Southerland" in the devise was meaningless, and must be rejected in construing the will. The jury have also found that these tracts are not a part of the Arnold tract willed to the plaintiff, as this question was submitted to them, and they found against the plaintiff's claim. In *Procter v. Pool*, 15 N. C. 371, it is said that, if one description in a deed sufficiently points out the thing with certainty, a false description may be rejected. In *Simpson v. King*, 36 N. C. 13, it is said: "An incorrect and unnecessary part of the description must be disregarded, rather than the whole disposition should fail, provided that the thing claimed be found to agree with those parts of the description that are retained." In *Scully v. Pruden*, 92 N. C. 173, it is said, "Where the subject-matter of a conveyance is completely identified by its location and by certain other marks of description, the addition of another particular which does not apply to it will be rejected, as having been inserted through misapprehension or inadvertence." In *Mayo v. Blount*, 23 N. C. 283, it is held that "a perfect description which fully ascertains the corpus is not to be defeated by the addition of further and false description." The general rule is that the quantity of the land stated to be conveyed will not be considered in determining location or boundaries. But there is a well-known exception to this rule, that is as firmly established as the rule itself. And that is this: Where the location or boundary is doubtful, quantity becomes important. *Brown v. House*, 116 N. C. 866, 21 S. E. 938; *Cox v. Cox*, 91 N. C. 256. The rule of con-

struction is to adopt that one which will give validity to the instrument, if sufficient appears upon the instrument to enable the court to do so. *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033; *Procter v. Pool*, supra.

We do not think the authorities cited by the plaintiff are in conflict with the views we have expressed in this opinion, or the authorities we have cited. Nor do we think the exceptions of the plaintiff can be sustained. And we are of the opinion that there was evidence sufficient to submit the question to the jury as to whether the testator owned any land known or called by the name of "Southerland," and, as the jury have found that he did not, we are of the opinion that the word "Southerland" in the devise to the defendant should be rejected as an inadvertence and meaningless. The word "Southerland" being rejected, we are of the opinion that there was sufficient other evidence to authorize the court to submit the question to the jury; and, as they have decided it in favor of the defendant, their finding and the verdict must stand. No error.

CLARK, J., did not sit on the hearing of this appeal.

(28 N. C. 471)

PERRY v. WESTERN NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. June 5, 1901.)

RAILROADS—STATIONS—INJURIES TO LICENSEE —TRACKS—LEASE—LIABILITY OF LESSOR FOR LESSEE'S NEGLIGENCE—TRIAL—IN- STRUCTIONS—IMPROPER REMARKS OF COUN- SEL.

1. A railroad leasing its road to another company is liable for injuries caused by the lessee's negligence in the operation of the road, in the absence of any evidence showing a release from such liability.

2. Where, in an action against a railway company for the negligent killing of a person at defendant's depot who claimed to have gone there for the purpose of hearing a political speech, there was evidence that the deceased went to the depot for the purpose of stealing a ride on one of defendant's trains, an instruction that, if the deceased went to the depot with the intention of stealing a ride on defendant's train, he was a trespasser, and defendant owed him no duty except not to injure him wantonly, was properly refused.

3. Where counsel, in his closing argument, in commenting on the credibility of witnesses, did not confine himself to their testimony, acts, or appearance on the stand, but related prejudicial facts within his personal knowledge, not of common information, and which were not in evidence, such remarks constitute a proper ground for a new trial.

Appeal from superior court of Burke county; Council, Judge.

Action by J. A. Perry, administrator of the estate of Pink Perry, deceased, against the Western North Carolina Railroad Company, for the negligent killing of intestate. Deceased went to defendant's passenger depot for the purpose of hearing a political speech, and, while attempting to cross the track from the passenger to the freight

depot at a place used by the employes and others in going from one station to the other, his foot was caught in the planking between the tracks, and a gravel train backing down the track ran over and fatally injured him. There was some evidence in the case that deceased started for the freight depot for the purpose of stealing a ride on one of defendant's freight trains. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Geo. F. Bason, for appellant. Avery & Avery and Avery & Ervin, for appellee.

DOUGLAS, J. This is a civil action brought by the administrator of Pink Perry, deceased, for damages for the alleged negligent killing of his intestate. The following are the issues, as submitted and answered: "(1) Was the injury resulting in the death of the plaintiff's intestate caused by the negligence of the Southern Railway Company as alleged in the complaint? Ans. Yes. (2) Did intestate by his own negligence contribute to the injury resulting in his death? Ans. Yes. (3) Notwithstanding such negligence on the part of the said intestate, could the Southern Railway Company, by the exercise of due care and prudence, have prevented the killing? Ans. Yes. (4) Is the defendant answerable for the negligence of the Southern Railway Company in causing the death of the plaintiff's intestate? Answer. Yes. (5) What damage has the plaintiff sustained? Ans. \$7,000." The following are the defendant's assignments of error: "(1) The defendant assigns for error such parts of the charge of the court as are embraced by exceptions 1, 2, 3, and 4. (2) To the refusal of the court to give the instruction numbered 13 which was prayed for by defendant. (3) To the refusal of the court to sustain defendant's objection to the remarks of counsel as set out in its sixth exception. (4) To the finding of the court of the fourth issue in the affirmative. (5) To the refusal of the court to grant a new trial."

The first assignment cannot be sustained. His honor's charge was full, occupying 13 pages of the printed record, and, we think, fairly presented the case. The defendant's exceptions to the charge are somewhat "broadside" in their nature, one of them including nearly two pages of the printed charge in a single exception. We have, however, examined the charge, and think it should be sustained upon its merits. As the questions involved have been so recently and so elaborately discussed by this court, and as a new trial must be granted upon the third exception, we do not think it necessary to further comment upon the charge.

The second assignment cannot be sustained. We suppose it refers to the sixth exception, although the prayer itself is not numbered in the records. This exception could not have been given, as it is against the uniform current of our decisions.

The fourth assignment is without merit, as the question involved has been directly decided in *James v. Railroad Co.*, 121 N. C. 523, 28 S. E. 537, 46 L. R. A. 306. Why it should have been put in the form of an issue in the case at bar does not clearly appear to us. As a common carrier chartered by the state assumes certain obligations to the public, of which it cannot absolve itself by its own act alone, it is primarily liable for all injuries caused by the negligent management of its road. In any event, the burden rests upon it of showing such facts as will release it from its prima facie, and we might almost say its inherent, liability. No such evidence appearing, there was no error in the direction of his honor. The matter seems to have been presented as a pure question of law. It is true, the counsel agreed in the court below that all evidence bearing upon this question, whether record, documentary, or oral, that had been offered in the *James Case*, 121 N. C. 523, 530, 28 S. E. 537, 46 L. R. A. 306, should "be considered as introduced" in the present case. No such evidence appears in this record, and we do not feel called upon to review the *James Case*. That a railroad company leasing its road is liable for the negligence of its lessee in the operation of the road is well settled in this state. *Aycock v. Railroad Co.*, 89 N. C. 821, 330; *Logan v. Railroad Co.*, 116 N. C. 940; *Norton v. Railroad Co.*, 122 N. C. 910, 937, 29 S. E. 886.

The third assignment of error has given us considerable difficulty, but we are forced to the conclusion that it must be sustained. The following statement is taken from the record: "During the course of the argument by one of the plaintiff's counsel, he took occasion to compliment R. E. Simpson, conductor of a material train, and to state that he was a man of good character; had been known to him all of his life; that he had no intention to attack him; and that he believed that Mr. Simpson intended to tell the facts correctly, as far as they came under his observation. He said further, however, that he regretted that he could not say so much for the witnesses Black and Hendricks, and it was transparent to every one who heard the examination that they were not fair and impartial witnesses, but were influenced by the fact that they were employes of defendant. He further stated that he had once thought that a man could take employment from this railroad company, and yet feel free to tell the whole truth upon the witness stand, but that his observation within the last few years in the court house had taught him that men who held their place at the will of a railroad company were, as a rule, subjected to great temptations, which most of them could not withstand. He then said: 'I will give you an instance, without mentioning any names. I was trying a case against the same defendant, when an engineer was placed upon

the witness stand whom I had known for 25 years, and whose character, I would have sworn to upon the stand, was good. This man had been discharged for carelessness by this company and re-employed two or three months before the trial. He was introduced for the company, and on his cross-examination in chief so stated the facts bearing upon the question of negligence in the case then on trial as to acquit the defendant of all blame. On the cross-examination, counsel who appeared with me handed him a printed statement, purporting to have been theretofore made by him, giving a full account of the facts which he had just professed to narrate, and which printed statement, signed by him, was utterly contradictory of his evidence as just delivered, and that thereupon he broke down, and begged, with tears in his eyes, that the paper should not be shown to him. Counsel further stated that he didn't then abuse that witness, for he felt he had perjured himself to put bread in the mouths of his children. He then said that he wished the jury, in passing upon the testimony of employes Black and Hendricks, to recollect that their bread and meat depended upon the managers of the Southern Railway Company. During the course of this argument the defendant, through their counsel, arose and objected to such argument being made. The court overruled the objection, and one of the counsel for defendant (S. J. Ervin) stated to his associate (G. F. Bason, the leading counsel in the case), in a tone audible to the court, 'Why don't you except?' and in reply Mr. Bason said, 'I do not have to except now.' Defendant's counsel, upon the statement of this case upon appeal, insisted that his language was intended to convey the idea that he did except to the language, whereupon the court allows such exception." The exception does not appear to have been taken in a very regular manner; but as his honor has allowed it, evidently for the purpose of giving the defendant the fullest opportunity of appeal, we will examine it in the spirit in which it was allowed. This court has said in the case of *McLamb v. Railroad Co.*, 122 N. C. 862, 872, 29 S. E. 894, 897: "Much allowance must be made for the zeal of counsel in a hotly-contested case, especially where the colloquy is mutual, and, indeed, much latitude is necessarily given in the argument of a case where there is conflicting evidence; but counsel should be careful not to abuse their high prerogative, and where the remarks are improper in themselves, or are not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to interfere." The same remarks will apply to the case at bar. If the witnesses had misbehaved in any way upon the stand, either in words or manner, or showed any bias, either of fear or favor, their testimony would be the proper subject of com-

ment by counsel. In cases where the direct testimony of witnesses is diametrically opposite, some of the witnesses must be testifying improperly, either to that which they know is not true, or to that of which they have no knowledge. In such circumstances, it is natural that the counsel should attribute such false testimony to the opposing witnesses. Whether he exceeds his privilege in doing so must necessarily be left largely to the discretion of the judge trying the case, who, hearing the testimony and seeing the behavior of the witnesses, can judge far better than any one else of the propriety of his comments. If that were all, we would hesitate to interfere; but counsel went far beyond any testimony in the case, and, over the objection of the defendant, related facts within his personal knowledge, not of common information, and which were not in evidence. These facts were essentially damaging in their nature, and, coming from so high a source, were capable of producing the most dangerous prejudice. That the counsel intended no impropriety, which we cheerfully admit, does not alter the case. The fact remains that such statements, coming from one of his high character and exalted position in his profession, became only the more dangerous when addressed to jurors whose confidence he justly possessed. Such statements were not in evidence, and were not properly admissible in the argument of counsel. For the failure of his honor to interfere at the request of opposing counsel, a new trial must be ordered. New trial.

MONTGOMERY, J., concurs in the conclusion reached in the opinion of the court that a new trial must be had, and for the reason assigned. He thinks, however, that his honor should have given No. 13 of the defendant's special prayers for instruction, which was in the following language: "If the jury find from the evidence that intestate went to defendant's depot for the purpose of beating a ride on one of defendant's trains, then intestate was a trespasser from the moment he entered defendant's premises, and the defendant owed him no duty except not to injure him wantonly or willfully, or with such carelessness as amounts to a reckless disregard of consequences." And it follows, therefore, if that view is correct, that that part of his honor's charge which laid down the law governing the defendant's duty towards the intestate, and its liability for the injury inflicted on him, as that which would be applicable to one who had a right to be at the depot, excepted to by the defendant in Nos. 1, 2, 3, and 4 of its exceptions, was erroneous. The witness Britain testified that the intestate told him a short time before he was killed that he intended beating his way on the train to Hickory from Morganton.

COOK, J., concurs in above.

(128 N. C. 477)

CUTLER et al. v. ROANOKE R. & LUMBER CO.

(Supreme Court of North Carolina. June 5, 1901.)

DEEDS—FRAUD IN TREATY—SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY—COMPETENCY OF EVIDENCE.

1. In 1887 plaintiff conveyed to defendant all the timber on certain land above 13 inches at the stump, with the privilege of establishing a tramroad on the land for the purpose of removing the timber. In 1899 he conveyed all the timber above 12 inches at the stump, and the fee simple in all the land covered by these roads; the deed also extending the time for the removal of the timber. Plaintiff alleges that the contract for the second deed was to sell defendant only the growth of timber above 13 inches since the date of the first deed, without extending the time for removal. Plaintiff testified that the deed was drawn by defendant's agent, and was not read by the plaintiff, because he could not read without his spectacles, which he did not have, but was signed by him, relying on the statements of the agent that it was drawn in accordance with the contract. *Held*, in an action to have the deed set aside for fraud, that the evidence was sufficient to submit the question of fraud in the treaty to the jury.

2. Plaintiff's testimony was not incompetent as contradicting the terms of the deed, since, fraud being alleged, the question at issue was the establishment of the deed as that of plaintiff.

Montgomery, J., dissenting.

Appeal from superior court, Washington county; McNeill, Judge.

Action by J. M. & J. A. Cutler against the Roanoke Railroad & Lumber Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

A. O. Gaylord, for appellant. H. S. Ward, for appellees.

FURCHES, O. J. This is an action to recover damages for trespass by defendant on the land of the plaintiff, for timber cut and removed from said land, and to vacate a deed dated the 17th of March, 1899, or to have it corrected. It appeared on the trial, and was admitted by all parties, that the plaintiff had conveyed all the timber on the land embraced in the deed of the 17th March, 1899, to the defendant, by deed dated 28th February, 1887, of a size above 13 inches diameter at the stump, and that the time in which defendant was to cut and remove said timber had not expired by some months. The allegation of the plaintiff is that on the 17th of March, 1899, one Freeman, agent of the defendant, came to him at the store of one Brown, and stated to him that since the date of the first deed (28th February, 1887) other timber on the land had grown to 13 inches, and proposed to buy that growth, or, in other words, to buy all the timber on said land above 13 inches; that defendant did not want any further time in which to get said timber off the land,—said that it would all be taken off by June, which was within the time named in the original deed. The orig-

inal deed of February, 1887, authorized the defendant to put such tramroads on said land as might be necessary to remove the timber therefrom. The plaintiff alleges that the contract was to sell defendant the growth of the timber since the date of the first deed, to 13 inches, for \$25, and that this was the only contract that was made. The case rests on the plaintiff's testimony, which is as follows: "The bargain between me and Mr. Freeman, the defendant's agent, for the sale of the timber under the deed of March 17, 1899, was made at Horace Bowen's store. Freeman said that the company would cut the timber I had sold to it by deed of June 13, 1887 (which was same sold in last deed before the time went out, on June 13, 1899), and that the company didn't want any more time, but that there was a lot of timber on the land that had grown up over thirteen inches at stump since that deed was executed; that they could not cut under that deed; and that the company wanted to buy the growth that had grown up since June 13, 1887. I thought they would break it to pieces in cutting the other, so I agreed to sell it. I told him I would not sell him any more time on the other timber, because he wouldn't offer me as much as he was offering others in the neighborhood. He said, all right; he didn't want anything but the growth, as he already had the balance. When we bargained, I went home to get my wife to sign the deed. It was about one-half or three-fourths of a mile. He went along with me to where the log was across the path, where he could not pass. He was in a buggy. I walked. I left him at the log to write the deed, while I went to the house for my wife. When I got back he had the deed written. It was late in the evening; the sun was about an hour high. His horse was so restless he wouldn't be still a minute. He said to me: 'Make haste and sign it. It is late, and I am in a great hurry. I've got to go to Washington to-night. This horse hasn't got sense enough to stand still.' My son was off some distance cutting wood. He handed me the deed to sign, and asked me if I wanted to read it. I told him that, if it was like the bargain he made, it was all right. He said it was just as the bargain was; that he would have all the timber cut off by June and before. I thought he was telling me the truth, and I trusted to his honesty. He paid me only \$25 for the timber, passed in this deed, and didn't read it. I cannot read good. I didn't have my glasses, and when I tried to read without them the lines ran together. I can read print better than writing. The timber is described in the printed part of the deed. I can read the words of the printed part of the deed as the counsel moves his pencil to them, but the lines at once run together, when he stops. (Counsel here took the deed, pointing with his pencil to portions of it, and witness' statements were in reference to the princi-

pal portions of the paper.) Freeman was notary, and took my acknowledgment and examination of wife. I thought, when I signed the deed, it did not convey all my timber, and was misled and induced to sign it by the statement of Freeman that it was as we bargained." The court thought this testimony sufficient evidence of fraud to submit the question to the jury, and this is the question presented by the appeal.

Frauds affecting the validity of deeds are of two kinds,—fraud in the factum, and fraud in the treaty. This distinction, though not as material now as formerly, is still material in some cases. *Medlin v. Buford*, 115 N. C. 260, 20 S. E. 463. Besides the importance of the distinction pointed out in *Medlin v. Buford*, it was important, before the junction of legal and equitable jurisdiction in the same court, to determine the jurisdiction, as courts of law had jurisdiction of frauds in the factum, but not of frauds in the treaty, which were cognizable alone in courts of equity. This made it important to determine, before commencing the action, whether it was fraud in the factum or fraud in the treaty, as the proper court in which to bring the action depended on this distinction; and, while the distinction is important, it is not of that importance that it formerly was, as one is sure now to get into the right court, if there is fraud, whether in the factum or in the treaty. In this case, there may be some slight evidence of fraud in the factum,—such as the unsuitable place where the deed was executed; the apparent haste with which it was done; the remarks of defendant's agent to hurry and sign the deed, that his horse did not have sense enough to stand, that it was then late, and he had to go to Washington that night, a distance of 18 miles. Besides, it seems to us that Freeman was doing a little too much. He was agent of the defendant company, and an officer of the law. When the deed was signed, he moved "the previous question," and, by taking the acknowledgment and privy examination, undertook to "lay the matter on the table." We do not say that he could not in law take this acknowledgment and privy examination; but these things, taken in connection with the fact that the deed was not read to the parties making it, is some evidence, we think, of fraud in the factum. But, leaving out of the case these suspicious circumstances we have just stated, it seems to us to be a case that should have gone to the jury upon the evidence of fraud in the treaty. In the case of *McArthur v. Johnson*, 61 N. C. 317, 93 Am. Dec. 593, the court held that plaintiff could not recover; and that was a case very much like this, except there was no question in that case but what the plaintiff could read. In this case the evidence leaves the question whether plaintiff could read in doubt, and, if this was a material question in the case, it should have been left to the

jury. The case of *McArthur v. Johnson* was brought in the superior court of law before it had equitable jurisdiction; and the court held that it was not a case of fraud in the factum, and the plaintiff could not recover. But in the discussion of the case the court lays down the distinction between fraud in the factum and fraud in the treaty; and, while the court did not decide that that case was a case of fraud in the treaty, it seems to us that the definition given in the discussion of the case shows that it was. And the same doctrine is held in *Gant v. Hunsucker*, 34 N. C. 254, 55 Am. Dec. 406, while the more recent case of *Medlin v. Buford*, 115 N. C. 260, 20 S. E. 463, which seems to be put largely on *McArthur v. Johnson*, clearly shows that this case is one of fraud in the treaty, if plaintiff's evidence is to be believed; and we have nothing to do with that, as it is purely a question for the jury. In *Medlin v. Buford* the plaintiff signed a paper upon the representation of Davis that it was a power of attorney authorizing him to raise \$1,000 to invest for her benefit, at a profit of \$25 per month. The plaintiff in that case could read, but did not read the deed; was imposed upon by the false representation of Davis as to the contents of the deed; and the court held that this was not a fraud in the factum, and, as third parties who were innocent of the fraud had become interested, the plaintiff could not recover. But it is distinctly held that it was a fraud in the treaty, and would be declared void as to Davis, and also as to Mrs. Buford, if she or her attorney (Mr. Cutler) had knowledge of the fraud. The distinction between fraud in the factum and fraud in the treaty seems to be very narrow; but still it exists, and it seems still important that it should be observed, as in the case of *Medlin v. Buford*. While it is important to observe these ancient landmarks, and to give force and validity to the doctrine of fraud as applied to executed contracts,—to deeds,—it should not be lightly done. Misrepresentations in the treaty as to location, boundaries, quality, value, etc., of which the other party had notice, or might have had knowledge by reasonable diligence, will not be heard by courts of law or equity to invalidate deeds. If this were so, it would seem that no man's title would be safe. Parties entering into solemn contracts, such as deeds, must use ordinary prudence,—must examine matters open to them at the time of executing their deeds,—or they will not be heard to complain. *Lyle v. Bird*, 48 N. C. 222; *Saunders v. Hatterman*, 24 N. C. 32, 37 Am. Dec. 404. In this case it appears from the deed of the 28th of February, 1887, that plaintiff sold and conveyed to defendant all the timber on a certain tract of land, containing 90 acres, above 13 inches at the stump, with the privilege of establishing tramroads across said land, to be used in removing said timber. In the deed of the 17th March, 1890, he conveys all

the timber above 12 inches at the stump, and conveys the fee simple in all the land covered by these roads, and extends the time to remove the timber to one year from the 17th of March, which would have been out at an earlier period. If the plaintiff's statement of the contract of the 17th March, 1899, be true, the changes contained in the deed as drawn by Freeman, and signed by plaintiff, are materially different; and as this deed was not read by plaintiff, as he says, because he could not read it without his spectacles, which he did not have, but was signed by him, relying on the statements of Freeman "that it was drawn just as the contract was," it was a fraud in the treaty upon the plaintiff, and should have been submitted to the jury. If the plaintiff had required it to be read, and Freeman had read it falsely, it would have been a fraud in the factum. *McArthur v. Johnson*, *Medlin v. Buford*, *supra*.

There were objections to the plaintiff's evidence as to the terms of the contract, upon the ground that they tended to vary and contradict the deed. This would have been so if the deed had been established as the deed of the plaintiff; but when that was the very question at issue, and when it was necessary to do so to establish the alleged fraud, it was competent for that purpose. And after a careful examination, we find no substantial error, and the judgment is affirmed.

DOUGLAS, J. (concurring). I cannot concur in the contention of the defendant that because two men are at arm's length,—as all men generally are, unless they occupy some fiduciary relation to each other,—one can safely perpetrate a fraud upon the other. This rather novel doctrine seems to be based upon the idea of contributory negligence on the part of the plaintiff, which, concurring with that of the defendant, becomes the proximate cause of the fraudulent result. This application of the doctrine of contributory negligence is new to me; but, even if it were admissible, it could not be a defense in the present action, because actual fraud is always willful. Even in actions sounding in damages, the defense of contributory negligence is never available against willful injury. Then, why should it be a defense against willful fraud? I will readily admit that if the negligence of the plaintiff had enabled the defendant to perpetrate a fraud upon a third party, who was himself innocent of fraud or negligence, he could not recover from such innocent party. Such a case is far different from the one presented to us in the opinion of the court. A man might be negligent in walking in the middle of the street on a dark night, and such negligence might excuse the driver of a wagon for unintentionally running into him, but it would be no excuse for robbery. The doctrine that mere negligence puts a

man beyond the pale of the law can never receive my assent. The defendant relies upon the case of *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538, the essential point in which was the fact that the defendant discovered the alleged fraud before the work was commenced, and yet permitted the plaintiff to proceed and put up the lightning rods without objection. The court said that such conduct was a waiver of the alleged fraud, if it ever existed, and that equity would not permit a man to accept work performed after he had full knowledge of all the facts, and then refuse to pay for it. It is true, in that case the court also said that the defendant was guilty of negligence, and cited *Boyden v. Clarke*, 109 N. C. 664, 669, 14 S. E. 52,—a case which I respectfully submit furnishes no foundation whatever for the contention of the defendant in the case at bar. Some isolated sentences in the opinion, considered without regard to the essential facts of the case, might offer some show of authority; but the case itself, taken as a whole, fails to do so. The defendant Clarke bought the equitable interest of one Sherrill, who held a bond for title from James Harper. Clarke subsequently paid Harper the remainder of the purchase money, and took a deed from him. The plaintiff Boyden, who had bought an adjoining tract, sought to hold Clarke responsible for alleged representations of Sherrill, although Clarke was an innocent purchaser for a valuable consideration, without notice, and held title under Harper, and not under Sherrill. The court says (109 N. C. 667, 14 S. E. 54): "It would be giving very great latitude to the doctrine of estoppel in pais, if the mistaken or fraudulent statements of a vendee, occupying land under a contract of sale, were allowed to have the effect of establishing title by estoppel, as against the original vendor and the assignee of the original vendee, after the vendor had performed his contract by conveying to the assignee; both grantor and grantee being ignorant of the fact that any misrepresentation had been made." That case, as thus stated in the opinion itself, furnishes no authority for the doctrine now contended for by the defendant,—that, as between the original parties, mere negligence is a defense for willful fraud. To the contrary may be cited a practically unbroken line of authorities. *Fetter*, Eq. § 87, p. 136, says: "But no obligation rests on him to investigate or verify the representations, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. In a court of equity no man can complain that another has too implicitly relied on the truth of what he himself has stated." *Beach*, Mod. Eq. Jur. § 95, says: "A false representation of one of the parties to a contract does not put the other on inquiry as to its truth. Every contracting party has an absolute right to rely on the express statement of an

existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." Story, Eq. Jur. § 154, says: "The danger of setting aside the solemn engagements of parties, when reduced to writing, by the introduction of parol evidence substituting other material terms and stipulations, is sufficiently obvious. But what shall be said where those terms and stipulations are suppressed or omitted by fraud or imposition? Shall the guilty party be allowed to avail himself of such a triumph over innocence and credulity to accomplish his own base designs? That would be to allow a rule introduced to suppress fraud to be the most effectual promotion and encouragement of it. And hence courts of equity have not hesitated to entertain jurisdiction to reform all contracts where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control contracts; wisely deeming such cases to be a proper exception to the rule, and proving its general soundness." Bisp. Eq. § 202, says: "There is, indeed, a distinction between deeds and other instruments which a man intends to execute, though his intention may be brought about by fraudulent means, and those which he has no intention to execute, but executes under the impression that the instrument is of a different character from what it actually is, or, in other words, executes the wrong paper. In the latter case the instrument is absolutely void, and the law above stated in relation to voidable instruments would, in general, not apply." Again, the learned author says in section 207: "A man who is dealing with another has a right to rest upon an assertion of a fact made by the latter; but he has no right to rely upon the latter's opinion,—unless, indeed, he is an expert, in which case the parties do not deal upon equal terms, and the ordinary rule does not apply." Neither space nor time will permit an examination of the numerous authorities cited by these different authors. I will quote but two: In *Redgrave v. Hurd*, 20 Ch. Div. 1, the celebrated Sir George Jessel, master of the rolls, says: "Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made was guilty of negligence." In *Sutton v. Morgan*, 158 Pa. 204, 218, 27 Atl. 894, 895, 38 Am. St. Rep. 841, 844, the court says: "It is said that Williams should have inquired for himself, and that his opportunities of obtaining information were just as good as those of Morgan. This may be. Prudence should

have led him and his 'financial man,' Sutton, to test the truth of the glowing statements made by Morgan and Gloss, but it did not. They fell easily into the trap which was set, with some skill and some effrontery, for them; but their neglect or want of prudence cannot justify the falsehood or fraud of those who practiced upon their credulity. The doctrine of contributory negligence cannot be invoked by the defendants to save them from liability for misleading their victim. They must stand or fall on the truth and good faith of the representations that led to the sale." This opinion is particularly striking on account of its conclusion. While granting the prayer of the plaintiff for the rescission of the contract, the return of the money paid, and the cancellation of the mortgage, it concludes as follows: "For his gross carelessness, the plaintiff ought to lose his costs. No bill of costs will be taxed for the plaintiff." There is an essential difference between actual misrepresentation and the mere concealment of material facts of which both parties had equal opportunities of information; but the latter principle I am not now discussing. A common instance of correcting a written instrument which both parties might have read is where a deed absolute in form is construed to be a mortgage. It seems to me that every principle of equity that would grant relief from fraud in the treaty would apply with even greater force to fraud in the factum. Whether there was sufficient evidence of fraud in the case at bar to go to the jury is an entirely different question; but even on that I concur with the court.

CLARK, J. (concurring in result). The charge here is fraud in the factum, in execution of the deed after the grantor consented to sign it, and not in the preliminary representations or treaty. The complaint alleges that the plaintiff agreed with one Freeman, agent of defendant, to sell a certain part of the timber, whereupon the said agent of the defendant company drew the deed, while plaintiff went off to get his wife; that on his return the deed was already drawn up, but plaintiff, having left his spectacles, was unable to read it; that he asked Freeman the contents of it, and was assured that it was a conveyance only of the specified timber, and plaintiff, relying upon the truth of such statement, signed and delivered the deed; whereas the timber actually conveyed was all the timber on the land, and the price paid (\$25) was not one-twentieth in value of the timber conveyed. Wherefore plaintiff charges that the execution of the deed was procured by fraud, and asks that the deed be reformed so as to convey only the timber agreed to be sold, and for recovery of \$400, the value of timber already cut outside of the kind it was agreed the plaintiff was to convey. The plaintiff introduced evidence in full support of above

contention, and, as a further circumstance in corroboration of the charge of fraud, evidence—which was admitted without objection—that when he got back, not having his spectacles, Freeman said to him: "Make haste and sign it. It is late, and I am in a great hurry. I've got to get to Washington to-night. This horse hasn't got sense enough to stand still." The plaintiff contends that this, together with the gross inadequacy of price,—\$500 for \$25,—and the difference between the deed as written and as it was agreed to be written, and the fact that Freeman told plaintiff that the deed was written as agreed, and knew that plaintiff could not read without his glasses, was evidence to go to the jury to show imposition and fraud by trick and device. As the defendant's exception is for refusal to tell the jury that there was no evidence, this evidence of the plaintiff must be taken as true, and in the most favorable aspect for the plaintiff.

Taken as true, no court of equity could refuse the relief asked. The jury found that it was true. The following issues were submitted without objection: "(1) Was the deed from J. M. Cutler and wife to the defendant, dated 17th March, 1899, obtained by fraud? Ans. Yes. (2) If so, what was the value of the timber? Ans. \$243,"—the latter evidently meaning, from the complaint and judgment, the value of timber cut in excess of what was agreed to be paid. The defendant asked the following special instructions, which were given with the modification below recited: "(1) That if the jury find from the testimony that the plaintiff J. M. Cutler, when he executed the deed to defendant on March 17, 1899, could have read it, if he had so desired, and failed to do so, then he is bound by it, and cannot be heard to say that a fraud was practiced upon him by defendant's agent, S. F. Freeman, by inserting in said deed more timber than said Cutler thought was therein, and more than said Freeman told him was conveyed by it. And if he could, by reasonable diligence, have ascertained the contents of said deed, it was his duty to do [so]; and if you find that he failed to do so, by not reading it, you will answer the first issue, 'No.' (2) That from all the evidence, if believed, the plaintiff J. M. Cutler could have read the deed of March 17, 1899, before signing it, and could have ascertained thereby what timber it conveyed, and his failure to do so, if he did fail, does not relieve him from the operation of said deed, and you will answer the first issue, 'No.' (3) That the deed of June 13, 1887, conveyed all the timber on the land described in the complaint, down to 13 inches on the stump, to the defendant in fee simple, and the deed of March 17, 1899, by the plaintiffs' admission, conveys the timber on said land down to 12 inches, which had grown to that size since June 13, 1887, and the legal effect of these deeds is to convey all the timber on said land to defendant, and to give

defendant the right to enter and cut and remove the same, and you will answer the second issue, 'Nothing.' These charges were given with this modification to each: "With this modification: 'Unless you shall find from the evidence that the company, by its agents, made a false representation as to the contents of the deed, and in reliance on this statement or representation, the agent knowing it to be false, he (plaintiff) signed the deed, and was defrauded thereby in the respect complained of.' (To this modification the defendant excepts.)" Those instructions were asked by defendant, and were the strongest possible presentation of defendant's case. The modification was eminently proper to be submitted to the jury, in view of the uncontradicted evidence that plaintiff could not read without his glasses, that Freeman was urging to hurry him up and sign, that his horse would not stand, etc.; the evidence tending to show gross inadequacy in price, and that the deed was written differently from agreement, and Freeman's misrepresentation that it was written as agreed. Without holding it illegal, it is proper to say that for the defendant's agent, who procured the execution of the deed, to take the acknowledgment of the grantor and the privy examination of his wife, is a practice to be avoided, not followed. *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538, was correctly decided. It holds that where a grantor negligently fails to read a deed, no fraud or deceit being shown, he cannot be allowed to contradict its terms by parol evidence, by showing that he intended something else. But here the very gravamen of the complaint is fraud in the factum,—the taking advantage of plaintiff's inability to read, the writing it differently from the way it was agreed to be written, the urging plaintiff to hurry up and sign it, knowing he could not read it without going to his house, a half mile off, on foot, to get his spectacles. While every presumption is in favor of the "written word," no deed is proof against fraud. Whether this evidence proved fraud was a matter which only a jury could pass upon. In submitting it to that tribunal, which the constitution says is "one of the best securities of the rights of the people, and ought to remain sacred and inviolable," his honor did only his duty. There being disputed matters of fact, the plaintiff had an inalienable right to have the truth of the evidence passed upon by a jury of his peers. The misrepresentations here are not as to matters in the treaty, as to which both parties had equal opportunity of examination, but as to the contents of a deed drawn by one of them, which the other could not read without his glasses, and who, at the same time, urged him to sign at once without going for his glasses. It was exactly as if the same advantage had been taken of a blind man, if plaintiff's evidence is to be believed; and whether it was to be believed or not no one could decide save a jury, to whom, there-

fore, the court properly submitted it. Juries may sometimes be prejudiced, but, knowing that judges are "men of like passions," the wisdom of the ages has properly provided that disputed facts shall be passed upon by 12 impartial men drawn from the body of the people, and at once returning to them, with unlimited challenge for favor and a reasonable number of challenges without cause assigned. Besides, if the verdict shows bias or mistake, or is upon insufficient evidence, the judge can set it aside without assigning cause. *Hardy v. Hardy* (at this term) 38 S. E. 815. There is thus every protection. But if the judges take to deciding the facts, there is no protection against bias or negligence or incompetence, and no power to set aside their verdict. Every consideration therefore demands that the evidence should be submitted to the jury, unless it is clear that there is not a scintilla in favor of him upon whom rests the burden, and that upon the evidence only one conclusion (and that adverse to the plaintiff) can be drawn. The judge below had power to set the verdict aside if he doubted the sufficiency of the evidence, and submit the issue to another jury. That is the proper remedy. It is not for this court, upon this evidence, to adjudge that the evidence was not sufficient to prove fraud, and thus deprive the plaintiff altogether of a right to trial by jury.

MONTGOMERY, J. (dissenting). The plaintiff and his wife, in 1899, executed to the defendant a deed, on the face of which there is conveyed all the timber on the land described in the deed. This action is brought to have the deed set aside and declared void, except as to the growth of timber to a certain size since 1887, on the ground of fraud, and also for the recovery of \$400, the alleged value of timber which the defendant is alleged to have wrongfully cut and removed from the land by virtue of the provisions of the deed. The fraud alleged is set out in allegation 3 of the complaint, and is as follows: "(3) That the defendant company, as this plaintiff is informed and believes and avers, claimed the right to go upon said land and remove said timber, by virtue of a deed executed to the said defendant by J. M. Cutler, registered in Book 41, page 236, which deed the plaintiff alleges was obtained by the defendant company by fraud in the manner and method as follows: The said company, through its agent, S. F. Freeman, on the 17th day of March, 1899, proposed to the said J. M. Cutler to buy the timber on said land which had grown to merchantable size since June, 1887, and expressly stated that he did not want to buy any other, and for said timber offered to said J. M. Cutler the sum of \$25, which offer said Cutler accepted, and authorized said Freeman to draw deed for said timber, which had grown up since 1887, as aforesaid, and no other, and left the said Freeman alone to write said deed, and on

his return found the deed filled out and ready for signing. That the said J. M. Cutler was unable to read the said deed at that time, and did not read it, but asked the said Freeman as to the contents of it, and he (the said Freeman) expressly stated that the deed conveyed only the timber that had grown up since 1887, and did not convey any other, nor any rights to any other; and the said Freeman so read the deed to said Cutler, from which it appeared that no interest passed except as above stated; and, relying upon that representation and reading and statement of said Freeman, said Cutler signed and delivered said deed." The allegation of fraud is both in the factum and in the inducement or treaty. In *McArthur v. Johnson*, 61 N. C. 317, 98 Am. Dec. 593, it was said by the court: "Another instance [fraud in the factum] is afforded by the case of a deed executed by a blind or illiterate person, where it has been read falsely to him upon his request to have it read." Upon the trial, however, the plaintiff's own testimony disproved the allegation of fraud in the factum, and in the argument before this court the plaintiff's counsel abandoned that view of the case, and relied entirely upon fraud in the treaty. I will now consider that aspect of the case.

The evidence of the plaintiff consisted of his own testimony alone, which was as follows: "The bargain between me and Mr. Freeman, the defendant's agent, for the sale of the timber under the deed of March 17, 1899, was made at Horace Bowen's store. Mr. Freeman said that the company would cut the timber I had sold to it by the deed of June 13, 1887 (which was same sold in last deed before the time went out, on June 13, 1899), and that the company didn't want any more time, but that there was a lot of timber on the land that had grown up over thirteen inches at stump since that deed was executed; that they could not cut under that deed; and that the company wanted to buy the growth that had grown up since June 13, 1887. I thought they would break it to pieces in cutting the other, so I agreed to sell it. I told him I would not sell him any more time on the other timber, because he wouldn't offer me as much as he was offering others in the neighborhood. He said, all right; he didn't want anything but the growth, as he already had the balance. When we bargained, I went home to get my wife to sign the deed. It was about one-half or three-fourths of a mile. He went along with me to where a log was across the path, where he could not pass. He was in buggy. I walked. I left him at log to write the deed, while I went to house for my wife. When I got back he had the deed written. It was late in the evening; sun about an hour high. His horse was so restless he wouldn't be still a minute. He said to me, 'Make haste and sign it. It is late, and I am in a great hurry. I've got to go to

Washington to-night. This horse hasn't got sense enough to stand still.' My son was off some distance cutting wood. He handed me the deed to sign, and asked me if I wanted to read it. I told him that, if it was like the bargain we made, it was all right. He said it is just as the bargain was. 'I will have all the timber cut off by June, and before.' I thought he was telling me the truth, and I trusted to his honesty. He paid me only \$25 for the timber, passed in this deed, and didn't read it. I cannot read good. I didn't have my glasses, and when I tried to read without them the lines run together. I can read print better than writing. The timber is described in the printed part of the deed. I can read the words of the printed part of the deed as the counsel moves his pencil to them, but the lines at once run together when he stops. (Counsel here took the deed, pointing with his pencil to portions of it, and witness' statements were in reference to the principal portions of the paper.) Freeman was notary, and took my acknowledgment and examination of wife. I thought, when I signed deed, it did not convey all my timber, and was misled and induced to sign it by the statement of Freeman that it was as we bargained." Freeman, as a witness for the defendant, testified that the deed was drawn according to the agreement; and Jordan, another witness for the defendant, said that the plaintiff told him that "Freeman offered to read the deed, or to let him (plaintiff) read it; that he did neither, and did not know its contents." But the evidence of the defendant is of no consequence in this appeal, and is only referred to in fairness to the defendant. The admission of the plaintiff's evidence in reference to the treaty leading up to the sale, in plain contradiction of the terms of the deed, and the further admission of the plaintiff's evidence that he was induced to sign the deed upon the statement and representation of Freeman that only the growth of timber since 1887 was conveyed in the deed, and the charge of his honor upon that evidence, are before us for consideration.

The transaction was between parties who were dealing as strangers; there being no relation of confidence between them. The deed was drawn by the grantee's agent, and handed to the grantor for his signature and that of his wife. The grantors, the plaintiff and his wife, could both read and write, and they signed the deed without reading it, or without asking that it be read to them. If a fraud was perpetrated by Freeman, the agent of the defendant, as is alleged in the complaint, the plaintiff cannot have relief, because his execution of the deed under the facts of this case was negligence on his part. *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538. He should have read the deed, or have had Freeman to do so. The deed was before him, he had every opportunity to read it, and there was not only no trick or device

practiced on him to procure his signature, but there was none charged in the complaint. The plaintiff himself testified: "I thought, when I signed the deed, it did not convey all my timber, and was misled and induced to sign it by the statement of Freeman that it was as we bargained." By his own evidence, the plaintiff executed this deed, relying as to its contents upon the statement made by one with whom he was dealing as a stranger, and not as with one in whose statements he had in law the right to confide. If the plaintiff has been cheated, it was his own fault; and the fraud, if there has been fraud, was perpetrated successfully through the plaintiff's own negligence in failing to read the deed.

It was argued here by the plaintiff's counsel that the request made by Freeman to the plaintiff, when he handed him the deed: "Make haste and sign it. It is late and I am in a great hurry. I have got to go to Washington to-night. This horse has not got sense enough to stand still,"—was some evidence tending to prove a trick or contrivance on the part of Freeman to procure the plaintiff's signature to the deed without reading it. In my opinion, it was not sufficient to be submitted to the jury as evidence; and certainly, from the plaintiff's own testimony, it made no impression upon him, for in his complaint he does not set up that matter as a trick or device to get his signature to the deed, or any other trick or device, as we have already seen. I think there was error.

(128 N. C. 498)

VANDERBILT v. BROWN et al.

(Supreme Court of North Carolina. June 5, 1901.)

EJECTMENT—PARTITION—COMMISSIONERS—POWERS—UNAUTHORIZED SALE—CONFIRMATION—EVIDENCE—BOND TO MAKE TITLE—PROCEDURE—CO-TENANTS—MARRIED WOMEN—INSTRUCTIONS.

1. Where a decree of sale for partition was made, and four commissioners appointed to make the sale, but no further action was ever taken by the court, a deed by one of the commissioners, never reported to or confirmed by the court, conveyed no title.

2. Where plaintiff in ejectment introduced an admittedly worthless bond to make title to defendant's grantor for the purpose of showing that defendant claimed thereunder, and so casting on him the burden of proving some better title, plaintiff did not thereby admit the validity of such bond.

3. Where plaintiff in ejectment claimed title under conveyances from several heirs, one of whom, as one of several commissioners to make partition, had previously given bond to make conveyance to defendant's grantors, without report to or confirmation by the court, such bond did not show even color of title in defendant's grantors, and hence, though they held possession thereunder, plaintiff was not thereby estopped from asserting the title derived from the heir who had given the bond.

4. Under the North Carolina practice of submitting a case on special issues only, a general

charge that the plaintiff "cannot recover" was properly refused.

5. That defendant in ejectment owns an interest in the land does not bar plaintiff's recovery, since plaintiff may be entitled to be let into possession as co-tenant.

6. An instruction that, if there was an agreement between heirs and commissioners appointed to make partition, authorizing any one of the commissioners to sell the land separately, all the heirs would be estopped to deny the legality of a sale by only one commissioner, was properly refused when it appeared that some of the heirs were married women.

7. Where part of a requested instruction is erroneous, it may be properly refused.

Appeal from superior court, Transylvania county; Allen, Judge.

Ejectment by G. W. Vanderbilt against G. W. Brown and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Geo. A. Shuford, for appellants. Merri-
mon & Merrimon, for appellee.

OLARK, J. The exceptions by defendants to the introduction of deeds are without merit, and it is unnecessary to discuss them. The appellee says in his brief, "When plaintiff rested his case, defendants made the usual motion to nonsuit, and the court made the usual ruling upon it, and defendants made the usual exception." The plaintiff made out a prima facie case upon the record as usual, and the motion was properly refused. The issues submitted were the usual ones in ejectment, and enabled the defendants to present every phase of the controversy. It was not, therefore, error to refuse the issues tendered by defendants. *Pretzfelder v. Insurance Co.*, 123 N. C. 164, 31 S. E. 470; *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 728; *Bradley v. Railway Co.*, 126 N. C. 735, 36 S. E. 181.

The plaintiff claims under conveyances, mesne or direct, from each of the heirs at law of George W. Candler, conveying their respective interests. It was in evidence that in 1867 the heirs of Candler filed a petition for sale for partition, and a decree of sale was made appointing four commissioners, but no further action thereon was had in court. In 1875 one of the commissioners—T. J. Candler—made a sale of the land in dispute to Lyda and Rabb, giving bond to make title. Rabb assigned to another Lyda. Both Lydas having died, in 1892 said T. J. Candler, "as commissioner," executed a deed to their heirs at law. The bond to make title by one commissioner, and the deed by him in 1892, were executed without authority of law, and were of no legal effect. On its face, in fact, the deed imports to convey only the interest of the grantor "as commissioner," and not the land itself, nor his interest therein. Even if such deed were color of title, there could be no possession under it till its date, April 12, 1892; and this action was begun August 26, 1896. The defendants acquired no rights by either paper,

nor by the alleged sale. In *Attorney General v. Roanoke Nav. Co.*, 86 N. C. 411, it is said: "The doctrine has been settled in this state that the bidder at a judicial sale * * * acquired no right before the confirmation of the report of the commissioner who made the sale under the order of the court." In *re Dickerson*, 111 N. C. 114, 15 S. E. 1027, holds: "The sale, then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. * * * While a formal direction to make title is not always necessary, a confirmation of the sale cannot be dispensed with." If this is true when a sole commissioner, or a majority of them, act, a fortiori it is true when such act is that of only one commissioner out of four. Here there was no report of sale, no confirmation, and no order of court of any kind, subsequent to the order appointing four commissioners. The action of one commissioner was not an obedience to the decree directing sale by four commissioners. The purchasers were bound to take notice of that fact. At the utmost it was a bond for title for T. J. Candler's interest in 1875, and his conveyance to Lusk in 1879 conveyed the title to another. The plaintiff introduced the bond to make title and the deed executed by T. J. Candler as commissioner to show that the defendants claimed title under the same source, and to throw upon them the burden of showing that they had acquired any other title.

The defendants asked 11 prayers for instruction, all of which were refused by the court, and the defendants excepted. The plaintiff having introduced the above bond to make title to show that the defendants claim under the same source of title, the first prayer was to instruct the jury that the plaintiff is bound by it himself. That is, if we comprehend aright, that, when a paper writing is introduced by plaintiff for such purpose, he thereby admits its validity. We do not so understand the law. There was evidence that the plaintiff had also taken a conveyance of one-half interest claimed under the university. The second and third prayers were for an instruction that, in any event, the defendants were not estopped as to that half, and that the plaintiff is estopped to deny that the university owned that half. The purchase by plaintiff of the outstanding claim of the university can have neither of these results. The fourth prayer is that, as plaintiff claimed under deeds from the heirs of Candler, made at a time when Lyda and Rabb were in possession under a bond to make title from T. J. Candler, the plaintiff is estopped as to the interest derived by plaintiff by mesne conveyance from T. J. Candler. But no adverse possession is shown in Lyda or Rabb's assignee till 1892, and the mere bond to make title from one commissioner, and without order of court, conferred no title upon them. The fifth prayer was that, if the jury find that the de-

defendants own any interest, the "plaintiff cannot recover," for the possession of a co-tenant is not unlawful. The prayer "cannot recover" is not applicable to our system of submitting a case upon issues. *Witsell v. Railway Co.*, 120 N. C. 557, 27 S. E. 125; *Bottoms v. Railroad Co.*, 109 N. C. 72, 13 S. E. 738. Besides, if the defendants were co-tenants, that would not defeat a recovery, but merely affect the form of the judgment which would let the plaintiff into possession with defendants. The sixth prayer was to like purport with the first,—that, to estop the defendants, the bond to Lyda and Rabb must be valid. But it was only offered to show that the defendants claimed under it, and thus place upon them the burden of showing any other title. The seventh prayer is based on the assumption that Lyda and Rabb entered into possession under the bond for title from T. J. Candler, but there is no evidence to that effect. The eighth prayer is that, if there was an agreement between the commissioners, acquiesced in by the heirs at law of G. W. Candler, that each commissioner could sell the land separately, then the sale and bond to make title to Lyda and Rabb by T. J. Candler would be an equitable estoppel upon all the heirs at law. As several of the heirs at law were married women, the prayer was properly refused as asked, and, being faulty in part, it was unnecessary for the judge to dissect it, and say what part, if any, was correct. *State v. Neal*, 120 N. C. 613, 27 S. E. 81; *Hampton v. Railroad Co.*, 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808. The ninth prayer was properly refused, for, though *McNamee* is admitted to have been the agent of plaintiff, the information given him was not sufficient to have the legal effect claimed in the prayer. The tenth prayer was properly refused, for the evidence negatives any adverse possession prior to 1892. The eleventh general prayer—that upon the evidence the plaintiff "cannot recover"—was properly refused, and the instruction to the jury, excepted to by defendants, that, if they believed the evidence, to answer the first two issues "Yes," and the third issue "One penny," was correct. Affirmed.

DOUGLAS, J. (concurring). While concurring in the judgment of the court, and substantially in its opinion, I doubt whether a plaintiff can, in an action of ejectment, set up a worthless bond for title purporting to have been made to some one under whom the defendant is supposed to claim, and thus shift the burden on the defendant of proving his title. It is not even color of title for the defendant, and is not inconsistent with a better title from a different source. If the defendant admits that he holds under the bond, of course he must abide by its legal effect; but, if he repudiates it, the burden should remain upon the plaintiff. It is a well-settled principle that a plaintiff in

ejectment must recover upon the strength of his own title, and not upon the weakness of the title of the party in possession.

(128 N. C. 508)

BRINKLEY v. BRINKLEY et al.
(Supreme Court of North Carolina. June 5, 1901.)

FRAUDULENT CONVEYANCE—PROMISE IN CONSIDERATION OF MARRIAGE—MARITAL RIGHTS.

Where defendant agreed to deed land to plaintiff if she would marry him, and after her promise to do so, but before marriage, conveyed the land, without consideration, to his children by a former wife, such conveyance, though recorded before the marriage, was fraudulent and void as against a deed to plaintiff, made 16 years subsequently.

Clark, J., dissenting.

Appeal from superior court, Washington county; McNeill, Judge.

Action by Ellen J. Brinkley against Joseph H. Brinkley and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

W. M. Bond, for appellant. A. O. Gaylord, for appellees.

COOK, J. Upon the trial in the superior court, judgment as in case of nonsuit was rendered against the plaintiff upon motion of defendants, under chapter 109, Acts 1897, as amended by chapter 131, Acts 1899, and plaintiff excepted and appealed.

The plaintiff contends that, by reason of the promise of Joseph H. Brinkley to convey to her the interest in the land as stated, she became a creditor of his, and that the voluntary deed executed by Joseph H. Brinkley to his minor children (all of whom are now defendants, except one) after a contract of marriage had been entered into between herself and said Joseph H. Brinkley, and without her knowledge and consent, was a fraud upon her marital and contract rights, and void as to her; and that she is entitled to recover the interest in the land conveyed to her by reason of the deed executed to her in April, 1900, pursuant to the promise made her by said Joseph when she consented to marry him in June, 1884. The defendants (other than Joseph H. Brinkley) claim title under the voluntary deed executed to them in July, 1884, and, while denying the parol promise alleged by the plaintiff, contend that it was void under the statute of frauds; that the deed executed to the plaintiff in April, 1900, conveyed no interest to her, was voluntary, and without valuable consideration; that she had actual knowledge at the time and long before its execution, and insist that she has no title to the land, and is not entitled to recover. It appears from the case on appeal that defendants introduced evidence contradicting the plaintiff's, but none appears in the record; and, the motion of defendants having been made "upon the whole of the

testimony," the case must be considered by this court only upon that which appears in the record, which, for the sake of the motion, must be accepted as true.

While the contention of the plaintiff as to being a creditor of Joseph H. Brinkley by reason of the parol promise to convey the land is without merit, yet her contention that the voluntary conveyance of the land to his children was a fraud upon her marital rights presents a very serious question. The contract of marriage entered into between the plaintiff and Joseph H. Brinkley in June, 1884, was based upon a valuable consideration. She had not only a right to expect the benefits to be derived from the marriage in her suitor's property to be cast upon her by operation of the law, but also had his express verbal promise to convey to her one-half undivided interest in his tract of land (which was substantially all the property that he then owned) immediately after their marriage. Relying upon these rights and his promise, and after many years sharing with him the toils of life, nurturing, caring for, and raising his minor children by his former wife, bearing children to him, and being a true and faithful wife, she suddenly finds herself, her husband, and several children of tender age ousted of her home, to which she was carried when a bride, and then informed that her marital rights and contracts had been supplanted by a voluntary deed, executed by a man whom she had consented to and had married; and that his promise, not being in writing, was void, and of no effect. But his parol promise to convey land was not void, only voidable; and between the parties could have been enforced, unless the statute of frauds were pleaded (*Hemmings v. Doss*, 125 N. C. 400, 34 S. E. 511; *Williams v. Lumber Co.*, 118 N. C. 928, 24 S. E. 800; *Loughran v. Giles*, 110 N. C. 423, 14 S. E. 966), which cannot be material in this action, since the deed was, before the institution of this action, duly executed, with full recitals of the original promise; that statute applying to executory, and not to executed, contracts (*Hall v. Fisher*, 126 N. C. 205, 35 S. E. 425; *McMannus v. Tarleton*, 126 N. C. 790, 36 S. E. 338; *Choat v. Wright*, 13 N. C. 289); and, while it has the effect of a post-nuptial settlement, yet it is valid, except as to creditors and purchasers for value, and without notice (*Rodg. Dom. Rel.* § 255, p. 217). The defendants (other than Joseph) claim title by reason of this voluntary deed, executed to them by their father after he had induced the plaintiff to consent to become his wife, and without her knowledge or consent. For what purpose was this deed then executed? If for the love and affection he had for his children, why did he wait until after the courtship and engagement? Why did he hold it as a basis of credit, and, after securing a promise for his prize, place it, as he thought, beyond the reach of the woman whose consent he had obtained to share with

him the vicissitudes of life for weal or for woe? If he had changed his mind, and concluded not to convey to her the interest in the land, as he had promised her to do, then why did he not so inform her, to the end that she might exercise the privilege of changing her mind as to the marriage? He admits in his answer (which was put in evidence) the agreement as stated in the complaint to be true. It is admitted for the sake of the motion, by defendants, that the plaintiff did not know of the voluntary deed until many years after the marriage; that it was executed without her knowledge or consent. While it is true that a man or woman, before marriage, is at liberty to dispose of his or her property at will and pleasure, yet it must not be done with an improper motive. If it be done to deceive the person who is then in treaty of marriage, it is a fraud. The courts have uniformly held that a voluntary deed, made by a woman in contemplation of marriage, afterwards consummated, and without the existence of the deed being made known to the intended husband, is in law a fraud upon him. *Strong v. Menzies*, 41 N. C. 544; *Baker v. Jordan*, 73 N. C. 145; 1 *Rop. Husb. & Wife*, pp. 163, 164; *Poston v. Gillespie*, 58 N. C. 258, 75 *Am. Dec.* 427. Then why should not the same rule apply to the intended husband, who gave to his children his property without the knowledge or consent of his fiancée? She, under our laws, acquires valuable interests and rights in his property. While, on the one hand, the husband, in addition to the personal services and earnings of the wife, acquires the right of a curtesy estate, absolutely owns all of the personalty in case of intestacy, etc., on the other hand the wife obtains a security in respect to her future support, and has the rights of dower, homestead, year's support at the death of the husband (which cannot be defeated by his will or creditors), a distributive share of his personalty, etc. *Schouler, Dom. Rel.* (3d Ed.) § 181. Nor can the constructive notice of registration avail the defendants. In the case of *Spencer v. Spencer*, 56 N. C. 404, in which case the intended wife had, previously to marriage and after engagement, made a voluntary deed to her property, it is held: "But if, after the courtship begins, the court of equity recognizes an inchoate right in the intended husband at all, it follows that it cannot be disposed of by the intended wife without his direct knowledge and acquiescence. In a case like the present there is no place for a constructive notice. That is always resorted to for the purpose of preventing the person who has it from doing an act to the injury of another. Here the husband can injure no other person. He has rights which the rule protects by preventing another person from injuring him." In *Taylor v. Rickman*, 45 N. C. 278, the husband actually signed the contract, but it was avoided upon the ground of surprise, because the paper was presented to him after

the parties had met together for the purpose of being married. And in *Poston v. Gillespie*, supra, it was held that, after the contract of marriage is made, neither can give away his or her property without the consent of the other, and notice before the marriage of such a gift does not hinder the party injured from insisting upon its invalidity. True it is, from the testimony in the case, that the defendants were minors, and innocent; but that cannot avail them now. "Though not a party to any imposition, whoever receives anything by means of it must take it tainted with the imposition. * * * Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it." *Tisdale v. Bailey*, 41 N. C. 358. Upon all the evidence submitted, it is clear to the court that the execution of the deed under which the defendants (other than Joseph) claim was fraudulent and void as to the plaintiff's marital rights, and there is error.

FURCHES, C. J. (concurring in the opinion of Justice OOOK). I state the following reasons for my concurrence:

If the plaintiff is entitled to recover, it is by reason of the fraud committed upon her marital rights. The statute of frauds has nothing to do with the case, for the reason that the deed has been executed, and the statute of frauds does not apply to executed contracts. *Hall v. Fisher*, and other cases cited in the opinion. Nor does the statute of frauds prevent a party from carrying out his contract, unless it affects creditors or purchasers for a full price, and without notice. *Triplett v. Witherspoon*, 70 N. C. 580. In this case there are no creditors of the grantor, unless the plaintiff be treated as such; and the defendant children are not purchasers for a full price. Indeed, it appears that they paid nothing for their deed. If the plaintiff was not strictly a creditor, her claim was in the nature of that of a creditor. After her contract with the grantor (J. H. Brinkley) in June, 1884, it was a fraud upon her marital rights for her intended husband to give away his property; and in this case it seems to have been all the property he had. In *Poston v. Gillespie*, 58 N. C. 258, 75 Am. Dec. 427, it is said: "After the courtship or negotiations about and concerning the marriage are concluded, and the parties bind themselves by a contract to marry, neither can give away his or her property without the consent of the other; and the matter does not then rest upon a mere question of deceit, which may be repelled by proof of notice, but involves a question of fraud on a right vested by force of a contract, for a breach of which an action will lie at law." So, if this case states the law, the action is given to either party. It rests on contract and vested rights, and is not to be defeated by notice. If this be the law, it is claimed that plaintiff's right of

action was not defeated by the registration of defendant's deed, and that contention of defendants must fail. But defendants claim that since the constitution of 1868 the wife has no marital rights except the inchoate right of dower, which is not due until his death; and that the husband has no marital rights in the wife's estate. If these contentions are true, there ceases to be such a thing as fraud on marital rights in North Carolina. While the husband may not have the same rights over the estate of the wife that he had before the constitution of 1868, I do not admit that the wife has not now the same rights in her husband's estate that she had before the constitution of 1868, and the same she had in 1859, when the case of *Poston v. Gillespie* was decided by this court, in which case it is held "that, after the engagement to marry, neither party has the right to give away his or her property." But this very question,—fraud on marital rights,—since the constitution of 1868, has been before the court, and it was held that the constitution of 1868 worked no such wonders, and that the doctrine of fraud upon marital rights still exists in North Carolina. *Baker v. Jordan*, 73 N. C. 145. Upon these authorities I must hold that the doctrine of fraud on marital rights still exists in this state; that, the defendant J. H. Brinkley having disposed of his land by gift to the other defendants after he and the plaintiff were engaged to be married, was a fraud upon her marital rights, and the deed must be set aside. My opinion is put upon the fraud, and not upon his promise to convey. But, when defendant's deed is set aside for fraud, there is nothing to prevent the plaintiff's deed of 1900 from becoming effective, and the plaintiff is entitled to be admitted to the possession of one undivided half of said land, as tenant in common with her husband.

We have had it impressed upon us that the first wife's father gave this land to the defendant J. H. Brinkley and his first wife. This may be a reason for making the deed of July, 1884, to the defendant children; but it could not constitute a legal consideration, and we are trying to dispose of the case according to the law. Under the laws of this state, upon the death of the wife the land becomes the property of the husband, and as such was liable to his contracts and creditors to the same extent as if he had bought the same with dollars. I must therefore concur in the opinion that there was error.

MONTGOMERY, J., concurs in the opinion of the CHIEF JUSTICE.

CLARK, J. (dissenting). The plaintiff alleges and testifies that in June, 1884, the defendant J. H. Brinkley promised her orally that, if she would marry him, he would convey to her one-half interest in the land in controversy as soon as the marriage had taken place, and, relying upon such promise,

she agreed to marry him. On July 12, 1884, the defendant J. H. Brinkley conveyed the entire tract of land, by warranty deed, to his children by a former marriage, who are his co-defendants in this action. Said land had been conveyed by their grandfather to their mother and himself. This deed of July, 1884, was registered August 1, 1884. Thereafter, on October 30, 1884, the plaintiff and the defendant J. H. Brinkley were married. On April 23, 1900, the defendant J. H. Brinkley executed a deed to the plaintiff, which was recorded April 26, 1900. On April 25, 1900, she instituted this action, alleging in her complaint that the defendants (other than Joseph H. Brinkley, her husband) wrongfully withhold possession of the premises, and asking that she be let into possession as tenant in common of one-half interest therein.

There are several insuperable reasons why the plaintiff cannot recover.

1. If the action is on the deed, that of the defendants from her husband, executed July 12, 1884, and recorded August 1, 1884, takes precedence of that from her husband to herself, executed when he was out of possession, April 23, 1900, and registered after this action was begun.

2. If the action is on the parol promise in June, 1884, it is void under the statute of frauds; and, though the husband, of course, does not set it up, the other defendants do plead it. Though third parties, if strangers, cannot plead the statute of frauds, it is otherwise as to privies as are the defendants, the grantees in the deed of 1884. *Browne, St. Frauds, § 135c; Best v. Davis, 44 Ill. App. 624.*

3. The grantees received from their father a conveyance of this land, which came from their mother's father. There was a good moral—indeed, a meritorious—consideration. Such a conveyance would not be a fraud, even though concealed from the intended wife. *Green v. Goodall, 41 Tenn. 404; Kerr, Fraud & M. 218.* If the father had, immediately after the second marriage, conveyed to the plaintiff, she would not have been a purchaser for value. *14 Am. & Eng. Enc. Law (2d Ed.) 472, note 8, and cases there cited, which hold such to be a voluntary deed.* The deed to the children of the first marriage having been recorded August 1, 1884, she was fixed with notice thereof at least as much as a purchaser for value would have been. It was her misfortune that 90 days after such registration she entered into the marriage, after it had become impossible for her husband to convey to her any part of the land. But, put it in the strongest possible light for the plaintiff, suppose the marriage, October 30, 1884, was ipso facto a conveyance for value of a half interest in the land to the plaintiff, and, further, that the deed to the children of the former marriage was not for a meritorious consideration, and was without any consideration, the deed re-

corded on August 1, 1884, though voluntary, would take precedence of a deed to a subsequent purchaser for value. This is settled by many decisions. "In the United States the authorities are almost unanimous in holding that a voluntary conveyance, if made bona fide, is valid against a subsequent purchaser with notice of the conveyance." *14 Am. & Eng. Enc. Law (2d Ed.) 468.* In this state, since the adoption of chapter 28, Laws 1840, one who purchases with notice of a prior voluntary conveyance will not be protected against it. *Triplett v. Witherspoon, 70 N. C. 589; Clement v. Cozart, 112 N. C. 421, 17 S. E. 486.* Registration of a prior voluntary deed is notice to a subsequent purchaser. *Taylor v. Batman, 92 N. C. 601.* Viewed aside from the fact that the legal title has been in the children of the first wife since July, 1884, and the alleged promise to plaintiff to convey was in parol and a secret promise, there is no evidence to explain why the plaintiff, nor her husband, took any steps after the marriage to execute any conveyance to her, nor why the plaintiff acquiesced in the nonexecution of the secret parol agreement for nearly 16 years. No evidence was offered that she at any time during all those years had called upon her husband to execute the promised conveyance, nor made any complaint in regard to the matter. It is not an explanation of this fact that during all that time up to January, 1900, the plaintiff and her husband lived on the land together with the children of the first marriage. There was no reservation for the benefit of the husband in his deed of July 12, 1884, and his remaining on the land was probably by reason of the nonage of said children, or some of them, and permissive thereafter as to those who became of age. His possession was at no time adverse. Why Joseph H. Brinkley is made a defendant does not appear. He is not in possession, and he is not resisting the plaintiff's claim, but is siding with her.

Even if this action had been for dower, the plaintiff could not recover, unless the deed was made with intent to defraud her of her dower rights; for at no time during coverture has her husband been seised of the premises. *Barnes v. Raper, 90 N. C. 189.* If, by his death, dower therein would not accrue to his wife, certainly, if living, he cannot convey to her. The court properly held that upon the testimony the plaintiff could not recover. Her husband could not have recovered, no matter when he brought suit, nor what his motive in making the deed. *York v. Merritt, 80 N. C. 285; McManus v. Tarleton, 126 N. C. 790, 38 S. E. 338.* The plaintiff, not being a creditor at the date of the deed, has no greater rights than the husband would have had. *Hiatt v. Wade, 30 N. C. 340; Taylor v. Batman, 92 N. C. 606; Clement v. Cozart, 112 N. C. 421, 17 S. E. 486.* It must not be overlooked that the question here presented is not whether by

the engagement to marry, in June, 1884, the wife became invested with an inchoate right of dower (the only interest she could acquire by the marriage itself), which could not be divested by the deed in July, 1884, to the children of the first marriage. The wife's position is certainly not stronger by virtue of her engagement than after marriage; and, if this deed to the children had been made after marriage, instead of before, they would have gotten a good title, subject only to the widow's contingent right of dower if she survived her husband. *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772. Here he is still living, and, as she could not maintain this action of ejectment against one taking under a deed after marriage, she certainly cannot recover dower by virtue of her marital rights against grantees taking long before marriage. Her right to dower cannot now arise.

This case rests upon the single proposition whether one who takes a verbal agreement to convey realty, upon a consideration thereafter to be paid, can recover the same 16 years thereafter against those who took a conveyance of the same land for a meritorious consideration, without participation in the fraud, if any, perpetrated upon the intended wife, and without any legal notice thereof (being minors), and when the deed to them was registered three months before the marriage; when, therefore, the purchaser by oral contract had the fullest legal notice before payment of the promised consideration. The cases cited in the opinion which protect the rights of an intending husband in his wife's property have no application to this case, where the plaintiff claims, not as a widow, but by virtue of a secret oral contract to convey in consideration of marriage, and the defendants are purchasers for a meritorious consideration, and without notice. If the plaintiff can sustain her claim, founded solely on a secret verbal agreement, then no other purchaser from a single man, without notice of a secret agreement with an intending wife, can hold the land against her, though, as here, 16 years may have passed without the husband and wife remembering to execute the promised deed, and making known the antenuptial agreement. The plaintiff's claim is not based upon a fraud upon her marital rights. She is not suing for dower, but upon defeat of an oral promise to convey realty by a deed made to another upon a meritorious consideration, without notice of her oral agreement, and duly registered before she pays the promised consideration. She relies upon a verbal contract, and stands like any other. Her marriage is purely incidental, and does not add to to her contractual rights. In *Poston v. Gillespie*, 58 N. C. 258, 75 Am. Dec. 427, it was the husband who was complaining that his contracted wife had, in fraud, conveyed away all her property. As the law then stood, at the moment of marriage he became entitled

to all her personal property, and tenant by the curtesy initiate of her realty. For deprivation thereof by undue influence of her father he had an immediate cause of action. Here the wife could acquire by virtue of the marriage nothing except a right to dower if she survived her husband, and has as yet not suffered, and may never suffer, anything by virtue of the deed to the defendants. And, even in that case, the decision is largely rested upon the ground that the deed by the wife was made by duress and undue influence exerted by her father. That is in no particular an authority for this case. In *Taylor v. Rickman*, 45 N. C. 278, the deed was set aside for surprise, the marriage contract not being mentioned till the husband stood up to be married; and, besides, it was never registered as required by law. The husband was thus deprived, as above stated, of an immediate absolute right to the personality, and on account of the surprise the deed was declared void. The same is true of *Tisdale v. Bailey*, 41 N. C. 358, and *Spencer v. Spencer*, 56 N. C. 404, in both of which cases the deed was made by the wife secretly, and with the intent to defraud her husband (which is not found in the present case), just before the marriage, and kept secret, not recorded. Unlike the wife in this case, the husband was in those cases thereby deprived of an immediate right of property. In every case cited for the plaintiff the husband was the plaintiff, and was deprived of an immediate right of property by the deed. None of those actions could now be maintained as the law now stands as to the property rights of women whose personality remains their own property. Certainly, they cannot be authority for one who claims, not marital rights, but by virtue of an oral contract to convey lands which were conveyed, and legal notice thereof given her by registration three months before the marriage, and who is attempting to set up a stale claim under such oral contract (if ever made) after 16 years' acquiescence. The plaintiff sues to recover a fee simple in half the land. A woman's "marital rights" in her husband's property are derived solely from statute, and no statutes gives her a half interest in fee of her husband's land, and that too, before his death. She has, therefore, no support in the claim that she has been deprived of her marital rights by fraud or otherwise, for she has not been. Her sole claim is that she made an oral contract for conveyance of land, and, three months before the consideration was paid, the land was conveyed to another for a meritorious consideration, without notice of her claim, and the deed duly recorded, which was notice to her; and the grantees plead the statute of frauds, as they have a right to do. That the consideration promised was marriage makes it a valuable consideration, but no more so than if money had been promised and paid after the registration of the deed to another, for meritori-

ous consideration, and who took without notice. That marriage was to be the consideration does not involve "marital rights" in this matter, nor take this verbal contract out of the statute of frauds, nor affect the fact that the defendant's deed was registered 16 years ago, and plaintiff's deed from her husband only since action brought. The plaintiff's claim is contractual, not marital, and there is no exception in the statute of frauds in her favor, and the court cannot create one.

(128 N. C. 532)

**FLEMING v. GREENLEAF-JOHNSON
LUMBER CO.**

(Supreme Court of North Carolina. June 7, 1901.)

**INJURY TO SERVANT—NONSUIT—SUFFICIENCY
OF EVIDENCE.**

Plaintiff's intestate was killed by a log rolling from a logging train operated by defendant, on which deceased was going to his work. He was employed by his brother-in-law, who had a contract to cut logs with the defendant, but was paid by the latter. The brother-in-law testified that defendant had the right to discharge the men, and that they were in its employ. The accident occurred while the train was going down a grade. There were no brakes on the train, except on the engine, nor standards on the car. Deceased and other laborers had been accustomed to go to and from their work on the train, and had not received notice not to ride thereon, though they knew that it was dangerous to do so. Deceased was riding in plain view of the engine when the accident occurred, but the train was not stopped. *Held*, that it was error to grant a nonsuit on defendant's motion.

Appeal from superior court, Pitt county; Bowman, Judge.

Action by Mahala Fleming, as administratrix of Daniel Fleming, deceased, against the Greenleaf-Johnson Lumber Company, for the wrongful killing of plaintiff's intestate while in the employ of the defendant company. From a judgment of nonsuit, the plaintiff appeals. Reversed.

Plaintiff's evidence showed that her intestate was killed by a log rolling from a logging train operated by defendant, and on which deceased was going to his work. Deceased was employed by his brother-in-law in cutting logs at a distance of three to four miles from the logging camp, and he and other employes were accustomed to go to and from their work on the train, though they were not employed thereon. The brother-in-law of deceased testified that he employed the latter, but that he was paid by the company, who had the right to discharge the men, and that they were really employed by the defendant company. The accident occurred while the train was going on a down grade, and the train was not stopped thereafter, though deceased was riding in plain view of the engine. There were no brakes on the train, except on the engine; and the car on which deceased was riding did not have standards, though the logs were held in

place by four-inch shoulders, but other cars on the train had standards. All of plaintiff's witnesses testified that they had not received notice not to ride on the train or that it was dangerous, but testified that they knew that it was dangerous to ride thereon, but preferred to take the chances rather than walk.

Skinner & Whedbee, for appellant. J. L. Fleming, for appellee.

PER CURIAM. Upon the evidence, the issues should have been submitted to the jury. New trial.

(128 N. C. 534)

COLEY v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. June 7, 1901.)

MASTER AND SERVANT—RAILROADS—ASSUMPTION OF RISK—DOCTRINE INAPPLICABLE—NEGLIGENCE OF PLAINTIFF—QUESTION FOR JURY—INSTRUCTION—DAMAGES—MEASURE.

1. Priv. Laws 1897, c. 56, §§ 1, 2, provide that any employe of a railroad company, who shall suffer injury, or the personal representative of any such employe who shall have suffered death, in the course of his employment, by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company. *Held*, that the doctrine of assumption of risk was rendered inapplicable by the statute in the case of an engineer injured through the company's failure to affix handholds to the tender, of which defect the engineer was aware.

2. Whether plaintiff acted as a prudent man in taking hold of a drain pipe on the tender of an engine, which was defective in not having handholds, was a question for the jury.

3. An instruction that the jury should give the plaintiff the present cash value of his injury, taking into consideration pain and mental suffering, not allowing anything as punitive damages, though not sufficiently definite as to the manner of ascertaining the damages, is not reversible error.

Montgomery and Cook, JJ., dissenting.

Appeal from superior court, Wake county; Hoke, Judge.

Action by Samuel S. Coley against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. H. Busbee and A. B. Andrews, Jr., for appellant. T. M. Argo and W. H. Day, for appellee.

FURCHES, C. J. This is an action for injuries by the defendant road. In the "case" it is stated: That the defendant North Carolina Railroad had been leased to the Southern before the injury complained of was received, and that the Southern was in possession and operating the same at that time. But, as no point was made as to this fact on the trial of the case nor on appeal, we will give it no further attention. The plaintiff was an experienced railroad man, having been engaged in railroad work for more than 20 years, and had been in the employ of the defendant for the last 4 years; and

on the 14th of June, 1898, while in the employment of the defendant as conductor of the shifting engine at Goldsboro, he received the injury complained of. That prior to and until the 20th of May, 1898, he had used a regular shifting engine with a sloping or turtle-top tender, but on that day the defendant took this engine and tender from Goldsboro, and replaced it with an old road engine and tender, unsuited for use as a shifting engine and tender. That his work as switch engineer necessitated his riding on the rear end of the tender much of his time. That he could not successfully do the work of switch engineer without so riding. That, besides the tender of the last engine furnished being unsuited for his work, it had no handholds or "grab irons" to enable him to raise himself upon its platform with safety, which it was necessary for him to do to enable him to signal the engineer. That he saw and knew this tender had no handholds or grab irons when he received it on the 20th of May, and he knew that it was dangerous to use it without them, but that he used it, and continued to use it, without such grab irons, until the 14th of June, when he received the injury complained of. That to supply the place of the grab irons, or, rather, because there were no grab irons, he used the drain pipes from the top of the tender. These were tubes or hollow cylinders leading from the top of the tender to take off the overflowing water, and were never intended to be used as handholds. The plaintiff says that he had frequently used them as handholds before the day of the injury, though he had used the one on the other side of the tender most. That on the day of the injury he had driven down to some lumber cars, and attached the shifting engine to them, and gave the signal to the engineer to move out. To do this the engine would have to move backward, and when he gave the signal to move he undertook to get on the platform of the tender, and, for the want of grab irons, he took hold of the drain pipe, which gave way (pulled out or broke off), and he fell to the ground, and was run over by one of the wheels of the tender. His arm was crushed so badly that it was necessary to amputate it, and he was badly injured otherwise. And he contends that it was no fault of his that he was injured, but that it was caused by the fault and negligence of the defendant in not furnishing him a tender with grab irons, with which to do his work. While, on the other hand, the defendant does not deny but what it was guilty of negligence in not furnishing a tender with grab irons, it contends that this was a patent defect, seen and known by the plaintiff on the 20th of May, when he received this engine and tender; and, by his continuing to use the same from that time to the time of the injury, that was a waiver of any objection on that account, and an "assumption of the risk" of any damage

that might result from such defect. The defendant also contends that the plaintiff was guilty of negligence which contributed to, and was the proximate cause of, his injury, and that he cannot recover on that account. The defendant also contends that there are errors in the judge's charge to the jury, in charging what he should not have charged, and by refusing to give special requests of the defendant that he should have given. The defendant also contends that the judge erred in his instructions to the jury as to the measure of damages, as pointed out in its assignment of errors, as that was the earliest opportunity it had of doing so.

While this case was ably and carefully tried, it is apparent from the record, the prayers for instruction, and the argument of counsel on both sides, that the main contention below, as it was in this court, was as to whether the plaintiff had "assumed the risk" of the defective tender in not having the grab irons; and this question has given us a great deal of trouble, as we had such a line of cases, commencing at least as far back as *Crutchfield v. Railroad Co.*, 78 N. C. 300, *Johnson v. Railroad Co.*, 81 N. C. 454, *Cowles v. Railroad Co.*, 84 N. C. 312, *Hudson v. Railroad Co.*, 104 N. C. 501, 10 S. E. 669, *Pleasants v. Railroad Co.*, 95 N. C. 195, and other cases in our own Reports, besides many cases from other courts that seem to sustain the contention of the defendant; while there are more recent decisions in our own court, though not directly in point, that seem to sustain a different rule,—such as *Greenlee v. Railway Co.*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, *Troxler v. Railway Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, and *Lloyd v. Hanes*, 126 N. C. 361, 35 S. E. 611. But, after all, it seems that this important contention as to the "assumption of risk" is disposed of by chapter 56, Priv. Laws 1897, which was not called to our attention in the arguments or briefs, and which reads as follows:

"Section 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.

"Sec. 2. That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section, shall be null and void."

Commencing with the often-cited case of *Priestley v. Fowler*, 3 Mees. & W. 1, what is known as the "Fellow Servant Law" had been developed until it seems to have become to be a hardship on the employees of

railroads, where there were so many employes whose rights depend on the action of some other employe; and Acts 1897, c. 56, was passed to relieve such employes from what appeared to be a hardship, and oppressive upon them. And, while there had not been uniformity in the different jurisdictions as to what is called the "assumption of risk," it seemed to be well settled by the decisions of this court (see cases cited above) that, where an employe entered into the service of a railroad company using defective machinery, knowing of such defects, or where he continued in the employment, after having such knowledge, without notifying his superiors, and protesting against its continuance, such employe would have been held to have waived such objection, and to have assumed the risk arising from the use of such defective machinery. This, it seems, was considered by the legislature a hardship, and oppressive, as the competition was so great for such employment that employes were deterred from making such complaints lest they might lose their places. So it seems that the legislature undertook to relieve the employes of this trouble, as it deemed it to be a hardship. So the legislature, after providing relief against acts of "fellow servants," enacted as follows: "Or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against said company." And by the second section of said act it is provided "that any contract or agreement, expressed or implied, made by any employe of said company to waive the benefit of the aforesaid section, shall be null and void." The court has construed this act, holding it to be constitutional, and giving effect to it so far as it applied to fellow servants. *Hancock v. Railroad Co.*, 124 N. C. 222, 32 S. E. 679. And we see no reason why we should not do so as to the "assumption of risk." It is agreed that assumption of risk is contractual, either by express terms or by implication; and disputes usually were as to whether the plaintiff contracted by implication or assumption for dangers not existing at the date of employment. And it would seem by this act that the legislature intended to put an end to such contentions by saying in the first section that he shall have a right of action for injuries caused by such defective machinery, and by providing in the second section that he cannot waive this right by contract, expressed or implied. This legislation (Acts 1897, c. 56) seems to be in the same spirit and in harmony with Acts Cong. 1893, c. 196 (23 Stat. 531). In that statute it is enacted in section 4 that all railroad companies engaged in interstate commerce shall have grab irons upon their cars, etc.; and in section 8 the right of action is given to any employe injured for the want of any of the appliances mentioned in said act, — grab irons being one of those mentioned. And then said section provides that no em-

ploye, by remaining in the employment of such company, shall be deemed to have assumed such risk by remaining in the employment of such railroad company. This is the statute upon which *Greenlee's* and *Troxler's* Cases are based. And while we do not base our opinion in this case upon this legislation of congress, but on the statute of 1897, still we think that this legislation of our state, and the construction we are placing upon it, are supported and strengthened by the act of congress and the construction put upon it by this and other courts. In 1880 the English parliament passed what is called the "Employer's Act," in which the doctrine of fellow servants theretofore existing in England was very much the same as in this state, and was disposed of very much as it was here by the act of 1897. The English act contains a section which provides that an employe shall not maintain an action against his master for injuries received from defective machinery, "ways," etc., unless he gives notice of such defects to the master, or some one superior to him, unless the master already knows of the defect. In the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, it was shown that the plaintiff was injured by reason of defects known to the master, and it was contended by reason of these negative expressions used in the statute they absolved the plaintiff from the doctrine of assumption of risk. And one member of the court (Lord Asher) held with this contention of the plaintiff, though the other two members of the court overruled him in this view of the case. But the same question was again presented in *Smith v. Baker* [1891] App. Cas. p. 325, where the court was again divided, but where a majority of the lords, who put their opinion upon the statute of 1880, agreed with Lord Asher that the statute did destroy or do away with the implied assumption of risk. We refer to the English statute and those cases from the English courts for the purpose of showing that, while the English courts may not have expressly decided that the English statute did away with the doctrine of assumption of risk, there was a strong tendency of the courts to hold that way. And in the case of *Smith v. Baker* a majority of the lords who put their opinions upon that statute so held; and, if there could be reason for such a construction upon a statute which did not in terms declare such object, but where the legislative will to that effect had to be found in the negative expressions of the statute, how could we escape such a construction where the legislative intent is manifested in express terms, and in the most emphatic manner? We are therefore of the opinion that, whatever might have been the proper rule in this state as to whether the plaintiff assumed the risk of operating this defective tender by remaining in the employment of the defendant, the statute of 1897 (chapter 56) has solved that question, and relieved the plaintiff

from the burden of assuming the risk of such defect, if it was on him before.

In putting this construction upon the act of 1897, it must not be understood that the plaintiff is relieved by this act, or the construction we have put upon it, from the responsibility of his own negligence. But, as we have said, the principal "battle" in this case was as to the assumption of risk, and it was ably conducted on both sides, barring the statute of 1897, and was ably conducted by the learned judge who presided at the trial. The greater part of the record, consisting of prayers for instruction and the judge's charge, is predicated upon the first issue,—the assumption of risk,—which are eliminated by the view we have taken of the case. This being so, there is but little more for us to do. The prayers of the defendant mainly, if not all of them, are addressed to the assumption of risk, and it is not necessary for us to discuss them after taking this view of the act of 1897.

The defendant's fifth prayer for instructions was addressed to the plaintiff's using the drain pipe as a grab iron. This prayer, it seems, the court gave, but added the following: "The drain pipe was not put there for a grab iron, and there is no negligence imputable to the defendant by reason of the weak condition of the drain pipe; but the question is left for the jury to say, upon the second issue, whether or not the plaintiff was negligent in taking hold of it, and whether he acted as a prudent man in taking hold of it. That question is left with the jury upon the second issue." This addition is assigned as error, but we see none. The prayer must have been addressed to the second issue, though it does not so state, and we see no error in referring the question to the jury. As we understand, the question of prudence, and the ideal prudent man, are always a matter for the jury. This seems to have been the ground of the exception that the court did not decide the question, instead of referring it to the jury.

There is one other exception that we think necessary to notice, and that is the measure of damages. As to this, it seems to us that it would have been proper for the court to have explained more fully the rule as to the measure of damages, or the manner of ascertaining them; especially as it seems to us that an improper rule had been insisted upon in the closing argument of the plaintiff's counsel. But we see no intrinsic error in what the court did charge,—that the jury should give the plaintiff "the present cash value" of his injury, taking into consideration pain and mental suffering, not allowing anything as a punishment, or punitive damages. The defendant cites but one authority to sustain its assignment of error as to instructions upon the question of damages,—*Pickett v. Railroad Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257,—and we do not think it sustains the defendant's contention.

That case is as to a prayer which the court held to be erroneous, but in passing upon the prayer the court suggest almost the exact language used by the court in this case as a proper instruction. It was contended before us in the argument that the jury found their verdict upon the erroneous rule laid down by defendant's counsel, but we have no means, as a court, of knowing that this contention is true. The plaintiff is still living. The verdict does not show that the jury were so governed in finding their verdict. It is far more than the simple calculation of time of expectancy by the plaintiff's yearly earnings. But they were instructed that they might give the plaintiff damages for pain, suffering, etc. This was not error, and we have no means of knowing how much they allowed for this and how much they allowed for his earnings. There may have been error in the manner in which the jury estimated the damages. But, if there is, we cannot know it, nor does the record, to which we are confined, disclose the error. Upon the view of the case we have taken, the judgment must be affirmed.

COOK, J., dissents.

MONTGOMERY, J. I cannot concur in the opinion of the court. It seems that the general assembly, in Priv. Laws 1897, c. 56, has deprived the defendant of its plea of assumption of risk. As is said in the opinion of the court, the effect of that legislation in respect to assumption of risk had not been called to the attention of counsel in the cause or to that of the court; but nevertheless we find, upon an examination of the statute, that to be its plain construction. But the issue on the "assumption of risk" being eliminated does not prevent the operation of the principle of contributory negligence, and it seems to me that the evidence of the plaintiff himself furnishes such clear and convincing proof that his own negligent act was the direct and proximate cause of his injury that his honor should have told the jury that upon his evidence they should respond "Yes" to the second issue. *Neal v. Railroad Co.*, 126 N. C. 634, 36 S. E. 117. There was a by-law of the company in the following words: "(8) Every employé must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars and in all movements of trains, in which work each employé must look after and be responsible for his own safety. Jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them, and all similar imprudences, are dangerous, and in violation of duty. All employés are warned that, if they commit these imprudences, it will be at their own peril and risk." The plaintiff knew of that by-law, and with a full knowledge of what he said himself was an obvious defect in the construction of the tender, to

wit, the lack of a grab iron, got upon the tender while it and the engine were in motion, and undertook to lift himself from the cross step up to a higher platform by grasping a drain pipe, which he says himself he had never examined, and that, too, with the engine and tender moving backward, his injury being certain if the pipe should give way. A prayer for instruction by defendant on the point of the plaintiff's using the grab iron for the purpose which he did was directed to the first issue, and refused on that account. But his honor undertook to charge the jury in respect to the contributory negligence of the plaintiff, and failed to call their attention to the plaintiff's neglect to examine the grab iron, which, in my opinion, was the most important point in the negligent course and conduct of the plaintiff. Especially is that failure on the part of his honor an error when it can be seen from the record that his honor, in speaking to the jury about the time and the circumstances of the seizing of the drain pipe by the plaintiff, misconceived entirely the evidence of the plaintiff on an important and vital point, and, as a consequence, failed to instruct the jury properly as to those conditions. His honor said: "In regard to a violation of a known rule of the company, his [plaintiff's] statement was that the rule was that he should not get on the engine in motion. He says that the engine had not started, but did start after he got up; and he contends that the injury did not result from that, but from his taking hold of the drain pipe, and that that was the natural thing for him to do, and he asked the jury to so find. The plaintiff had testified that the engine and tender were in motion when he got upon the step; that it was going at about a mile an hour when he got on, and about two or three miles an hour when he fell." There is an exception by the defendant to this misrecital of the evidence and its effect. Certainly, if the injury was caused from the plaintiff's taking hold of the drain pipe, that was the proximate cause of the injury, and as his honor had told the jury that the drain pipe was not made to be taken hold of by the plaintiff, and that they should not consider the drain pipe in any aspect whatever as connected with the defendant's negligence, the plaintiff's use of it for the purpose with which he did use it was an act of negligence so gross that his honor should have instructed them to find the second issue "Yes."

In reference to the rule laid down by his honor as to the measure of damages, I think that it was not sufficiently definite, taken in connection with the rule which counsel of the plaintiff argued to the jury. I know that a trial judge is not expected to controvert every erroneous argument made by counsel in the course of the trial, but after that part of the argument referred to in this case his honor should have in some way explained

more fully what he meant by the words "the present net money value of such loss incident to his injury." I think there was error.

(128 N. C. 546)

LAYDEN v. ENDOWMENT RANK K. P. OF THE WORLD.

(Supreme Court of North Carolina. June 7, 1901.)

REMOVAL OF CAUSES—CORPORATIONS—FOREIGN AND DOMESTIC.

1. Where, by act of congress, a body is thereby incorporated "in the District of Columbia" to exercise all the powers incidental "to fraternal and benevolent corporations within the District of Columbia," it is a corporation created for local purposes, and as such has no inherent right to do business in a state in violation of the state statutes.

2. Pub. Laws 1899, c. 62, § 1, provides that every foreign insurance company desiring to do business in North Carolina shall become a domestic corporation by filing with the secretary of state copies of its charters and by-laws. Section 8 provides that on compliance with the act such corporation shall immediately become a corporation of the state, and may sue and be sued in the state courts. *Held*, that a body incorporated by act of congress as a fraternal and benevolent corporation in the District of Columbia, on compliance with such state law, becomes a domestic corporation, and not a mere licensee to do business in the state.

3. A fraternal and benevolent foreign corporation which had become a domestic corporation by compliance with Pub. Laws 1899, providing the manner in which foreign corporations may become domestic corporations, when sued in the state court by a citizen of North Carolina as a domestic corporation on a cause of action which discloses no federal question, cannot remove the cause to the United States circuit court.

Appeal from superior court, Davidson county; Bryan, Judge.

Action by Minnie O. Layden against the Endowment Rank of the Knights of Pythias of the World. From an order refusing to remove the cause to the United States circuit court, defendant appeals. *Affirmed*.

The following is the statement of the case on appeal: This was a civil action returnable to fall term of the superior court of Davidson county held on the first Monday in September, 1900, H. R. Bryan, judge presiding, for the recovery of \$3,000 upon an insurance policy issued by defendant company on the life of T. L. Layden, plaintiff's intestate. In apt time, namely, before defendant's time for answering had expired, the defendant company, by its attorneys, moved to remove this action into the circuit court of the United States in and for the Fourth district of Western North Carolina, and presented a petition and bond, copies of which are herewith attached, and made a part of this case on appeal. The motion for removal was made upon the ground that the defendant company was, at the beginning of this action and at the time of the filing of the said petition, a nonresident of the state of North Carolina, and that the plaintiff was at the said time a resident of the said state, and upon

the further ground that it was a corporation organized by act of the congress of the United States, and hence that the controversy arose under the constitution and laws of the United States (28 Stat. 96, c. 119) approved June 29, 1894. This motion was resisted by plaintiff upon the ground that the defendant company was a corporation under the laws of the state of North Carolina, having theretofore amended her complaint by leave of court, setting forth this fact, which complaint was not verified. This motion his honor refused, upon the ground that the defendant had become a domestic corporation under the act known as the "Craig Act"; and from this order refusing to order the removal of this cause into the circuit court of the United States defendant excepted, and appealed to the supreme court. It appears that in apt time the defendant filed the following petition for removal, together with the bond required by law: "Comes the defendant, Supreme Lodge Knights of Pythias, sued herein as the Endowment Rank Knights of Pythias, and shows to the court: That this suit is brought by the plaintiffs to recover the sum of \$3,000 upon a certificate of membership in the Endowment Rank Knights of Pythias, issued by the defendant, in which said certificate were named the said plaintiffs as beneficiaries, and is wholly of a civil nature; that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of \$2,000, all of which will more fully appear by the complaint in said suit, filed July 5, 1900, which is hereby referred to, and made a part hereof; that the said suit is one arising under the laws of the United States; that the said Supreme Lodge Knights of Pythias is, and was at the time of the commencement of said suit, a nonresident of this state, and a corporation organized and existing under the act of congress, to wit, the act approved May 5, 1870, entitled 'An act to provide for the creation of corporations in the District of Columbia by general law' (16 Stat. 98), and the amendments thereto, and an act was passed, 'An act to incorporate the Supreme Lodge Knights of Pythias,' approved June 29, 1894 (28 Stat. 96, c. 119); that the said certificate was so issued by the defendant under and by virtue of authority derived from and under said acts of congress, and that the same, and acts done under and in pursuance thereof, are involved in this action; that the plaintiff, at the time of the commencement of this action, was, and still is, a resident and citizen of the state of North Carolina; that the time within which the said Supreme Lodge Knights of Pythias is required by the laws of the state of North Carolina, and the rules and practice of said court, to answer or plead to said complaint in said suit, has not yet expired; that said Supreme Lodge Knights of Pythias makes and files herewith a bond in the sum of \$500, with

good and sufficient surety, for its entering into the circuit court of the United States in and for the Fourth district of Western North Carolina on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if it shall hold that this suit was wrongfully or improperly removed thereto. Wherefore the Supreme Lodge Knights of Pythias prays this court to proceed no further herein, except to accept this petition and bond, and to make an order requiring said defendant to enter and file a copy of the record herein in said circuit court of the United States, as required by law."

The complaint is as follows: "The plaintiffs, complaining of defendants, allege: (1) That in the year 1894, at and in the county and state aforesaid [Davidson county, N. C.], T. F. Layden, deceased, of Lexington, N. C., took of the defendants a duly-executed policy of insurance (No. 49,165), whereby they agreed to pay the sum of \$3,000 at his death to 'Minnie O. Layden, his wife, and surviving children,' and said T. F. Layden paid all the premiums and dues regularly for a period of six years, and up to his death, and fully complied with all the conditions of said policy. (2) That the plaintiff, Minnie O. Layden, was the wife therein referred to, and E. H. Layden, for whom Minnie O. Layden, his mother, is guardian, is the only child, surviving, or otherwise, of said T. F. Layden, insured. (3) That said T. F. Layden died in Lexington, N. C., on the 15th day of January, 1900, while in good standing, and due notice and proof of death were made to the defendants, insurers, on blanks provided by them as the policy required. (4) That the defendants refused, and still refuse, to pay the beneficiaries herein recited the \$3,000 due on and by said policy on the 15th day of January, 1900, and said amount is still due and unpaid to plaintiffs. Wherefore the plaintiffs demand judgment against the defendants: (1) For the sum of \$3,000, with interest from the 15th day of January, 1900, till paid; (2) for such other and further relief as the plaintiffs may be entitled to in law and equity; (3) for the costs of this action." The amendment to the complaint is in the following words: "(1) That the defendant company herein sued, and against whom this plaintiff asks relief, is a corporation duly formed under and by authority of the laws of the state of North Carolina, doing business in said state as an insurance company."

Walser & Walser, for appellant. S. B. Williams, for appellee.

DOUGLAS, J. (after stating the facts) The point directly presented to us is whether a corporation originally organized under the laws of the United States, but which has become a domestic corporation of this state

under the provisions of chapter 62 of the Public Laws of 1899, can remove a cause into the circuit court of the United States when expressly sued as a domestic corporation. That such a corporation, originally organized under the laws of another state, cannot do so, is settled in the recent case of *Debnam v. Telegraph Co.*, 126 N. C. 831, 36 S. E. 269, which is adopted as a part of this opinion. Whether the present defendant comes within the operation of that decision is the question before us. We think it does. We are not prepared to say that the United States are on a level in all respects with the states, which are considered as foreign jurisdictions. The national government, while a distinct sovereignty, is not a foreign state, because it is composed of all the states, and is equally at home in all of them. The line of demarkation between state and federal authority does not depend upon territorial limits, but entirely upon the subject-matter of legislation or judicial construction as defined by the constitution of the United States. This doctrine applies to the federal government only in its relation to the states, as it is controlled by principles essentially different when dealing with the District of Columbia, or other territories of the United States. Congress is the supreme lawmaking power of all territories, certainly unrestrained by any local authority, and it would seem but indefinitely so even by the federal constitution. In such cases it seems to us that congress acts, not in its national capacity, but as a local legislature; and its acts, unless otherwise clearly expressed, are confined in their binding operation to the jurisdictions for which they were originally intended. We therefore think that corporations chartered primarily to do business in the District of Columbia have no right, beyond that of comity, to operate in any of the states, unless expressly authorized by their charters. They therefore stand on the same footing as corporations of other states, so far as the act of 1899 is concerned. By that act the right of comity was withdrawn from them in common with all other foreign corporations, and they were forbidden to exercise their corporate powers within this state, unless they became domestic corporations. It is admitted that the defendant domesticated under that act, and, as we have held that the legal effect of the act "was to charter and not to license, we are compelled to hold that the defendant has no right to remove the case at bar into the federal court.

We can find no provision in the constitution of the United States directly authorizing the formation of corporations by the federal government. That it has the implied authority to do so whenever necessary and proper for carrying into effect its express powers was finally settled by the case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, but it is interesting to note the limitations placed upon such authority in the opin-

ion of the court. Chief Justice Marshall, speaking for the court, says, on page 411, 4 Wheat., and page 602, 4 L. Ed.: "The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them." And again, on page 421, 4 Wheat., and page 605, 4 L. Ed., alluding to the fact that the constitution gave to congress no express authority to create corporations, he says: "Had it been intended to grant this power [of creating corporations] as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But, being considered merely as a means to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it." Again, the great chief justice, speaking for the court, in *Osborn v. Bank*, 9 Wheat. 738, 860, 6 L. Ed. 204, 233, says: "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court in the case of *McCulloch v. Maryland* is founded on and sustained by the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'" These questions become important in construing the opinion in *Railroad Co. v. Myers*, 115 U. S. 1, 5 Sup. Ct. 1118, 29 L. Ed. 319, wherein the court says: "We are of opinion that corporations of the United States, created by and organized under acts of congress, like the plaintiffs in error in these cases, are entitled as such to remove into the circuit court of the United States suits brought against them in the state courts under and by virtue of the act of March 3, 1875, on the ground that such suits are suits 'arising under the laws of the United States.'" We do not propose to go into a lengthy argument on the subject. We think that the question has been substantially decided long ago by this court. The exhaustive argument by Chief Justice Marshall in the case of *Osborn v. Bank*, 9 Wheat. 817, 828, 6 L. Ed. 204, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of

the United States is a suit arising under the laws of the United States." The words, "like the plaintiffs in error," which we have italicized, taken in connection with the limitations in the cited opinion of *Osborn v. Bank*, would indicate that there might be other classes of corporations organized under the authority of congress that would not have the inherent power of removal in all cases. Such, for instance, would be the corporations authorized by congress under its special powers of legislation for territories directly under its control, and not intended to be, used in any way as governmental agencies, or in furtherance of interstate commerce. The petitioner at bar, whether viewed as a life insurance company or as a fraternal organization, is in no sense a governmental agency; and we do not think that life or fire insurance can be brought within the definition of interstate commerce. We think that the petitioner was incorporated by congress to operate primarily in the District of Columbia, with only such incidental powers outside of said District as it might have by the law of comity. Therefore we think that it comes within the principle of the decision in *Railroad Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048, in which the court says, on page 497, 162 U. S., page 871, 16 Sup. Ct., and page 1051, 40 L. Ed.: "But, even if the court were obliged, under the allegations of the plaintiff's complaint, to take judicial notice of the defendant company's charter, no act of congress was pointed out under which it was acting when operating the railroad in the state of Oregon. So far as appears, the defendant company existed and was doing business in the state of Oregon solely under the authority of that state, whether express or permissive. The two acts of congress referred to do not disclose any intention on the part of congress to confer powers or rights to be exercised outside of the territories named therein." Such a principle, relating to railroads, which are admittedly instruments of interstate commerce, would apply with even greater force to a corporation having no such character. An examination of the acts under which the petitioner was incorporated will clearly show its local character. It was originally incorporated, as shown by its petition, under chapter 80, 16 Stat., entitled "An act to provide for the creation of corporations in the District of Columbia by general law," approved May 5, 1870. It was again incorporated by special act approved June 29, 1894 (28 Stat. c. 119). The first section of this act reads as follows: "That George B. Shaw * * * [and others], officers and members of the Supreme Lodge, Knights of Pythias, and their successors, be, and they are hereby incorporated and made a body politic and corporate in the District of Columbia by the name of 'The Supreme Lodge, Knights of Pythias'; and by that name it may sue and

be sued, plead and be impleaded in any court of law or equity, and may have and use a common seal, and change the same at pleasure, and be entitled to use and exercise all the powers, rights and privileges incidental to fraternal and benevolent corporations within the District of Columbia." Neither of these acts give any authority, either express or implied, to the petitioner to exercise any of its corporate powers outside of the District of Columbia. We are not now dealing with the right of comity, for that has been expressly withdrawn by the state of North Carolina by the act of February 10, 1890. Nor do we mean to treat the petitioner as a citizen of the District of Columbia, but as a federal corporation created for local, and not for national, purposes. As such, it has no inherent right to do business in this state in violation of our statute. It seems to have recognized this fact, and took advantage of the provisions of the statute to become a "domestic corporation," as therein provided. Its status as such is settled by the decision of this court in *Debnam v. Telegraph Co.*, supra. Acting, therefore, as a domestic corporation—the only capacity in which it could then lawfully act—at the time this cause of action accrued, and sued only as a domestic corporation, we see no legal grounds for removal. We are not inadvertent to the cases of *Supreme Lodge v. Hill*, 22 C. C. A. 280, 76 Fed. 468, and *Same v. England*, 36 C. C. A. 298, 94 Fed. 369, in which it is held that this petitioner has the right of removal to the federal courts; nor to the case of *Supreme Lodge v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163, in which the court entertained the appeal. In the last case the question of jurisdiction does not seem to have been raised; nor do any of the cases refer to the petitioner in its relation as a domestic corporation,—the essential question in the case at bar. We have considered the line of cases holding the doctrine that in all cases of removal the jurisdiction of the subject-matter of the action must appear on the face of the complaint as filed by the plaintiff, and cannot be injected into the record by the defendant in making out his case for removal. *Metcalf v. City of Watertown*, 128 U. S. 588, 9 Sup. Ct. 173, 32 L. Ed. 543; *Tennessee v. Union & Planters' Bank*, 152 U. S. 854, 14 Sup. Ct. 654, 38 L. Ed. 511; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Land Co. v. Brown*, 155 U. S. 488, 15 Sup. Ct. 357, 39 L. Ed. 233; *Railroad Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048; *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 20 Sup. Ct. 545, 44 L. Ed. 673. As we have some doubt of the application of these cases to that at bar as precluding an inquiry as to the origin of its incorporation, in view of the decision in *Railroad Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L.

Ed. 1132, and as a determination of the point is not necessary to our decision, we prefer to rest our opinion on the grounds already stated. As we said in *Debnam's Case* we must say now: We are of the opinion that, as the defendant has become a domestic corporation of the state of North Carolina, and in contemplation of law a citizen thereof, and as the plaintiff has sued the defendant as a North Carolina corporation upon a cause of action which discloses no federal question whatever, the case cannot be removed into the circuit court of the United States. Therefore the judgment of the court below is affirmed.

(128 N. C. 517)

STEWART v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. June 5, 1901.)

MASTER AND SERVANT—RAILROADS—INJURIES TO EMPLOYEES—CONTRIBUTORY NEGLIGENCE.

Where plaintiff's intestate seated himself on the end of a railroad tie while acting as flagman, and, while asleep thereon, was struck by defendant's engine, the whistle of which had been sounded and the bell rung when the engineer discovered the deceased, and the brakes applied when it was seen the deceased did not move out of danger, a nonsuit was properly granted, as deceased was guilty of contributory negligence.

Douglas, J., dissenting.

Appeal from superior court, Davidson county; Bryan, Judge.

Action by J. J. Stewart, administrator, against the Southern Railway Company. From a judgment in favor of the defendant, plaintiff appeals. Affirmed.

L. S. Overman, for appellant. Glenn & Manly, for appellee.

PER CURIAM. We adopt the following opinion in this case prepared by the late Chief Justice FAIRCLOTH:

This is an action to recover damages for killing Julius Hargrove. The plaintiff's intestate was a flagman or brakeman on defendant's work train, and was an old railroad man, and knew the rules of railroads as to the passing of trains. The conductor of the work train stationed plaintiff's intestate at a point between Elmwood and the work train, to hear the freight train blow, and to signal the work train out of the way of the freight train. The signal was given, and, as the work train went out, the conductor said to him, "Stay here until I return; will follow 74 [freight train] right back." The intestate knew and expected that train 74 would come by as soon as the work train was out of the way. He was then awake, sober, and in his right mind. Three hundred yards above the place where the intestate was injured, the freight train stopped to "fix a log," and could be seen that distance. The intestate was sitting on a cross-

tie asleep, within a few inches of the iron rail. As the engineer of train 74 approached and saw a person sitting on the cross-tie, he assumed that he would get off, but on nearer approach, seeing that the person did not move, he gave the alarm signal by sounding the whistle, ringing the bell, and applying the brakes. The intestate was struck by the freight train, injured, and died soon afterwards. When the conductor saw that the intestate did not move, it was too late to stop before passing the intestate. The defendant introduced no evidence, and, when the plaintiff closed, his honor intimated that the plaintiff could not recover, and a nonsuit and appeal were taken.

In this and like cases the plaintiff's evidence is taken as true. The rule on this subject has been so frequently and recently expressed by this court that repetition seems to be superfluous work. However, in *Norwood v. Railroad Co.*, 111 N. C. 240, 16 S. E. 5, the court said: "When he placed himself in a position where he was liable to be stricken by a passing engine, it was his duty to keep a sharp lookout; and if he carelessly, recklessly, and in a drunken stupor remained on the track when the engine was approaching, and till it came in contact with him, he was negligent. * * * If it were conceded that the engineer saw the deceased walking along the track, or sitting upright on the end of a cross-tie, in time to have stopped the train without peril or difficulty, he was justified in believing up to the last moment, in the absence of knowledge or information that he was insane or deaf, that the intestate would take reasonable precaution for his own safety by moving out of the way,"—citing other decisions to the same effect, which decisions have been followed ever since. In *Wycoff v. Railroad Co.*, 126 N. C. 1152, 37 S. E. 999, the facts were not identical, but were similar, and presented the same question. The plaintiff testified that he, being worried, stepped off, and sat on the end of a cross-tie to rest a few minutes, and while sitting there he dropped off to sleep, and was knocked senseless by a passing train. The court affirmed per curiam the nonsuit on the authority of *Norwood's Case*, supra. Affirmed.

DOUGLAS, J. (dissenting). I cannot concur in the opinion of the court. The answer alleges that "the said plaintiff's intestate deliberately, with a reckless disregard of his own safety, sat down upon the railroad track, and fell asleep"; and "that the engineer of said locomotive, when he saw a person sitting on the cross-ties, supposed that he would get off, and thus escape injury. As he approached quite close, and seeing that the person did not move, he gave signals of alarm by blowing the whistle and ringing the bell of the locomotive, thus endeavoring to warn the said person of the danger; and then, seeing that he did not move, the engineer ap-

plied the brakes, and did everything in his power to stop the engine, but it was too late." The fireman testified as follows: "Bob James was engineer. He blew whistle twice, and made one application of brakes, and came over on my side and asked if he hit that man. We had done passed." This clearly shows, what was practically admitted upon the argument, that the engineer neither blew the whistle nor gave any signal whatever until he was too close to the deceased to do any good. In the fateful words of the answer, "it was too late."

The opinion of the court seems to be based exclusively on the Cases of Norwood and of Wycoff, as those are the only cases cited. As the latter case was decided by a mere per curiam judgment, without setting forth either the facts or the law, it is a just precedent for neither. The facts in Norwood's Case were essentially different from those in the case at bar. In the former case it appeared from the evidence that the engineer kept a constant lookout; that neither he nor the fireman saw the deceased at any time; and that, owing to a curve in the track, it would have been impossible for the engineer to have seen him in time to have prevented the accident by stopping his train. There are in the opinion some unguarded expressions, in the nature of dicta, that have been construed to mean that the engineer had a right to presume, up to the last moment, that the deceased would get off the track, and that therefore there was no duty resting upon the engineer to give any warning whatever until the last moment, when, of course, it would have been too late. The mere statement of the proposition exposes its inherent falsity. That it was a mere dictum is shown by the fact that the engineer never saw the deceased, and therefore had no occasion for any presumption of any kind. If this was ever the meaning of Norwood's Case, it has been clearly overruled in *Fulp v. Railroad Co.*, 120 N. C. 525, 27 S. E. 74, where Justice Furches, speaking for a unanimous court, says: "But the great error of the charge is that it is in violation of that great principle in favor of human life, so thoroughly settled in this state and in every jurisdiction, that the jury shall pass upon the acts of the defendant where negligence is alleged, and upon the contributory negligence of the intestate if that is alleged. This has not been done in this trial. We have shown that it has not been done as to sounding the whistle in a sufficiently intelligible way to be understood whether it was passed on or not." As it was necessary for the jury to pass upon the fact whether or not the whistle was sounded, there surely must have been some recognized obligation upon the defendant to sound the whistle. It is true, the whistle should have been sounded at the crossing; but it is equally true that Fulp's Intestate was on the track 30 or 40 yards away from the crossing, and was never seen by the en-

gineer, who did not know that he had struck him until the next day. If the defendant was liable for failure to blow at a crossing because it might have aroused a man lying 40 yards down the track, of whose existence it had no knowledge, how much greater would seem to be its negligence when the deceased was in full sight of the engineer! I do not mean to say that in the case at bar the engineer should have stopped his train as soon as he saw the deceased sitting on the ends of the cross ties; but I do say that he should have given him timely warning by bell or whistle, one or both, as might be necessary. It would have taken but little trouble to have sounded the whistle, and would not have interfered in the slightest degree with the running of his train. Surely a human life is still worth something,—the pulling of a bell cord, the opening of a whistle. Where a human life is at stake that may be saved by the sounding of a whistle, then it is gross negligence—call this an expletive if you will—not to blow the whistle. Against the dictum in the Norwood Case, I would respectfully invite the attention of the court to the following authorities:

In *Finlayson v. Railroad Co.*, 1 Dill. 579, 582, Fed. Cas. No. 4,793, the court says: "In this case the uncontradicted evidence on both sides is that the man who was killed was walking on the track of the defendant corporation along the same course the train was going that struck and killed him; and the question arises what degree of precaution or care a railroad company or its servants are bound to take to guard against injuring a man under such circumstances. * * * I instruct you that the agents of the railroad company had a right to suppose he was such a man, of sound mind and sound hearing, and that he would take reasonable care to protect himself in case of danger. Under that view of the case, I further say to you that these agents or officers of the company were bound to give a reasonable and fair notice of their approach, when they found that the man was not taking steps to get out of the way,—such a notice as would reach a man, under ordinary circumstances, of good hearing, and who had his attention alive to his situation. If, then, you believe that the bell was rung, and that the whistle was sounded, in time to enable this man to get off the track, these parties are guiltless, and the company is not liable. If, on the other hand, you believe they delayed making any signal at all until it was entirely too late for him to get off the track; that they, being aware of his presence, delayed to ring the bell or sound the whistle until he could not have stepped aside and saved himself,—in that case there was negligence on the part of these employees, for which the railroad company is responsible." This able opinion was written by Justice Miller, of the United States supreme court, and concurred in by Judge Dillon. Their names are a sufficient

guaranty of the value of the opinion. The italics are my own.

The same rule was laid down by the supreme court of Pennsylvania as far back as 1864, in *Railroad Co. v. Sparen*, 47 Pa. 300, 304, as follows: "The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but, the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger, or, if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if, instead of the adult, it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it." These are the words of a court of recognized ability, and one that has certainly never been inclined to hamper railroad management by useless restrictions.

In *Railroad Co. v. Morlay*, 30 C. C. A. 6, 86 Fed. 240, 242, the United States circuit court of appeals (three circuit judges concurring therein) says: "The testimony shows that when from 200 to 300 feet away from the man the danger of his situation was recognized by the engineer and fireman, and that from that moment to the instant of the injury they attempted, by blasts of the whistle and by shouts, to warn him; but the testimony of other witnesses, and the fact that the man's attention was not awakened, tend to show that the warnings were not given. Whether they were given, and whether an earlier effort to stop or reduce the speed of the train should have been made, were therefore questions for the jury,"—citing *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270.

The following headnotes are taken from the case of *Railroad Co. v. Tinkham's Adm'r* (Ky.) 44 S. W. 439: "(1) Where the trainmen see a trespasser on the track in front of the train, it is their duty to give timely warning of the danger, and, if necessary and practicable, to slacken speed and stop the train. (2) Where an engineer saw a trespasser on the track 600 yards ahead of the engine, and neither gave the usual signal nor made any effort to stop the train until within 100 yards, the question of negligence was for the jury."

The following headnotes are from *Railroad Co. v. Hocker* (Ky.) 55 S. W. 438: "(1) Whether the servants in charge of the train gave timely warning of the approach of the train after discovering the presence of a trespasser on the track was properly left to the jury. (2) While the servants in charge of a train are not bound to stop the train upon discovering a trespasser upon the track, they should warn him by sounding the whistle or ringing the bell; having the right to

presume, when such warning has been given, that he will get off the track in time to prevent injury."

In the recent case of *Railroad Co. v. Harvin* (decided in December, 1899) 54 S. W. 629, the court of civil appeals of Texas lays down the rule in the following explicit terms: "The instruction sought, that the persons operating the engine 'are authorized to presume that a person seen on the track will leave such track in time to avoid injury, and are authorized to act upon such presumption,' should have been qualified so as to show that such presumption would not arise unless some warning is given of the approach of the train. *Railway Co. v. Smith*, 62 Tex. 254. Without this qualification, the court was not required to give the instruction."

The rule is thus laid down in 2 *Shear. & R. Neg.* § 483: "Thus a locomotive engineer or motorman, after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to anticipating injury, before it becomes imminent, and the utmost care and diligence of which he is personally capable, after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train, and will step off the track in ample time to avoid all danger, without any diminution of the speed of the train." Numerous authorities are cited by the learned authors.

In *Patt. Ry. Acc. Law*, the author says, in section 204 (page 197): "• • • When they [engineers] do see a trespasser on the line, apparently of adult years and of average capacity, they are bound to warn him by signal of his danger, and that, having done so, they may assume that he will get off the line, and that they are only bound to stop the train when the circumstances of the locality are such (for instance, on a bridge or in a narrow cutting) that the trespasser does not have an opportunity to escape, or when the trespasser does not apparently hear or heed or comprehend the warning of his danger."

In 2 *Wood, R. R.*, the author says, on page 1461: "If, after becoming aware of the trespasser's presence, the engineer fails to exert every effort possible to prevent the injury, the company must be held liable." Again, on page 1463, he says: "Therefore, where an adult person appears on the track, the company has a right to presume that he will heed the warnings of approaching danger and protect himself, and is not bound

either to stop the train or to slacken its speed." Again, on page 1470, he says: "Of course, this rule requires the company where there is reason to apprehend that a person seen upon the track will not heed the signals of danger, and take himself out of the way of the train, to use reasonable diligence to stop the train, and avert the serious consequences likely to ensue from failure to do so; but this condition, as we have seen, does not apply, as a rule, except where it is observable that the person is not in possession of his faculties, or is so young that it cannot be reasonably expected that he will avoid the threatened danger." All these quotations are in the same section (section 320), and apply to the same subject. They tend to show that, even where the author does not say in so many words that the signals must be given, he proceeds upon the assumption that they are given.

The cases of *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. 816, and *Meredith v. Same* (N. C.) 13 S. E. 137, are not cited by the court, perhaps because the facts therein are so different from those before us; and yet both opinions contain expressions, in the nature of dicta, that would seem to support the opinion of the court. Neither case is an authority. Meredith stepped in front of a train that was backing, and there seems to be no evidence that the engineer either saw him or could have seen him. Therefore there was no room for presumption. In *McAdoo's Case* the opinion says (on page 153, 105 N. C., and page 320, 11 S. E.): "The plaintiff 'would not swear' that the bell was not rung, while the engineer and fireman both testified that it was rung." Therefore it seems that the warning was given, and again the presumption was excluded. The error in these dicta arises from the singular misapprehension of the court as to the legal effect of the presumption, which simply relieves the engineer from the obligation of stopping his train, but not from the duty of giving timely warning. The *McAdoo Case* is a marked instance of those numerous cases in which appellate courts fail to apprehend the real point attempted to be presented. Both *McAdoo* and the engineer swore that *McAdoo* was walking between four and five miles an hour, and the engineer swore that the train was not going over four miles an hour,—the speed limited by city ordinance. If this were so, it would have been a physical impossibility for the train to have overtaken *McAdoo*. And yet this court gravely says, on page 154: "If it was running at five miles an hour (and the only testimony is that it was running four or five), it is manifest that a reduction of the speed to one mile less an hour would not have prevented the injury by enabling the plaintiff to see with his face turned in the opposite direction." Of course not, but it would have prevented the injury by preventing the train from ever overtaking him.

Moreover, the warning by bell or whistle is addressed to the sense of hearing, and not to the sense of sight. The duty of giving warning to a man walking with his back to the engine is imposed to enable him to exercise the only sense which the laws of nature permit him to use under such circumstances. Is not this common sense, even if opposed to the speculative dicta of judges of acknowledged ability and learning?

It would be needless to deny that I regret the decision of this court, because it seems to me a retrogression. It happened that the decision of the *Greenlee Case*, governing also that of *Troxler*, depended upon my individual vote, and that vote I gave for what will ever be to me the sacred cause of humanity. The same principle impels me now to file this dissent. We then held that it was negligence in a railroad company not to have automatic couplers, because a prudent man, having due regard for human life, would have all such safety appliances as were in common use and within his reach. But we did not say, and we could not say, that the railroads must have such couplers; but we did say that the failure to have them would be such continuing negligence as would render them liable for any resulting injury. We thus placed upon them practically the burden of obtaining such couplers. Is it any greater, or as great, a burden to require them to ring a bell or blow a whistle when a human life is at stake? The trespasser may be sick or even drunk, but he is a human being; and why not give him a chance for his life, when it will not interfere in the slightest degree with the running of the train? Conditions have changed in recent years. In former times the railroad train, with its long, loose coupling, alternately taking up and letting out the slack, and with rails loosely set in chairs, and rattling at every joint, made noise enough to be heard a mile away; and, as it took three or four minutes to travel that mile, the trespasser on the track had time enough to collect his senses. Now the vestibuled train, with its close coupling and patent buffers, makes but little noise on a track that the fish bar has practically made into one continuous rail; while its terrific speed gives but a few seconds for thought or action after it comes within hearing. As our decisions have professed to meet other progressive emergencies, why not do so in the present case, when its object can be attained without imposing any additional burden upon the railroad company? But it may be said we have held to the contrary. Suppose we have; no rule of property is involved, and, if we are wrong, who can correct our errors except ourselves? As has been well said by the great chief justice of Georgia, this court is supreme in the majesty of duty as well as in the majesty of power. In view of the foregoing authorities, so thoroughly consistent with the highest principles of

public policy and the enlightened humanity of a Christian age, I most respectfully dissent from the opinion of the court.

(128 N. C. 465)

STRAUSS v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court of North Carolina. June 4, 1901.)

MUTUAL BENEFIT ASSOCIATIONS—CHANGE OF BY-LAWS—CONSENT OF MEMBER—VESTED RIGHTS—REMEDY—RECOVERY OF PREMIUMS—MANDAMUS.

1. A mere general consent, given by a member of a mutual benefit association, that its constitution and by-laws may be amended, does not authorize such a change in its rules as will destroy his vested rights under his insurance contract by subjecting him to pay a greater rate of assessment than the contract calls for.

2. Where a mutual benefit association violates its contract with a member, the most practical remedy is the recovery of premiums paid, with interest thereon, and mandamus for reinstatement need not be resorted to.

On rehearing. Dismissed.

For former opinion, see 36 S. E. 352.

W. W. Clark, for plaintiff. Hinsdale & Lawrence, Shepherd & Shepherd, and Sewell Tyng, for defendant.

DOUGLAS, J. This case is before us on a rehearing, being originally reported in 128 N. C. 971, 36 S. E. 352. We have again given it careful consideration, and have been forced to the same conclusions announced in our former opinion. It seems useless to again discuss the principles involved, as they are few and simple, as the case is viewed by us. The plaintiff had a contract of insurance with the defendant, which the latter seems to have violated in its most essential features, with the result of having destroyed its value to the plaintiff. But it is said that the plaintiff made such contract of insurance with a mutual insurance association, of which he was a member, and by virtue of such membership; and that he is, therefore, bound by all such rules and regulations as may be thereafter lawfully adopted. "Lawful adoption" may mean much or little. Rules may be adopted under the forms of law that might nevertheless be so unreasonable and inequitable as to be clearly beyond any possible contemplation of law. In any event, such rules can never have any greater force than the law that authorizes their adoption; and, if this has the effect of impairing the obligation of a contract, it is void by constitutional inhibition. But it is said that the plaintiff, upon entering the association, agreed, expressly or impliedly, that changes might be made in its constitution and by-laws, and is bound thereby. We have no evidence that he agreed that such changes might be made as were made, and we have no idea that he ever intended to place it within the power of the association to break his contract at pleasure, or render it utterly

valueless by subsequent stipulations or regulations adopted without his consent. A mere general consent that the constitution and by-laws may be amended applies only to such reasonable regulations as may be within the scope of its original design. We must again repeat what we said in our former opinion: "Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights."

It is urged by the defendant that, if the plaintiff is entitled to any relief, it is not by recovery of the premiums he has paid, but by mandamus for reinstatement. This remedy is not demanded by the plaintiff, nor does it seem practicable to us. It is true, we might issue the mandamus to a foreign corporation having its general offices in New York; but how to make such a mandamus effective is a different question, the solution of which is not at all clear to us. Moreover, in the present instance the plaintiff, Strauss, is now dead. Much stress has been laid upon the fact that the supreme court of Minnesota, in *Ebert* against this defendant (83 N. W. 506), while agreeing with us upon the main question of the right of recovery, differs with us as to the measure of damage. We are much impressed with the views of the court upon that point, which have much to commend them as theoretical propositions; but we are equally impressed with the frank admission of the court as to the difficulty of their practical application. Our own rule, even in our own minds, falls short of theoretical perfection; but, after most careful consideration, we are unable to find a better. The impaired health of the insured, or his having passed the insurable age, would present complications practically insurmountable in the actual trial of an action. Moreover, the defendant claims that the plaintiff's insurance has cost more than he has paid in, and therefore his recovery would be nothing. The plaintiff would have no means of disproving the alleged cost of his past insurance, the proof of which would be exclusively in the possession of the defendant. He might cross-examine the defendant's witnesses, or demand its books and papers; but, if he got them, what could he do with them? It seems to have taken the defendant several years to find out that the plaintiff's insurance was costing more than his premiums, and this it did only with the assistance of the insurance commissioner of New York and expert actuaries. With or without such assistance, what chance would the average juror have of mentally digesting five hundred pages of insurance statistics? All actions must be capable of a practical determination, with a reasonable certainty of substantial justice; and rules of law must be adjusted to that end, even if, in exceptional cases, they fall short of the full measure of ideal right. A distinguished jurist has said: "Indeed, one

of the remarkable tendencies of the English common law upon all subjects of a general nature is to aim at practical good, rather than at theoretical perfection; and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business." Story, Eq. Jur. p. 115. The rule we have followed is not new. It was laid down by Chief Justice Pearson in *Braswell v. Insurance Co.*, 75 N. C. 8, and has been uniformly followed in this state for the past 25 years. But it is said this rule was intended to apply to "old line" companies, and not to mutual associations. Where is the essential difference in principle or in its practical result? Both companies pay back only what they have received, with legal interest thereon, and neither company is permitted to retain anything for the cost of past insurance. If the mutual association receives less, it pays back less. If the old line company collects more than the actual cost of insurance, it pays back that much more, and loses its surplus, as well as its cost of insurance. As we see no reason to change our former judgment, the petition to rehear is denied. Petition dismissed.

(128 N. C. 463)

HILL v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court of North Carolina. June 4, 1901.)

MUTUAL BENEFIT ASSOCIATIONS—VESTED RIGHTS—APPROVAL—RESOLUTION—PROXY—ESTOPPEL.

Where a member of a mutual benefit association sent his proxy to a meeting of the association held in another state, it will be presumed, in the absence of evidence to the contrary, that such proxy was intended for the ordinary purposes of meetings; and hence a resolution passed thereat, depriving the member of vested rights under his insurance contract, will not be binding on him by reason of his proxy.

Montgomery, J., dissenting.

On rehearing. Dismissed.

For former opinion, see 36 S. E. 1023.

W. W. Clark, for plaintiff. Hinsdale & Lawrence, Shepherd & Shepherd, and Sewell Tyng, for defendant.

DOUGLAS, J. For the reasons stated in *Strauss v. Association* (at this term) 39 S. E. 55, the defendant's petition to rehear is denied. In this case it appears that the plaintiff was present by proxy at the meeting of the defendant association at which the objectionable resolution was passed. We said in our former opinion in this case (126 N. C. 977, 36 S. E. 1023): "It is quite common for members of an association to send their proxies by request to the secretary or president, in order to permit a meeting to be held; but we cannot suppose that by any such formal act they intend to waive their vested rights, or to release the association

from its contractual obligations." Judges cannot entirely divest themselves of the knowledge acquired as practicing attorneys, and those who have had experience in corporate management know that when a corporation is doing well, and no material changes are contemplated in its business, but few of the individual stockholders take any active part in its management, or even in the election of its officers. Frequently there would be no quorum, even, at its annual meetings, if it were not for the proxies of absent stockholders. This is especially true where there are a large proportion of non-resident stockholders. The secretary usually incloses a blank proxy in his notice of the meeting sent to each stockholder, which the stockholder, if he does not intend personally to attend the meeting, usually signs in blank, and returns to the secretary, or other officer, from whom he received it. In this way the officers of a corporation usually control its meetings. Even those stockholders that attend are generally willing to let well enough alone. The officers, after consulting with the controlling stockholders, who are usually themselves directors, make up a list of names to be voted for as directors, and hand it to some stockholder whose name is not on it, and whose character and influence are guaranties of good faith. He then places the names in nomination, and moves that the secretary be instructed to cast for them the aggregate ballot of the meeting. If there is no objection, this is done, and they are declared duly elected. That the system of proxies, although necessarily permitted by custom as well as by law, is liable to grave abuse, cannot be denied. In the meetings of national banks its operation is expressly limited by section 5144, Rev. St. U. S., which reads as follows: "In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote." We do not mean to say that, in the absence of legal prohibition, there is any controlling reason why an officer of a corporation should not act as proxy, provided he acts in entire good faith; but he must not abuse his trust. In the absence of evidence intrinsic or aliunde, we must assume that such proxy was intended simply for the ordinary purposes of the meeting, and not to waive any vested rights belonging to the stockholder as an individual. These principles are especially applicable to cases like the present, where an association has a large number of stockholders—perhaps a majority—living in other states, who are neither willing nor able to incur the expense of going to a distant city simply to be pres-

ent at a stockholders' meeting in which their individual votes would practically amount to nothing. Petition dismissed.

MONTGOMERY, J., dissenting.

(128 N. C. 617)

**STREET v. MUTUAL RESERVE FUND
LIFE ASS'N.**

(Supreme Court of North Carolina. June 4, 1901.)

On rehearing. Dismissed.

For former opinion, see 36 S. E. 1024.

Hinsdale & Lawrence, Shepherd & Shepherd, and Sewell Tyng, for appellant. W. W. Clark, for appellee.

DOUGLAS, J. For reasons stated in the case of Strauss v. Association (at this term), 39 S. E. 55, the defendant's petition to rehear is denied. Petition dismissed.

(128 N. C. 455)

**MOORE v. CHARLOTTE ELECTRIC ST.
RY. CO.**

(Supreme Court of North Carolina. June 4, 1901.)

**STREET RAILWAYS—VEHICLES—COLLISION—
EVIDENCE—DEMURRER—VIGILANCE
—RECIPROCAL DUTIES.**

1. Plaintiff testified that, when about to cross the track of defendant street railway, he looked and saw the car some distance away. His horse was about halfway across the rail when he saw the car near him. He attempted to get out of the way, but the car struck his vehicle before he could do so. The motorman could have seen some distance ahead that he was about to cross. Both the car and vehicle had lighted lamps. No gong was rung before the accident, which occurred on one of the principal streets of the city. Plaintiff, after starting to cross, did not look for the car until his horse's feet were on the track. It was then about 40 feet from him, coming at about the rate of 15 miles an hour. *Held*, that a demurrer to the evidence was improperly sustained.

2. On motion for nonsuit, the evidence must be construed in the light most favorable to plaintiff, both as to effect and credibility.

3. The duties of street-railway companies and drivers of vehicles to use vigilance in looking out for collisions are reciprocal.

Appeal from superior court, Mecklenburg county; Robinson, Judge.

Action by Walter Moore against the Charlotte Electric Street-Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Osborne, Maxwell & Keerans, for appellant. Burwell, Walker & Cansler, for appellee.

DOUGLAS, J. This was an action brought by the plaintiff to recover damages for injuries alleged to have been caused by the negligence of the defendant. Walter Moore, the plaintiff, testified: "On the night of March 26, 1900, at about 8 o'clock, I was

driving a one-horse surrey on West Trade street, near the old court house, and had started to drive across the track of the defendant to water my horse at a fountain near the old court house. I looked and saw the car some distance from me. When the horse was about halfway across the rail, I found the car near me, and drew the horse's head around so as to get out of the way of the car that was coming, to prevent being struck. The car struck the surrey and broke both wheels in front and the top of same. I was thrown out between the dashboard and the shaft, and was injured in my right side and hip, which disabled me for two weeks or more. It cost me \$4 to have the top of the hack fixed, and about one month thereafter I had to quit the business. When I started across the street I looked and saw the car about 30 or 40 feet beyond Church street crossing. I had a light on the front of my carriage, and the car also had a light on. The motorman could have seen some distance ahead that I was going to cross the track. When I first saw the car, it appeared from the distance it was from me that I had plenty of time to cross over, but the motorman was running at such rapid speed that he struck me. He did not ring any gong until after I was struck, and did not stop the car until he had ran a length ahead of me, and then came and asked if I was hurt. It appeared to be running about 15 miles an hour. I was on this side of Church street crossing when the car struck me, and the motorman did not ring any gong at Church street crossing. It appeared to be running very rapidly when the car struck me. The length of the car was about 24 feet. It was only about one-half a block from the public square where I was stricken, and the street on which I was was one of the principal streets of the city, and on which many vehicles and passengers pass and cross. I started across, but did not look for the car until my horse's feet were on the track. As I pulled the curtain and looked, it was then about 40 feet from me, and appeared to be coming at about 15 miles an hour. I did my best to get out of the way." At the close of the plaintiff's evidence the defendant demurred to same under Acts 1897, as amended by the act of 1899, and the court sustained the demurrer and dismissed the action. The plaintiff insists that the case should have been submitted to the jury, and that there was more than a mere scintilla of evidence.

It is well settled in this state that on a motion for nonsuit the evidence must be construed in the light most favorable to the plaintiff, both as to effect and credibility. This rule is clearly laid down by Furches, J., in delivering the opinion of the court in Johnson v. Railway Co., 122 N. C. 955, 29 S. E. 784, in the following words: "In cases of demurrer and motions to dismiss under the act of 1897, the evidence must be taken most

strongly against the defendant. Every fact that it reasonably tends to prove must be taken as proved, as the jury might so find." To the same effect are the following cases: *Collins v. Swanson*, 121 N. C. 67, 28 S. E. 65; *Cable v. Railway Co.*, 122 N. C. 892, 29 S. E. 377; *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848; *Cogdell v. Railroad Co.*, 124 N. C. 302, 32 S. E. 706; *Gates v. Max*, 125 N. C. 139, 34 S. E. 266; *Capital Printing Co. v. City of Raleigh*, 126 N. C. 516, 36 S. E. 33. Construing the evidence in the light of these decisions, we are of opinion that there was certainly more than a scintilla of evidence tending to prove the negligence of the defendant, and that the case ought to have been submitted to the jury.

In case of nonsuit, it is neither necessary nor practicable to discuss as fully in detail points that may arise as it is in cases that have been tried where the alleged errors are specifically pointed out by exception, and we will therefore confine ourselves to a discussion of the general principles governing such cases.

As our state has few cities of even moderate size, and consequently but few street railways, we find but little help from our own Reports. In fact, neither of the learned counsel who so ably argued the case cited us to a single decision in this state which can be taken as an authority. In *Doster v. Railway Co.*, 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481, there was no collision whatever; the damage being caused entirely by the mule, which took fright at the noise of the street car while running, as the plaintiff himself testified, "in the usual and ordinary way." The destructive proclivities and capabilities of a mule, whether frightened or not, are of common knowledge, and furnish but slight analogy for any other kind of accident. In the absence of home authorities, we must examine those where street railways have longest been in most general use. The following extract from the opinion of the court in *Cooke v. Traction Co.*, 80 Md. 551, 554, 31 Atl. 327, very clearly expresses our own views: "There is, to begin with, no possible analogy between a case growing out of an injury caused by a street-railway car to a person rightfully upon the public thoroughfare, and a case involving an injury inflicted by a steam-railroad train on a trespasser wrongfully upon the latter company's right of way. And this is so because the citizen has the same privilege to use the street for travel that the street-railway company has for propelling its cars thereon; and the railway company has, apart from its franchise to lay its rails, no right to the use of the street as a highway superior in any degree to that possessed by the humblest individual. The franchise to lay its rails upon the bed of the public street gives to the company no right to the exclusive use of that street, and in no respect exempts it from an imperative obligation to exercise due and

proper care to avoid injuring persons who have an equal right to use the same thoroughfare. It is bound to take notice of, recognize, and respect the rights of every pedestrian or other traveler; and if, by adopting a motive power which has increased the speed of its cars, it has thereby increased, as common observation demonstrates, the risks and hazards of accidents to others, it must, as a reciprocal duty, enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which its own appliances have made more imminent." In *Thatcher v. Traction Co.*, 166 Pa. 66, 67, 30 Atl. 1048, the court says: "It is not our duty now, nor was it that of the court below, to pass on the credibility of plaintiff's witnesses as to the rate of speed, and the absence of efforts to stop the car when the danger was manifest. That was for the jury. If the gripman recklessly ran on at a high rate of speed, when the probable consequence was a collision, that was negligence for which defendant was answerable. As is held in *Ehrisman v. Railway Co.*, 150 Pa. 180, 24 Atl. 596: 'It is not negligence per se for a citizen to be anywhere upon such tracks [railways on streets]. So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car.' Or, as is said in *Gilmore v. Railway Co.*, 153 Pa. 31, 25 Atl. 651: 'Street-railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks.' * * * The right of the wagon, in certain particulars, is subordinate to that of the railway. The street car has, because of the convenience and exigencies of that greater public which patronizes it, the right of way. Whether going in the same direction ahead of the car, or in an opposite one to meet it, the driver of the wagon must yield the track promptly on sight or notice of the approaching car. But he is not a trespasser because upon the track. He only becomes one if, after notice, he negligently remains there." In *Robbins v. Railway Co.*, 165 Mass. 30, 36, 42 N. E. 334, it is said: "The decisions of this court show that a distinction has been taken with respect to the duty to look and listen when crossing the tracks of a steam railroad where a railroad train has the exclusive right of way, and when crossing the tracks of a street-railway company in a public street, where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and with travelers. The fact that the power used by the street-railway company is electricity, instead of that of horses, has not been deemed by the court sufficient to make

the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway." In *Railway Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374, it is held that: "(2) The rule requiring one exercising his lawful rights in a place where the exercise of lawful rights by others may put him in peril to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed would endanger him. (3) Street cars propelled by electricity, and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety." In this case we quote from syllabi. In *Kennedy v. Railroad Co.* (Sup.) 52 N. Y. Supp. 551, the appellate division of the supreme court says: "The cable car had no absolute right to the exclusive use of the street. Pedestrians and vehicles have some rights which even cable cars are bound to respect. They have a right to cross the street, even though a cable car may be in sight. If not, then the city would be divided into as many zones as there are lines of power cars running the length of the island, and nobody could ever get across. It was not incumbent upon the driver of this vehicle to wait until no cable car was in sight before he attempted to cross. He had a right to cross the track when there was a reasonable opportunity to do so, even though it required the cable car to slacken its speed in order that it might not upset his vehicle. The rights of drivers of vehicles and of cable cars are reciprocal, and the gripman of a cable car is bound to use as much diligence to avoid running into a vehicle which is crossing its track as the driver of a vehicle is to avoid running into a cable car which may be crossing its path. It seems to be assumed upon the part of the defendant that, unless a vehicle can certainly entirely clear a cable car approaching at a high rate of speed, its driver has no right to attempt to cross, and that the car is in no case bound to slacken its speed. We know of no such rule of the road." This case is approved and applied in *Blate v. Railroad Co.* (Sup.) 60 N. Y. Supp. 732, in an opinion delivered on November 10, 1899. In *McClain v. Railroad Co.*, 116 N. Y. 459, 22 N. E. 1062, it was held that: "A mere error of judgment does not necessarily amount to carelessness. If the plaintiff took reasonable care, and then made a mistake as to the safest course to pursue in crossing the street, he was not

guilty of contributory negligence for that reason." And, again, "that the place was a public street, and plaintiff had a right to go where he chose; that, no matter how many cars were in the street, he had a right to select any point to go across, but was bound to exercise care."

We freely admit that the company has the superior right to the use of its own tracks, as otherwise it could not use them at all. If a wagon and a car meet, going in opposite directions, the wagon must turn out, because the car cannot. If going in the same direction, the wagon must also get off the track, because the car cannot go around the wagon, and the public convenience requires the car to travel at a greater speed than the ordinary vehicle. But this superior right is not exclusive, and will not justify the company in needlessly interfering with the convenience of the public, or excuse it from the consequences of its own negligence. Where the wagon and car meet at right angles, either can stop long enough for the other to pass without serious inconvenience; and, as the wagon must cross the track in order to proceed, it is said that under such circumstances the rights of the wagon are somewhat greater than between crossings, with a corresponding obligation resting upon the railway company to exercise greater care, on account of the greater probability of meeting vehicles and pedestrians, with the increased risk of accidents. But this rule cannot be extended to interfere with the right of the public to cross the track with reasonable care at any point that their convenience may suggest. *Booth, St. Ry. Law*, §§ 303-305; *Elliot, Roads & S.* §§ 761, 765, 767, 810-812. Numerous other cases might be cited, but we think that the view we have taken is sustained by the practical consensus of judicial opinion, and certainly by the overwhelming weight of authority. The judgment of nonsuit will be set aside, and the action tried upon its merits. Error.

(128 N. C. 450)

MESSICK et al. v. FRIES et al.

(Supreme Court of North Carolina. June 4, 1901.)

MORTGAGES ON STOCKS OF GOODS—FRAUDULENT CONVEYANCES—RIGHTS OF SUBSEQUENT CREDITORS.

Defendant G., being indebted to defendant F. on three notes, one of which was given for F.'s interest in a stock of goods belonging to a partnership of which defendants were members, executed a mortgage to F. on his own interest in the firm and on that purchased by him from F. The mortgage provided that G. was to have possession, to continue the business in his own name and for his own account, and was to cover goods bought afterwards to keep up the stock. The mortgage was properly recorded. There was no evidence of fraud in the execution of the mortgage. Held, in an action to have the mortgage declared void as fraudulent as to G.'s subsequent creditors, that under the evidence the court properly refused

to submit the question of fraud to the jury, and properly granted a nonsuit.

Appeal from superior court, Forsyth county; Timberlake, Judge.

Action by A. F. Messick and others against H. W. Fries and another to have a mortgage declared fraudulent as to creditors and void. From an order granting defendants' motion for a nonsuit, plaintiffs appeal. Affirmed.

Jones & Patterson, Swink & Swink, and D. H. Blair, for appellants. Watson, Buxton & Watson, for appellees.

MONTGOMERY, J. The defendant Glerish in 1892 was indebted to the other defendant, Fries, in the sum of about \$14,000, evidenced by three promissory notes, two of which were executed in 1887, and the other in the sum of \$8,600; the consideration of the last-mentioned one being the purchase money agreed to be paid to Fries for the interest of Fries in the stock of goods and merchandise belonging to a partnership of which the defendants were members, the purchase having been made on the day of the execution of the note for the purchase money, the 15th of July, 1892. To secure all three of the notes, Glerish executed a mortgage to Fries on the 15th of July, 1892, on the entire stock of goods—his own interest and that purchased by him from Fries—in the Fries storehouse in Salem, and all book accounts, notes, and other evidences of debt due to the late firm of Fries, Glerish & Senseman. It was stipulated in the mortgage that monthly payments were to be made by Glerish to Fries on the indebtedness, and a calculation shows that several years would have elapsed before the indebtedness could have been paid if the payments agreed upon should be promptly met. There was a further provision in the mortgage, by which the possession of the goods was to be left in Glerish, it being contemplated that Glerish was to continue the business in his own name and for his own account. The following is the language of the mortgage on that point: "This mortgage is also to cover all goods hereafter bought to keep up the stock, and such goods, when bought, are to be substituted for their sales as long as anything remains due to H. W. Fries and secured in this mortgage."

The plaintiffs are judgment creditors of Glerish, the indebtedness, however, having arisen since the execution of the mortgage, and the consideration of which being for goods and merchandise sold to Glerish to replenish and keep up his stock, and they have brought this action to have the mortgage declared fraudulent and void. If the plaintiffs had been creditors of Glerish at the time of the execution of the mortgage, a strong presumption would have been raised as to its fraudulency; and if the deed had shown on its face that there were other creditors of Glerish, and that all of his property was embraced, the fraudulent intent would be irrefutable; the deed would be void on its face.

Cheatham v. Hawkins, 76 N. C. 335. The decision in the last-mentioned case is greatly shaken, if not overruled, by the case of **Kreth v. Rogers**, 101 N. C. 263, 7 S. E. 682; but it is not necessary to the decision of the present case to undertake a reconciliation between those two cases, for they concerned existing creditors, while in the matter now before us the creditors are subsequent ones to the execution of the mortgage. We find inconsistencies on the same subject in the opinions of the supreme court of the United States. In **Robinson v. Elliott**, 22 Wall. 513, 22 L. Ed. 753, in reference to existing creditors, it was decided (1874) that a mortgage of a stock of goods to two of several creditors, in which the possession of the goods was left with the mortgagor to sell and supply the place of those goods sold with other goods purchased, the substituted goods to be subject to the lien of the mortgage, was void on its face, and was so declared by the court, and that notwithstanding the mortgage had been duly registered. On the last point the court said: "Manifestly, it was executed to enable the mortgagors to continue their business, and appear to the world as the absolute owners of the goods, and enjoying all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard." In the later cases in the same court of **Bank v. Bates**, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754, and **Etheridge v. Sperry**, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171, the doctrine held in **Robinson v. Elliott**, supra, is overruled, though not expressly so. In the last-mentioned case the mortgagor was left in possession of the stock of goods with a verbal agreement that he might use the proceeds of his daily sales for the support of himself and to keep up the stock, the whole of the surplus to be applied to the payment of the debt; and the court held that the matter of alleged fraud in the execution of the mortgage was a matter of fact, and not one of law. The court said: "Why should a transaction like this be condemned, if made in good faith, and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor in payment of a debt. If an absolute sale, why not a conditional sale with such conditions as he and his creditor agree upon? As between the parties, no court would question this right or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement by which the mortgagor can continue in business, for in 99 cases out of 100 the taking of possession by a creditor results in closing the business, and turning the debtor out of em-

ployment. The only parties who can claim to be injuriously affected are unsecured creditors. But they are notified by the record of the exact relations between the mortgagor and mortgagee; and surely subsequent creditors have no right to complain if they deal with the mortgagor with full knowledge of such relations. Existing creditors may, of course, challenge the good faith of the transaction; but, if they cannot disturb an absolute sale when made in good faith, why should they be permitted to challenge a conditional sale if made in good faith? The fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent." But the plaintiffs were not creditors of Giersh at the time of the execution of the mortgage, their debts having been contracted by Giersh since its execution. Is the mortgage presumptively fraudulent as to subsequent creditors, the plaintiffs? The same rules cannot apply to the rights of these two classes of creditors. The character of the evidence must vary, and so must the measure of relief. In voluntary conveyances, where subsequent creditors are concerned, the touchstone of fraud is the intent with which they are made; and that is not a matter of law, but is to be passed upon by the jury. *Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862; *Cook v. Johnson*, 12 N. J. Eq. 54, 72 Am. Dec. 381; *Payne v. Stanton*, 59 Mo. 159; *Walt, Fraud. Conv.* 201. It was decided in *Etheridge v. Sperry*, supra, that in case of a mortgage to secure a debt—an instrument that cannot be called a voluntary conveyance—subsequent creditors have no right to complain if they deal with a mortgagor with full knowledge (by constructive knowledge from registration of mortgage) of such facts as were set out in the mortgage. Inclining to the correctness of the view of the court in that case, nevertheless, if the mortgage in the present case be treated for the sake of argument as a voluntary conveyance (which it is not), the question of fraud would be a question of fact, and not of law. There was no evidence in this case that there was any fraud in the execution of the mortgage at or before the time of its execution. But the subsequent acts of the parties may be submitted to the jury, as they "may reflect light back upon the original intent," and help to characterize and discern it more correctly. *Walt, Fraud. Conv.* 201. Fraud must be proved to be in the inception of the matter, but the after-conduct of the parties is evidence going to explain the motives which controlled the actions in the beginning, and give point to the original purpose.

Upon a most careful review of the evidence, we find none that ought to have been submitted to the jury to show fraud in the transaction. The debts secured were admitted to be bona fide. No attempt was made to keep secret the mortgage. It was on the registration books. The debt of \$8,600 had been paid. No act of the mortgagor or mort-

gagee was brought out in the evidence in the least calculated to show a fraudulent purpose in the execution of the mortgage. That the bank of which the mortgagee was a director tried to help the debtor in his financial difficulties is not evidence of fraud. They mislead no creditor. No misapplication of the proceeds of sale with the consent and knowledge of the mortgagee was shown. Neither was there any evidence that the mortgagor was using the profits of the business for his own ease and advantage in fraud of his creditors, and with the knowledge of the mortgagee.

The other exceptions of the plaintiffs are without merit, and do not justify a discussion. His honor was right in holding that there was no fit evidence to be submitted to the jury to prove fraud, and he properly dismissed the action upon the motion to nonsuit the plaintiffs. No error.

(128 N. C. 325)

DITMORE v. GOINS.

(Supreme Court of North Carolina. May 28, 1901.)

JUSTICES OF THE PEACE—SERVICE OF SUMMONS—SUFFICIENCY—ATTACHMENT—JUDGMENT.

A summons and warrant of attachment were sued out and issued by a justice of the peace December 6, 1898. The summons was returnable December 10, 1898, and the warrant January 4, 1899. On the return day of the summons the sheriff returned it with the indorsement "Not found." No alias summons was sued out, nor order made for service by publication. The publication of the warrant was made for four weeks, as required by Code, § 350. On the return day of the warrant the justice tried the action, the defendant not appearing, and rendered judgment for plaintiff. Held, that the judgment was void, the service of summons not being sufficient, under sections 214, 217-219, directing that service of summons shall be made by delivering a copy thereof or by publication, when the person on whom service is to be made cannot be found within the state; nor was it rendered sufficient by publication of the warrant of attachment.

Clark, J., dissenting.

Appeal from superior court, Cherokee county; McNeill, Judge.

Petition by J. H. Ditmore against N. A. Goins to set aside and vacate a judgment. From a judgment for petitioner, defendant appeals. Affirmed by per curiam order. Petition for rehearing. Affirmed.

E. B. Norvell, F. P. Axley, and Shepherd & Shepherd, for petitioner. Dillard & Bell and Busbee & Busbee, contra.

COOK, J. The summons and warrant of attachment were sued out and issued by the justice of the peace on the 6th day of December, 1898. The summons was returnable on December 10, 1898, and the warrant on January 5, 1899. On December 10th, the return day of the summons, the sheriff returned the summons to the justice, indorsing thereon, "Due search made, and the de-

fendant not found in my county." No alias summons was sued out, nor was there an order made by the justice for the service of a summons by publication. The affidavit, as required, was made for obtaining the warrant, which was duly issued, and served by levy upon personalty and realty. The publication of the warrant, which was signed by the plaintiff, was made for four weeks, as is required for the publication of the warrant by section 350 of the Code. Upon the return day of the warrant, January 5, 1899, the justice proceeded to try the action upon the plaintiff's cause of action (the defendant not appearing), and rendered judgment in favor of the plaintiff against the defendant for the amount sued upon. Thereafter the defendant moved in the justice's court to set aside and vacate the judgment. Upon the hearing of the motion the justice denied the same, and defendant appealed to the superior court. Upon the hearing before his honor, he reversed the justice and rendered judgment in favor of the defendant vacating and setting aside the justice's judgment, from which judgment the plaintiff appealed to this court.

Under our system of practice, no party can be brought into court except by a service of the summons upon him, unless he voluntarily appears. Service must be made upon him personally, if he can be found in the state, or by publication, neither of which was done in this case; nor did the defendant voluntarily appear. The manner of service is plainly prescribed in sections 214, 217, 218, and 219 of the Code. It is well settled that any judgment rendered in an action without service of the summons is absolutely void,—is a nullity,—and will be so treated whenever and wherever introduced. *White v. Albertson*, 14 N. C. 241, 22 Am. Dec. 719; *Jennings v. Stafford*, 23 N. C. 404; *Stallings v. Gully*, 48 N. C. 344; *Doyle v. Brown*, 72 N. C. 393; *McKee v. Angel*, 90 N. C. 60; *Harrison v. Harrison*, 106 N. C. 282, 11 S. E. 356; and other cases. The issuance and service of a summons in an action are indispensable to a valid judgment. Before a court can render an order or judgment disposing of a person's property, it must give him such notice as is required by law, to the end that he may come into court and assert his rights; and the rules and requirements regulating the issuance and service of such notice by summons must be strictly complied with. In actions within the jurisdiction of a justice of the peace, the summons must be signed by the justice, run in the name of the state, directing the officer to summon defendant at a time therein named, not exceeding 30 days from its date (Code, § 832); and in the event of service by publication a notice must be published in any one or two newspapers most likely to give notice to the person to be served, not less than once a week for six weeks, giving the title, purpose, etc. (Code, §§ 219, 840, rule 15), which must be

under authority of an order made by the justice, based upon an affidavit (Code, § 218). The publication of the warrant of attachment does not serve this purpose. But in attachment proceedings, under section 352 of the Code, as amended by Acts 1893, c. 363 (Clark's Code, p. 415), when the warrant is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in the said publication to the defendant of the issuing of the attachment. Said publication shall state the names of the parties, the amount of the claims, and, in a brief way, the nature of the demand, and the time and place to which the warrant is returnable; and it also provides that, in attachment proceedings in a justice's court, advertisement in a newspaper shall not be necessary, but advertisement at the court-house door and four other public places in the county for four successive weeks shall be sufficient publication, both as to the summons and warrant of attachment. This modification permits the incorporation of the warrant of attachment to be made in the summons, not the summons in the warrant. The summons is an official process, and must be signed and issued by the justice of the peace, whether its service is to be made personally or by publication, while the warrant, if not incorporated in the summons as above provided, is not official, and may be signed by the plaintiff himself, as above cited, and, if not taken out at the time of issuing the summons, has to be served separately, as provided in said section. In this case the warrant of attachment was signed by the plaintiff, as was prescribed in the Code of Civil Procedure before the passage of Acts 1870-71, c. 166, § 3, which is now section 352 of the Code, as amended by Acts 1874-75, c. 111, § 2, and Acts 1893, c. 363, and did not then serve as a process to bring the parties into court, but was only intended to give notice that a warrant of attachment had issued in the cause. An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. *Marsh v. Williams*, 63 N. C. 371; *Toms v. Warson*, 66 N. C. 417. Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action, if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. Code, § 348. Notice of the same must be published within 30 days after its issuance for only 4 successive weeks, and at the court-house door and four other public places in the county (Code, § 350), and may be signed by the plaintiff (Code, § 909, form 16). In this case the summons was not served at all, which fully appeared thereon when returned to the jus-

justice's court on the return day, December 10, 1898. No alias summons was sued out (Code, § 205), and the failure to do so worked a discontinuance of the action (*Fulbright v. Tritt*, 19 N. C. 491; *Webster v. Laws*, 86 N. C. 178).

The trial had on January 5, 1899, was without authority of law, and the judgment rendered was absolutely void, and his honor should have so held. With this modification, there is no error, and the petition is dismissed.

CLARK, J. (dissenting). It appears from the record evidence herein that December 6, 1898, the plaintiff caused a summons to be issued against the defendant by a justice of the peace, and on the same day filed an affidavit, on proper allegations, for an attachment of the property of the nonresident defendant, giving the bond required by statute. On the same day the justice issued the warrant of attachment, which was returned in due form, regularly levied upon the property of defendant, December 7, 1898. Thereupon the plaintiff made publication for four weeks of the summons and warrant of attachment in the following form, as prescribed by Code, § 909, form 16: "North Carolina, Cherokee County, Murphy Township. J. H. Ditmore vs. N. A. Goins. Seventy-six dollars and twenty-five cents due by note and duell. Warrant of attachment returnable before J. M. Vaughan, a justice of the peace for Cherokee county, at his office, in Murphy, in said county, the 5th day of January, 1899, when and where the defendant is required to appear and answer the complaint. Dated this 7th day of December, 1898. J. H. Ditmore, plaintiff." Not only is this publication of summons and warrant in the same publication a literal compliance with the form prescribed by the statute, and therefore valid, but the joint publication is required by section 352, as follows: "When the warrant of attachment is taken out at the time of issuing the summons [which was the case here] and the summons is to be served by publication [here the affidavit alleged he was a non-resident] the order shall direct that notice be given in said publication to the defendant of the issuing of the attachment, * * * said publication shall state the names of the parties, the amount of the claims, and, in a brief way, the nature of the demand and time and place to which the warrant is returnable." If this publication was defective, it did not invalidate the jurisdiction which was based upon the seizure into the custody of the law of the property. When the defendant appeared in the action, as she afterwards did, it was ground for a motion to reopen the judgment, but not for a dismissal of the attachment and of the proceedings ab initio. In a very respectable authority (*Cooper v. Reynolds*, 10 Wall. 309, 19 L. Ed. 931) it is said, "The seizure of the property of the defendant under the proper process of the

court is therefore the foundation of the court's jurisdiction, and defective or irregular affidavits and publications of notice, though they might reverse a judgment in such case for error in departing from the directions of the statute, do not render such a judgment or the subsequent proceedings void." When there can be service on the person, service of summons is indispensable, and the foundation of the proceeding. But where it is a proceeding in rem, or quasi in rem, as is an attachment of this kind, then the foundation is the seizure of the rem, and the publication of summons, if not properly made, is an irregularity. If not regular, or for the proper time, the remedy is an order for republication, not a dismissal of the attachment. There are two kinds of attachment,—the one where the defendant is personally served with process, and the attachment is an ancillary remedy given in cases prescribed by statute to secure the fruits of the judgment when it shall be obtained. The other is where the defendant cannot be served with process. There a publication of summons alone would be a nullity. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 585; *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402,—in both of which cases the matter is fully discussed. In *Cooper v. Reynolds*, at page 319, 10 Wall., and page 933, 19 L. Ed., that eminent authority, Mr. Justice Miller, says: "On what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction. Without this the court can proceed no further. With it the court can proceed to subject the property to the demand of plaintiff." Then, after saying that proper affidavit is the preliminary to issuing an attachment, but, if the attachment is levied, a defective affidavit would be ground of appeal, but would not invalidate the attachment, he adds: "So, also, of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made; and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment,"—not hold it void, as stated in the opinion in this cause. In the present case the publication was made in the form required and prescribed by statute, but, if it had been irregular, the remedy is not to dismiss the action which is validly based on an attachment, but retaining the cause, to set aside the judgment, with a new trial, as in the case of any other error not going to the jurisdiction. *Drake, Attachm.* §§ 224, 437, 437a. In *Bank v. Blossom*, 92 N. C. 695, the publication of summons and warrant of attachment in the same notice, as here, was held valid; but, if made for less than six weeks, it was held an irregularity as to the summons, and the court could "retain the cause and order a sufficient publication." If

that were still the law, the judgment should, on defendant's motion, be set aside, and re-publication of summons ordered, but it would be error to dismise the action. Since that decision, however, the incongruity of requiring publication of summons for a longer period than is required for publication of the warrant, both being in the same notice, has been cured by chapter 363, Laws 1893, incorporated in section 352, Clark's Code (3d Ed.), which provides that, when attachment proceedings are begun before a justice of the peace, publication for four weeks shall be sufficient, "both as to the summons and warrant of attachment." Hence there has been no irregularity or defect in this case. The defendant being a free trader, judgment could be rendered against her in a suit before a justice of the peace. *Neville v. Pope*, 95 N. C. 346. The defendant does not set up that she has a meritorious defense if the judgment is set aside (*Le Duc v. Slocumb*, 124 N. C. 347, 32 S. E. 720), and to set aside a judgment for irregularity in such case is erroneous. Cui bono go over the trial again without a meritorious defense? I am of opinion that the judgment below reversing the justice and setting aside his judgment should itself be reversed, and the justice's judgment should be reinstated.

(128 N. C. 446)

FRIEDENWALD CO. v. SPARGER et al.
(Supreme Court of North Carolina. June 4, 1901.)

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—
OMISSIONS IN DEED—MISSTATEMENTS—
FRAUD—EVIDENCE—PREFERENCE.**

1. The fact that a justice of the peace did not affix his private seal to a deed of assignment for creditors will not invalidate it.

2. Where defendants exaggerated and willfully misstated the value of their property, but there was no evidence that in the execution of the assignment for creditors in question there was any fraud on account of these misstatements, nor anything in the conduct of the defendants to show fraud, there was no error in refusing to submit the question of fraud to the jury.

3. The fact that a deed of assignment was prepared and kept to be registered in case of proceedings against the assignees by creditors is no evidence of fraud.

4. Where debts to relatives not exceeding one-fortieth of the assets were given preference in a general assignment for creditors, no presumption of fraud would arise therefrom, so as to compel assignors to show the consideration of the debts.

Appeal from superior court, Surry county; Timberlake, Judge.

Action by the Friedenwald Company against Sparger Bros. to set aside a deed of assignment. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Jones & Patterson, for appellants. Glenn & Manly, Watson, Buxton & Watson, and Burwell, Walker & Cansler, for appellees.

MONTGOMERY, J. James H. and B. F. Sparger in November, 1897, being partners

in trade, and, finding themselves unable to pay their debts in full, made a voluntary assignment of all their property, real and personal, to T. B. McCargo and R. L. Haymore, for the benefit of their creditors, with preferences. In the body of the deed it was recited that the grantors, as partners, under the firm name of Sparger Bros., and James H. Sparger in his individual capacity, in consideration of the premises, etc., conveyed the partnership property, and also the individual property, real and personal, of James H. Sparger; the partnership property and the individual property of James H. Sparger being particularly described. The deed was signed: "James H. Sparger. [Seal.] B. F. Sparger. [Seal.] Sparger Bros. [Seal.]" The following is the form of the probate: "Surry County. Personally appeared before me this day James H. Sparger and B. F. Sparger, who compose the firm of Sparger Bros., the makers and signers of the foregoing deed of assignment, and acknowledge the due execution thereof. Witness my hand and private seal this 6th day of November, 1897. Samuel G. Pace, Justice of the Peace." The action was brought by the plaintiffs, who are judgment creditors, to have the deed declared void for fraud, and set aside. On the trial, exception was made to the manner of the signing of the deed by the grantors, and to the probate of the deed on the ground that the justice of the peace did not affix his private seal at the end of his signature. The plaintiffs also alleged that certain of the preferred debts were not described with such particularity as to amount and consideration as is required by the act of 1893, c. 453.

The first two matters complained of on the trial by the plaintiffs were not alluded to by their counsel in his brief in this court, and on the oral argument, while not abandoned, were not insisted on. We see no fault in the ruling of his honor on either matter. The deed was signed by both individuals composing the firm. The indebtedness was recited, and also the intent to convey both the property of the firm and that of James H. Sparger. It is usual for justices of the peace who act in probate matters to attach their private seals to their names at the end of the probate, but that act is not essential to the validity of the probate; and, there being no dispute as to the fact that the person who took the probate was a justice of the peace at the time, we think that the statute is substantially complied with.

As to the alleged failure on the part of the defendants to properly describe the preferred debts, that matter was passed upon in *Brown & Co. v. Nimocks*, 124 N. C. 417, 32 S. E. 743, and we do not feel disposed to overrule that decision.

On the question of fraud we have scrutinized the evidence closely, and we think that his honor was correct in ruling that there

was none sufficient to be submitted to the jury. There were letters and statements of the defendants tending to show an exaggeration of the value of their property, or a willful misstatement about that matter. But there is no evidence that in the execution of the assignment there was any fraud on account of these misrepresentations, nor can we see anything in the subsequent conduct of the defendants going to throw any suspicion on the motive of the parties in making the assignment. There was no evidence that the defendants bought or sold in any unusual manner—especially on credit—before the assignment, or that their business was conducted out of the usual way. Their preferences were permissible under the law at that time, and the fact that the deed of assignment was prepared and kept to be registered in case of proceedings against them by creditors is no evidence of fraud. *Guggenheimer v. Brookfield*, 90 N. C. 232. An honest preference was allowable at that time. There were some small debts, probably amounting to one-fortieth of the value of the assets, preferred for the benefit of near relatives of the defendants. We are of the opinion that such a preference in the general assignment for creditors raises no presumption sufficient to compel the plaintiffs to show the consideration of the debts, nothing else appearing to show fraud. In *Hawkins v. Alston*, 89 N. C. 137, the debtor conveyed to his brother the whole of his property. In *Jordan v. Newsome*, 126 N. C. 553, 36 S. E. 154, the debtor preferred his mother-in-law, who lived in the same house with him, and to an amount of more than one-half of the debtor's property.

We see no error in the ruling of his honor dismissing the action on the motion for nonsuit made by the defendants. No error.

(128 N. C. 435)

SKINNER v. WILMINGTON & W. R. CO.
(Supreme Court of North Carolina. May 30, 1901.)

INJURY TO PASSENGER—NEGLIGENCE—EVIDENCE.

A train, on reaching a station, was stopped a little before the baggage car was placed against the baggage on the platform. Plaintiff's intestate was standing on a car platform at this time, supporting himself by his hand on the door facing. The train was moved forward gently, and without jerking, and stopped, whereupon the car door shut itself, injuring intestate's hand. There was no evidence of any fault in the condition or construction of the car door. *Held*, that plaintiff could not recover, as there was no negligence in the management of the train.

Appeal from superior court, Wilson county; Bowman, Judge.

Action by Emily Skinner, administratrix, against the Wilmington & Weldon Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Deans & Cantwell and J. H. Pou, for appellant. Aycock & Daniels, for appellee.

39 S.E.—5

MONTGOMERY, J. The plaintiff's intestate was a passenger on one of the defendant's trains, and upon its reaching Wilson he got up to disembark. The train was stopped a little before the baggage car was placed against the baggage to be taken on. At this time the intestate was seen standing on the platform of a passenger car, supporting himself by having his hand in position on the door facing. The train was then moved up a little forward, gently, and without jerking, and stopped. At this juncture the door of the coach shut itself, and the intestate's hand was caught in the jamb, and badly injured. The following is the whole of the evidence offered by the plaintiff in the case: David Barnes, for the plaintiff, testified: "I was porter at the hotel. Met train No. 48, June 14, 1898, at the depot in Wilson. When the train arrived, it stopped a little before it got the baggage car against the baggage. Mr. Skinner was standing on the platform, supporting himself by his hand between the door face. Train moved forward a little, and at the second stop the door came shut, and his fingers were caught in the jamb of the door and injured. When I first saw Mr. Skinner, he was in his seat. This was before the train stopped the first time; and just about the time it was coming to a stop I saw Mr. Skinner get up and walk forward. When I next saw him he was standing on the platform, with his hand on the door jamb, as before stated." On cross-examination this witness testified that it was not always possible to stop a train exactly against the baggage, and it was not unusual for it to move up a little ways after it first stopped, in order to get the baggage. When the train moved up to the baggage, it moved up in an ordinary way, and stopped as it ordinarily stopped, without jerking. Frank Pierce testified for the plaintiff as follows: "I was working for the express company on the 14th of June, 1898, when the accident occurred. When the train stopped, I boarded the express car to unload and load express. The train moved up a little. I called to the hand to pull truck off. Train moved up and stopped. After it stopped, I saw a man getting off with his hand hurt. I did not know the man at the time, but afterwards found it was the intestate of the plaintiff. Train did not move but a little ways, and moved up and stopped gently." We cannot see the least negligence in the management of the defendant's train, and there was no testimony of any fault in the condition or construction of the coach door. The occasion was purely an accident. Nothing short of stationing a man at both doors in each coach at every stopping place to watch the doors to prevent injury to passengers could prevent just such accidents, and such a requirement would be most unreasonable under present conditions. There is no analogy between this case and that of *Nance v. Railroad Co.*, 94 N. C. 623. There the train had been brought

to near a standstill at a station, and the passenger was in the act of alighting, when the engineer caused a motion of the train, violent and sudden. His honor was right in granting the defendant's motion to dismiss the action. No error.

(128 N. C. 425)

VANN v. EDWARDS.

(Supreme Court of North Carolina. May 30, 1901.)

HUSBAND AND WIFE — CHOSE IN ACTION — WIFE'S ASSIGNMENT—HUSBAND'S CONSENT—NECESSITY—INSTRUCTION.

1. The indorsement and transfer by a married woman of her note, without the consent of her husband, did not vest the title in the indorsee, and hence, on her death, the note passed to her husband, subject to her debts.

2. Where there was evidence that a note, which a married woman had indorsed to defendant, was afterwards in possession of her husband, and, subsequent to his possession, was seen in the hands of defendant, who had it at the time of the husband's death, the refusal to charge that the law would presume that the defendant's possession was lawful, and that he was the owner of the note, and that the burden was on the husband's administrator to show that defendant's possession was not lawful, was erroneous.

Appeal from superior court, Hertford county; McNeill, Judge.

Action by T. E. Vann, as administrator of the estate of D. Edwards, against D. K. Edwards. From a judgment in favor of plaintiff, defendant appeals. Reversed.

L. L. Smith and S. J. Calvert, for appellant. Winborne & Lawrence, for appellee.

MONTGOMERY, J. The note, for the recovery of which this action was brought, was originally the sole and separate property of the wife of the plaintiff's intestate, who was the mother of the defendant, and who died before her husband, the father of the defendant. The note was executed by the defendant to his mother, and by her was indorsed and transferred to the defendant without her husband's knowledge or consent. If that was the defendant's only claim to the note, it would avail him nothing (*Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544), and it would have passed to the husband as his property, upon the death of his wife, subject to the payment of her debts. But there was evidence tending to show that the note had been in the possession of the plaintiff's intestate after the death of his wife; that it was afterwards seen in the hands of the defendant, and was in his hands at the time of the plaintiff's intestate's death. It is to be observed in passing, however, that there was no attempt made by the defendant to show how he got possession from his father. Any way, the defendant asked the court to instruct the jury that, "if the jury find that the note in controversy was in possession of Darius Edwards at any time

after the death of Sarah F. Edwards, and prior to October, 1896, and that afterwards it was in possession of the defendant from October, 1896, until the commencement of this action, the law presumes that such possession was lawful, and that he is the owner thereof, and the burden is upon the plaintiff to satisfy the jury, upon preponderance of the testimony, that such possession is not lawful, and, unless the plaintiff so satisfies the jury, you must answer the first issue, 'No.'" The prayer was refused, and therein there was error. *Jackson v. Love*, 82 N. C. 405, 33 Am. Rep. 685; *Causey v. Snow*, 120 N. C. 279, 26 S. E. 775.

New trial.

DOUGLAS, J., concurs in result.

CLARK, J. (concurring in result). I dissent from that part of the opinion which says that "if" the defense had rested upon the assignment of the note by the wife, who owned it, being proceeds of sale of her land, it would not have availed; citing *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544. An appeal here is to review rulings of the judge below upon exceptions duly taken. There was no ruling below upon this point, no exception thereon, and the ruling which does come before us is upon an entirely different state of facts. The obiter in *Walton v. Bristol* can only become authority if approved upon a state of facts, and upon an exception which calls it in question, and not by an obiter upon an "if." *Walton v. Bristol* is not authority for the proposition that a married woman cannot indorse and assign a bond belonging to her. In that case the assignment was called in question on the ground that it "lacked the assent of the wife"; here, the hypothetical case presented—for it is not before us on exception—is that the assignment by the wife of a bond, her own property, lacks the assent of the husband. What was said in the *Walton Case* in reference to assignment of bonds by a wife without assent of her husband was not pertinent to the facts, and was entirely obiter. This, therefore, is obiter upon an obiter. If, however, the proposition that the assent of the husband is necessary to the assignment by the wife of her choses in action is to be decided without facts or rulings or exceptions raising the point, it is my duty to give my reasons for dissenting, for no question of greater importance, or of more far-reaching consequences, is likely to come before us. Married women daily assign and transfer notes, checks, and other personal property, or hypothecate them as security for loans, and the assignees take them relying upon the provisions of the constitution. If the title to personal property does not pass without the husband's written assent, and he or his administrator can recover it back, it will cause great litigation and wide-spread alarm in business circles. There is no rule which

can hold that a married woman's assignment of a bond or promissory note is a "conveyance," and therefore invalid without the written assent of her husband, which would not apply equally to her indorsement of a check payable to her, or her assignment of the whole or part of a fund in bank by her check payable to another, or her sale, transfer, or other disposition of any other personal property.

In a barbarous age, woman was a slave, a chattel, and hence her property, and especially her chattels, passed to her master upon marriage, and with it the right to chastise her (*Fitzh. Nat. Brev.* 80; *Litt.* §§ 669, 670); which idea still survived to a late day (1 *Bl. Comm.* 444; *Joyner v. Joyner*, 59 N. C., at page 828, 82 Am. Dec. 421; *State v. Black*, 60 N. C. 262, 86 Am. Dec. 436); and though in *State v. Oliver*, 70 N. C. 60, *Settle, J.*, says at last "the courts have advanced from that barbarism," it has been held as lately as *State v. Eldens*, 95 N. C. 698, 59 Am. Rep. 294, that a man can commit the foulest libel upon his wife with impunity because she is his wife. Just in proportion as civilization has progressed, we have gotten away from a legal classification which placed in the same category "infants, idiots, lunatics, convicts, and married women." The laws of this state took married women out of that class, except as to the statute of limitations, and recent legislation has removed even the stigma of that "survival" of the ideas of an age which deemed a married woman "non sui juris." *Const.* 1868, art. 10, § 6, placed North Carolina nearly abreast of the legislation in England and our sister states by providing: "The real and personal property of any female in this state," after marriage, "shall be and remain the sole and separate estate and property of such female, * * * and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." The meaning of these words, never doubtful, was placed beyond controversy by the history of the movement for the emancipation of married women as to their property rights, and the uniform decisions in England and our sister states upon similar legislation or constitutional provisions.

The clearly expressed meaning is that a married woman, as to the control of her property, shall "remain" as if a feme sole, with liberty to devise or bequeath it, sell or dispose of it, except that, as to property which can only pass by "conveyance,"—i. e. by deed or mortgage,—the written assent of her husband is necessary. The general rule is that as to her "property, real and personal," her control is not changed by marriage. The sole restriction is that as to "conveyances" the husband's written assent is needed. To construe "conveyances" to mean ordinary dispositions of personal property, which are rarely made by "conveyances," is to put a

forced meaning upon that word, and to veto the free control given a married woman in the first clause by making the restriction as broad as the liberty. It is to say, in effect, that a married woman is to have as full control of all her property, real and personal, as if she remained single, except that she is to have control of none of it, real or personal, without the written assent of her husband.

Carrying out this idea, the courts invented the doctrine of "charges in equity" without a line in any statute to support it, and thereby restricted a woman's rights over her property into narrower limits than she possessed before the adoption of the guaranty of emancipation given her by the constitution, though this charging in equity doctrine has since been virtually overruled. *Brinkley v. Balance*, 126 N. C., at page 396, 35 S. E. 631. If a woman could, as provided by the constitution, control her property as if single, save as to alienation by deed, it follows that, of course, she can make contracts, as if single, whose enforcement might affect it. In New York, with the identical clause as to woman's control over property (for our convention copied it), and in all other states with similar provisions, a married woman's right to contract is untrammelled. *Bank v. Howell*, 118 N. C., at page 273, 23 S. E. 1005. But our decisions in later years have completely negated the constitutional provision by holding that, if a married woman can contract without written consent of her husband, therefore she can subject her property to the payment of her liability, and therefore the courts will not allow her to sell, transfer, or assign her personal property without written consent of her husband, because her power to contract in some respects is restrained by Code, § 1826. If the restriction upon "contracting" by that statute restrains the free control given by the constitution, then the statute, and not the constitutional provision, is null. But it seems to have been forgotten that the statute of frauds, for two centuries and a half, had made voidable oral contracts and agreements for sale of any interest in lands without any court ever conceiving that it was possible to hold that all verbal contracts were voidable, because reality could be sold to enforce the liability thereby created, and a party could thus "do indirectly what he was forbidden to do directly."

Having left the broad, plain highway of the constitution, every step since has taken us further and further into the wilderness. The construction that a married woman's personal earnings are still the property of her husband belongs to the age when she was her husband's chattel. It has no other support. There is no statute to that effect. It is true it was reannounced some 15 years ago by one of our ablest and most accomplished judges, who doubtless remembered that he had read it at law school in books hundreds of years old, but who forgot that he had read the

decree of equality of woman's property rights in the constitution of 1868. And so on, from step to step, we have gone into the wilderness, away from the plain guaranty of the constitution that a married woman's rights over her property shall remain as if she were single, save that in deeds and mortgages the husband must give his written assent, just as he has like control over his own property, except that she must assent to the conveyance of his realty. Instead of holding to this plain, unmistakable provision, we have a multiplicity of judicial

interpretations, reservations, restrictions, and conditions, till no one can say absolutely what are the rights of a married woman over her own property, except that they do not remain as if she were still single.

An able and painstaking lawyer, Prof. Samuel F. Mordecai, has tried to elicit something like orderly method as to a woman's rights over her property, and her power to affect it by her contracts, for the instruction of his law class at Wake Forest College, and has thus summed up the confusing, and somewhat conflicting, results:

Analysis of Contracts of Married Women, Who are not Freetraders, etc.

(By S. F. MORDECAI)

SUCH CONTRACTS ARE:

1. EXECUTED—

- 1. Which require husband's written consent, whether real or personal estate conveyed (1).
- 2. Which also require private examination of wife and other statutory forms, etc., if realty conveyed or mortgaged (2).

2. EXECUTORY—WHICH, AS AFFECTING—

1. Real Estate of the wife, must—

- 1. Be written (3)—under seal—with private examination of wife; (4)
- 2. Have written consent of husband; (5)
- 3. Be charged expressly on specific real estate; (6) but the
- 4. Consideration need not be beneficial; (7) and the
- 5. Homestead will not be defeated (8) unless in case of a
- 6. Mechanic's and Laborer's Lien duly filed and prosecuted; (9) or
- 7. By contract which is in effect a conveyance. (10).

2. Personal Property of the wife—

1. NEED NOT HAVE THE HUSBAND'S (WRITTEN) CONSENT IF AMONG—

Those excepted by The Code, § 1826, to-wit: (11)

- 1. For her necessary personal expenses.
- 2. For the support of the family.
- 3. To pay her antenuptial debts.

(The husband is primarily liable for her support and that of the family (11a), and what comes within these exceptions depends upon the circumstances and surroundings of each case (11b). They are confined to goods bought for direct benefit of herself and family, such as food, clothes and other necessities (12), and do not embrace supplies for a boarding-house, hotel, etc., by which the family is supported (13), or goods for a store which she runs (14), or a cook stove per se (15), agricultural supplies (16), except where husband of no account (17), money borrowed to pay a lawyer (18), land bought (19), building a house (20), hiring an overseer (21).)

- (a). All such contracts she may charge expressly upon her separate personal estate by herself or by her agent (22).
- (b). But whether they must be expressly charged is not clear. It seems not (23).
- (c). Her separate personality—but not her realty—may be subjected to satisfy such contracts (24), but
- (d). She will be entitled to her personal property exemption (25). The creditor has no specific lien (26).
- (e). A personal judgment may be rendered against her on such contracts (27).

2. MUST HAVE THE HUSBAND'S WRITTEN CONSENT TO—

All contracts not excepted by Section 1826 (28), (though there is a dictum that it is unnecessary if the consideration is for the benefit of her separate estate) (29), of which contracts the following are the important elements to be considered—

1. The consideration—which

- (a). Is not imported by a seal (30); but will be investigated, in all cases, where material, by the Court (31).
- (b). Need not be beneficial to the wife if her separate estate is expressly charged (32), which charge must be express (33), but need not be specific (34).
- (c). If beneficial to her personally or to her separate estate this may dispense with the necessity for an express charge (35).

2. The form and essential contents of the contract—which

- (a). Must be in writing, it seems; (36)
- (b). Must have the written consent of the husband; (37)
- (c). Must contain an express charge on her separate estate (38), unless, perhaps, when the consideration is beneficial to her personally or to her estate (39)—or an intent to charge expressly must appear from the context of the instrument (40)—which charge, however, need not be specific (41); but in 128 N.C., at bottom page 574 and top page 575, and in 128 N. C., at bottom page 394, are dicta which indicate that no "charging" is essential.

3. *The written consent of her husband—*

- (a). Which is essential to all contracts not excepted by § 1826 (42), (except where consideration beneficial?) (43).
 (b). Which is sufficiently manifested—
 (1). If set out in the body of the instrument—need not be by separate paper (44).
 (2). By joining with the wife in executing the contract—signing it with her (45).
 (3). By signing as subscribing witness to the wife's signature (46).
 (4). By a separate paper of later date guaranteeing the payment of her contract (47), certainly if he also write and sign the contract as agent for the wife (48).
 (c). Which written consent does not give validity to all her contracts, but simply to such as before the Act of 1871-'2 (The Code, § 1826) she might have made without his consent (49). Nor does it enable the wife to make a contract at all—but simply to enter into an agreement in the nature of an executory contract (50).

4. *The Legal Effect—*

The legal effect of those of her contracts, to which the written consent of her husband is required, is not that of a contract at all, but of an agreement, which will be enforced in equity against her separate personal estate (51), not only that which she had when contract was made, but that acquired afterwards (52). No judgment in personam can be rendered upon such contracts or quasi contracts (53). Being enforceable only in equity, a Justice of the Peace has no jurisdiction (54).

It must be remembered that a Justice has jurisdiction of an action in which a mechanic's lien is involved (55), and that a judgment in personam can be rendered by the Superior Court on contracts excepted by § 1826, but such judgments can be satisfied only out of the personality (56).

Unless there is a mortgage, pledge, deed of trust, etc., or a mechanic's lien, the contract does not debar her of her personal property exemption in her personality (57). The contract charging her separate estate does not give the creditor a lien (58), nor a right to seize her property under claim and delivery proceedings (59). He can only proceed by judgment and execution (60), which last must set out particularly the personality to be subjected (61), but perhaps can be levied on that and any other personality she owns (62). She may be subjected to supplemental proceedings, and her personality, or some of it, subjected thereby to her debts (63). A receiver may be appointed in a proper case (64). The cases require more to be in the execution than the statute requires (65).

- (1) 125 N. C., bot. p. 422; 120 N. C., 51; 126 N. C., 48; 123 N. C., page 176; 126 N. C., middle page 274; 126 N. C., middle page 426; 126 N. C., page 51.
 (2) The Code, § 1824; Laws 1899, chapter 235.
 (3) 112 N. C., 622; 123 N. C., 571.
 (4) 122 N. C., 572; 106 N. C., 289-359; 108 N. C., middle page 337; 117 N. C., at page 38; 119 N. C., top page 327; 119 N. C., at middle page 421; 121 N. C., bottom page 337.
 (5) 122 N. C., 571.
 (6) 122 N. C., 571.
 (7) 122 N. C., 571.
 (8) 122 N. C., 571; 112 N. C., 54.
 (9) Constitution, Article X, § 4; 95 N. C., 35; 106 N. C., bottom page 300; 117 N. C., middle page 93.
 (10) 112 N. C., 243.
 (11) The Code, § 1826; 119 N. C., at page 326, paragraph 1, citing 103 N. C., 296; 121 N. C., at page 388, citing 110 N. C., 70; 119 N. C., 323; 121 N. C., 69; 106 N. C., bottom page 296 and near top 298; 126 N. C., bottom page 273 and top page 274.
 (11a) 122 N. C., at page 597; 102 N. C., at page 523; 106 N. C., bottom page 296.
 (11b) 102 N. C., 526.
 (12) 98 N. C., 431; 123 N. C., 4.
 (13) 98 N. C., 421; 122 N. C., 4.
 (14) 117 N. C., 84; 126 N. C., 332.
 (15) 102 N. C., 525; 106 N. C., bottom page 296.
 (16) 106 N. C., bottom page 296, approving 102 N. C., 525.
 (17) 126 N. C., 512, re-affirming 121 N. C., 59.
 (18) 116 N. C., 708.
 (19) 116 N. C., 144.
 (20) 121 N. C., 337.
 (21) 122 N. C., 1.
 (22) 121 N. C., at top page 323, citing 110 N. C., 70; 119 N. C., 323; 121 N. C., 69; 106 N. C., bottom page 296 and near top page 298; 126 N. C., top page 274.
 (23) See note 35, post, and cases there cited.
 (24) 124 N. C., 410; 124 N. C., at middle page 614, citing 119 N. C., 223; 106 N. C., 301; 106 N. C., 289; 103 N. C., 236; 76 N. C., 463; 74 N. C., 343; 126 N. C., top page 274.
 (25) 126 N. C., at page 274.
 (26) 126 N. C., at page 274.
 (27) 122 N. C., at page 715, modifying the language used in 116 N. C., 144.
 (28) The Code, § 1826; 122 N. C., middle page 3.
 (29) 106 N. C., 333, facts in the case and middle page 337, but see 94 N. C., at page 249; 106 N. C., bottom page 296; 106 N. C., at page 513; 126 N. C., at bottom page 426; 122 N. C., at page 3.
 (30) 103 N. C., middle page 312.
 (31) 103 N. C., middle page 312.
 (32) 106 N. C., 367; 106 N. C., at page 297; 103 N. C., at top page 313 and at page 311; 114 N. C., at page 616; 122 N. C., middle page 714; 118 N. C., at page 273.
 (33) Cases at notes 32 and 34.
 (34) 106 N. C., bottom page 312; 118 N. C., middle page 354; 114 N. C., at page 616; 119 N. C., bottom page 328.
 (35) 94 N. C., middle page 249; 106 N. C., at page 296; 103 N. C., middle page 337; 106 N. C., at page 710; 118 N. C., at page 274; 123 N. C., top page 575; 126 N. C., bottom page 396—all dicta which seem to justify this conclusion. But see 117 N. C., 94, and 125 N. C., bottom page 426, which lay stress on the fact that the husband gave his written consent to a contract of this character.
 (36) 112 N. C., 622.
 (37) The Code, § 1826.
 (38) 118 N. C., at page 273; 119 N. C., bottom page 326; see cases also at notes 22 and 23.
 (39) See note 35.
 (40) 119 N. C., bottom page 326; 114 N. C., top page 616; 117 N. C., middle page 59.
 (41) 108 N. C., bottom page 313; 113 N. C., middle page 254; 114 N. C., page 616; 119 N. C., bottom page 328.
 (42) 122 N. C., at middle page 3; 112 N. C., 622.
 (43) See note 35.
 (44) 114 N. C., at page 616; 126 N. C., at page 51; 126 N. C., top page 297.
 (45) 122 N. C., at page 574; 94 N. C., at page 249; 144 N. C., at page 616; 126 N. C., at page 551; 126 N. C., top page 297.
 (46) 126 N. C., 47.
 (47) 117 N. C., 94; 126 N. C., bottom page 51.
 (48) 117 N. C., 94; 126 N. C., bottom page 51; 126 N. C., 392.
 (49) 122 N. C., middle page 3.
 (50) 119 N. C., bottom page 326, citing 116 N. C., 73, and 118 N. C., 271.
 (51) 119 N. C., bottom page 326; 88 N. C., 300; 122 N. C., at pages 713, bottom 714, below middle page 715.
 (52) 117 N. C., middle page 100.
 (53) 88 N. C., 300; 122 N. C., at pages 713, bottom page 714, below middle page 715.
 (54) 122 N. C., at page 713, bottom page 714 and below middle 715.
 (55) 95 N. C., 85; 106 N. C., bottom page 300; 117 N. C., middle page 93.
 (56) 122 N. C., at page 715, modifying 116 N. C., 144.
 (57) 106 N. C., at page 312; 117 N. C., at page 101; 126 N. C., at page 273.
 (58) 117 N. C., at page 100.
 (59) 126 N. C., at page 273.
 (60) 126 N. C., at page 273.
 (61) 117 N. C., bottom page 100.
 (62) 117 N. C., middle page 100 and bottom page 100.
 (63) 117 N. C., at page 101.
 (64) 114 N. C., at middle page 617; 116 N. C., middle page 54; The Code, § 279 (2), and see 111 N. C., 625.
 (65) The Code, § 443; 117 N. C., at page 100.

It is impossible for any one to say whether or not he is right in every particular, notwithstanding his great and most careful research and his citations of authority sustain him. If we are now to add, by an obiter, upon facts not raising the point, that a married woman cannot indorse or assign a bond without her husband's consent, his table already needs further amendment. Prof. Mordecai, however, omitted to note that the doctrine of "charging" the wife's property is held to be without warrant in the constitution or statutes. *Brinkley v. Balance*, 126 N. C., at page 396, 35 S. E. 631.

The remedy is to get out of this wilderness, which becomes more and more tangled as we proceed, with the underbrush more and more confusing, and return to the straight and unmistakable highway marked out by the organic law, which is beautiful by its simplicity and clearness, and to plant our feet once more upon the rock of the constitution. Instead of the "codeless myriad of precedent," cited by Prof. Mordecai, the constitution has but one rule, which no one should misunderstand or misapply, which is that a married woman remains as absolute owner of her property as if she stayed single, except only that in deeds and mortgages the husband must give his written assent, which is exactly the case as to the husband's property, over which he retains the same control as if single, save that by statute, in deeds for his realty, the wife must join.

(113 Ga. 640)

LOTT et al. v. BUCK et al.

(Supreme Court of Georgia. May 25, 1901.)

SECONDARY EVIDENCE—ADMISSIBILITY.

In order to render admissible secondary evidence of the contents of a writing, it must be affirmatively shown that at the time the same is offered the original is not in existence, or is inaccessible or lost. (a) This is not shown by proving that long previous to the trial the person in whose custody the paper was shown to have last been had made an ineffectual search for it, without showing that he had not in the meantime found it, or that it was still inaccessible or lost.

(Syllabus by the Court.)

Error from superior court, Coffee county; Jos. W. Bennet, Judge.

Action by Lott & Perkins against Buck & Downing. Judgment for defendants. Plaintiffs bring error. Affirmed.

The following is the official report:

Plaintiffs introduced a complete chain of title from the state to themselves, except "a certified copy of lease from the Waycross Lumber Company and the Bewick Lumber Company to Lott & McLain." The admission of this copy was objected to on the ground that the existence of an original had not been shown or accounted for. Plaintiffs introduced John McLain, who testified: That he had delivered the original to Pad-

gett, a lawyer at Baxley, Ga., about four years ago; the same having been delivered to Padgett, as his attorney, in connection with business with which he was intrusted. He afterwards called on said Padgett for said original, and search was made for the same, and it could not be found. This was about two years ago, and he does not know that Padgett has since found it. He has frequently called on Padgett for it, and has never been able to get it. He believes the original has been lost or destroyed. That Padgett has been in attendance upon the court this week, and, he thinks, left here yesterday. W. H. McDonald testified that his firm brought suit for the plaintiffs, of which the pending suit is a renewal, and that, while the original suit was pending, he having been notified that Padgett had said original lease, he called on Padgett for the same, and that Padgett made a most diligent search through his papers, witness assisting him, and that they had been unable to find it. This search was made about three years ago. Witness did not know but that Padgett might have had other papers in his office or elsewhere which were overlooked when that search was made, nor that said original may not have been among papers overlooked. The objection to the introduction of the copy was sustained. Damage to the timber was admitted by the defendants, and that the cutting was done under their direction. Plaintiffs closed, and the court granted a nonsuit.

Quincy & McDonald, for plaintiffs in error. C. A. Ward, Jr., and F. W. Dart, for defendants in error.

LUMPKIN, P. J. This case presents for decision here the single question whether or not the court erred in refusing to admit in evidence a copy of a lease claimed to have been lost. The testimony relied on as laying the foundation for the admission of the secondary evidence is set forth in the official report. We agree with the trial court in holding that it was insufficient. At best, it did not affirmatively show that at the time the copy was sought to be introduced the original was not in existence or could not be found. That an ineffectual search was made for it at a time long previous to the trial by the person in whose custody it was shown to have been when last seen did not establish the fact that he had not in the meantime found the paper, or could not have produced it at the trial. Under the facts appearing, it is clear that a complete and proper showing with respect to the alleged nonexistence or inaccessibility or loss of this paper could not be made without calling that person as a witness. For some reason this was not done, and no good reason for failing to do so was shown. Judgment affirmed. All the justices concurring.

(118 Ga. 468)

BROWN v. ATLANTA RY. & POWER CO.
et al.

(Supreme Court of Georgia. May 20, 1901.)

STREET RAILROADS—CARRIERS—RATIFICATION—LEGISLATIVE GRANT—EFFECT—CORPORATIONS—POWERS—INJUNCTION—SUPREME COURT—JURISDICTION—PUBLIC IMPROVEMENTS—USE OF STREETS—CITY'S CONSENT—CITY ORDINANCE—VALIDITY.

1. The act of August 31, 1891 (1 Acts 1890-91, p. 169), providing that "all charters heretofore granted by the secretary of state to street and suburban railroad companies are hereby confirmed and declared to have had full effect from their dates," was, in effect, a general law giving the consent of the general assembly that street and suburban railroad companies theretofore organized under the charters referred to might in the future exercise the corporate powers mentioned in such charters; and with this legislative consent such companies became, after either an express or an implied acceptance of the provisions of the act, de jure corporations, with all the powers granted in the charters; and this is true whether the charter in a given case was originally granted without authority of law, or in violation of law.

2. The general assembly had in 1891 authority to grant corporate powers to a street-car company, though the consent of the corporate authorities of the town or city in which the lines of street railway were to be located had not been first obtained; but the grant of such powers did not authorize the construction of a line of street railway upon the streets of any town or city until the consent of the corporate authorities had been obtained.

3. That a corporation may have acquired a portion of its property in violation of law is not a sufficient reason for enjoining it from exercising its legitimate corporate powers, at the instance of a private citizen whose property will be damaged by the exercise of such powers.

4. Following the decision of this court in *Moore v. City of Atlanta*, 70 Ga. 611, this court will not control the discretion of the trial judge in refusing to grant an interlocutory injunction which would interfere with a public improvement in which no part of the property of the applicant is actually taken, although there was evidence before the judge authorizing a finding that the property of the applicant would be damaged by the improvement.

5. Even if in 1891 the general assembly had no power to confer upon street-car companies the authority to become common carriers of freight, the grant of such authority would not in any way affect other powers which had been lawfully granted to such companies.

6. A street-car company which has acquired the lines of street railway of two other companies may, when authorized by its charter, and with the consent of the authorities of the city in which its lines of railway are situated, connect the lines acquired from the other companies by laying its tracks upon such portions of a street of the city as may be necessary to make the connection.

7. A street-car company having authority to lay its tracks along the streets of a city will not be enjoined from laying its tracks along a given street, at the instance of one claiming to have an interest in a line of street railway in another street, on the ground that the construction of the new line may operate as an abandonment of the line in which he is interested.

8. The lawmaking body of a municipal corporation may pass a special ordinance which is in conflict with a prior general ordinance, when there is nothing in the charter prohibiting this kind of legislation.

9. A general power in the charter of a street-railway company to construct a line of street

railway authorizes the construction of double tracks upon the streets of a city, provided the authorities of such city consent that the streets may be so used.

10. The rulings on the admission of evidence were free from error, and no sufficient reason for the reversal of the judgment has been shown.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Bill by Julius L. Brown against the Atlanta Railway & Power Company and others for an injunction restraining defendants from building connections between street railroads. From an order denying an interlocutory injunction, plaintiff brings error. **Affirmed.**

Plaintiff filed his petition against the Atlanta Railway & Power Company, the Metropolitan Street-Railroad Company and the Atlanta Consolidated Street-Railroad Company, seeking to enjoin the construction of a street-railway line in front of his residence, on Washington street, Atlanta, and from making a connection between the lines of the two companies last above mentioned, and from the removal of tracks and changes of schedules on Woodward avenue and Pulliam and Clark streets, and from using the franchises and tracks of the Metropolitan Street-Railroad Company by the Atlanta Railway & Power Company. The injunction was refused, and plaintiff excepted. The plaintiff owns and resides on a lot at the corner of Washington and Rawson streets. He also owns a lot on Pulliam street, in the same block with the other. Washington and Pulliam streets are parallel and run north and south, and Pulliam is west of Washington. Rawson street is the southern boundary of this block. The next street which crosses Washington north of Rawson is Woodward avenue, formerly Jones street, and the next cross street south of Rawson is Clark street. There is no street-car line on Washington street between Woodward avenue and Clark street. There is one extending to Woodward avenue along Washington street from the north and the center of the city, then along Woodward avenue eastward for a distance of two blocks to Capitol avenue, which is parallel to Washington street, and along Capitol avenue southward, which line was built and originally operated by the Atlanta Street-Railroad Company, under a charter granted in 1866; and there is a line, subsequently established, from Clark street southward on Washington, extending from the center of the city to and along Pulliam street to Clark, and along Clark to Washington, which line was built and originally operated by the Metropolitan Street-Railroad Company under a charter granted in 1882, which defined its route. Acts 1882-83, p. 201. One share of stock of the last-mentioned company is owned by the plaintiff, who has held it since 1890. In 1891 Hurt and others filed in the office of the secretary of state articles of association for the purpose of forming a corporation to be

known as the Atlanta Consolidated Street-Railway Company; and a certificate of incorporation was issued to them, under which the railroads of the Atlanta Street-Railroad Company and the Metropolitan Street-Railroad Company, with other lines which the incorporators had obtained control of, were consolidated and operated under one management. In 1892 the property and franchises of the Metropolitan Street-Railroad Company were bought by the Atlanta Consolidated Street-Railroad Company at a receiver's sale made under an order of court, and the sale was confirmed by the court. In 1899, on the application of the Atlanta Consolidated Street-Railroad Company to the secretary of state, its charter was amended by changing its name to the Atlanta Railway & Power Company. In August, 1900, on the application of the Atlanta Railway & Power Company, authority was granted to it by a municipal ordinance "to extend its line of street railway on Washington street from Woodward avenue to Clark street by laying single or double tracks on said portion of Washington street"; and the ordinance provided that inasmuch as the work permitted to be done was a straightening, rather than an extension, of the lines of the company, the acceptance of this grant should not be held to place its lines under the operation of the general street-railway ordinance approved August 22, 1899, which imposes certain burdens on all existing street-railway companies applying for and accepting privileges to construct a new line, to extend an existing line, or to connect to one otherwise held to be an existing line. An extension of the time for laying tracks was subsequently granted; and, in pursuance of the authority thus granted, work on the tracks was begun, whereupon this petition for injunction was presented. The plaintiff alleges that the running of cars in front of his residence will be a nuisance, and that he will be thereby damaged from the noise and dust, and from interference with the entrance and exit to his home; the street being narrow, requiring the track to be placed near the curb stone. Damage would also result from the electric wires with which cars are operated. He alleges that no compensation has been offered or paid for damage above specified. Plaintiff alleges that he was the chief promoter of the Metropolitan Street-Railroad Company, and specified the line of its road in its charter, so as to avoid having any line in front of his residence, which was afterwards built at great expense; that he established his home in its present location, believing that the line of the company last named, and also that of the Atlanta Street-Railroad Company, was permanently established. He alleges: That the defendants intend to run a line in front of his residence, and to remove its tracks on Woodward avenue and Pulliam street, and on Clark street between Pulliam and Washington streets, and

to change existing schedules, to the inconvenience of the public. That they have no power under their charter to make such change. That the charter powers of said railroad companies on said streets were exhausted when their lines were established and built, and that any company succeeding by purchase or otherwise to the franchises is bound by the obligations of the former company as to schedules and route. That, under the constitution, no company can be authorized to buy the tracks of another or to change its route. That there is no necessity for running the proposed line, the present transportation facilities being ample. That the charter of the Atlanta Consolidated Street-Railroad Company is void, and that "the act to ratify and confirm the incorporation of street and suburban railroad companies under the general law for the incorporation of railroads," approved August 31, 1891, is also void, being repugnant to that provision of the constitution which prohibits retroactive laws, and because it is in conflict with that other provision of the constitution prohibiting the general assembly from authorizing the construction of a street railway without the consent of the corporate authorities. That the charter of the Atlanta Railway & Power Company is void because of noncompliance with the above-mentioned requirements of the constitution, and because it fails to specify the streets intended to be occupied. That the Metropolitan Street-Railroad Company was established to compete with the Atlanta Street-Railroad Company, and that by uniting said companies it is sought to destroy competition and to create a monopoly. That such was the purpose of Hurt and his associates in obtaining control of said companies, and such is now their purpose. That the ordinance relied on by them to make the changes and connections hereinbefore charged is void, because it seeks to authorize different companies to connect their lines, and thereby to create a monopoly. It also attempts to grant exemptions, which is violative of that part of the constitution which requires that all laws shall be uniform in their operation. That the Atlanta Railway & Power Company has usurped the franchises of the Metropolitan Street-Railroad Company, and that the court has no power to pass an order for the sale of said franchises, which could be obtained only by complying with the law as expressed in section 2167, pars. 11, 12, and section 2168, of the Code. Plaintiff states that he was not a party to said sale, and that since the purchase of a share of stock in 1890, which is now held by him, he has not attended a meeting of the Metropolitan Street-Railroad Company, nor has he been notified of any meeting to be held. That he has not consented to an amendment of its charter, and that he has always opposed the construction of a line in front of his residence. The Atlanta Railway & Power Company and the Atlanta Street-Railroad Compa-

ny filed a joint demurrer and a joint answer. The answer states that the Atlanta Railway & Power Company has acquired the rights and properties of the other defendants, and is alone interested in this suit. It admits that the franchise of the Metropolitan Street-Railroad Company to be a corporation still exists, but says that this property and other franchises were conveyed by its receiver. It denies the allegations of damage made by plaintiff and also the allegations in reference to the creation of a monopoly. Defendant contends that the construction of said railway would not be an additional servitude, entitling the owners of abutting property to complain of damage; that the plaintiff has no right to maintain his suit; that such right only exists in the state, and that the plaintiff cannot collaterally attack the decree under which the receiver's sale of said franchises and rights was made; and also that the plaintiff is barred by laches.

Julius L. Brown and Albert H. Cox, for plaintiff in error. Payne & Tye and King & Anderson, for defendants in error.

COBB, J. (after stating the facts). 1. Corporations (using that term to designate organizations merely claiming or alleged to be corporations, as well as those which are in all respects legally constituted) have been divided into three classes,—corporations de jure, corporations de facto, and corporations by estoppel. Corporations de jure have been defined to be those whose legal right to exist cannot be questioned even by the state itself. The expression "de facto corporations" is generally used to denote associations exercising corporate powers under color of a more or less legal organization. One who has contracted with a corporation as such is estopped to deny its existence as a corporation at the date of the contract in any suit arising thereunder, and such a corporation has been, it seems to us with great propriety, designated a "corporation by estoppel." See notes of John Lewis, Esq., to Vanneman v. Young, 3 Am. R. & Corp. Cas. 662 (s. c. 52 N. J. Law, 403, 20 Atl. 53), and authorities there cited. Where there cannot be a corporation de jure, there cannot be one de facto. In order to constitute a corporation de facto, it is necessary that there should be either a charter or a law under which such a corporation could exist with the powers it assumes to exercise, and a colorable compliance with the requirements of the charter or the law, and a user of the rights claimed under the same. See Georgia S. & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 316, 21 S. E. 701, and cases cited. Whether or not the rule that there must be a charter or a law authorizing the creation of a corporation, and a colorable compliance with the terms of such charter or law, applies to corporations by estoppel, is one upon which there is some conflict of authority.

The better doctrine seems to be that estoppel prevails notwithstanding the law under which the corporation claims to exist may be unconstitutional or otherwise invalid. See the notes to Vanneman v. Young, supra, and cases therein cited; Georgia S. & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 315, 21 S. E. 701, and cases cited. The power to create corporations resides in the state. If there is nothing in the constitution limiting or restricting the authority of the law-making body in this respect, this power is to be exercised by it. When this power is possessed by the state legislature, the question whether a given company of individuals has a legal corporate existence is to be determined by ascertaining whether the legislature has given its consent to the existence of such a corporation, either by the passage of a general law providing the manner in which corporations of that character may be formed, or by a special charter, if the legislature has authority to create corporations in this manner, and by ascertaining further whether there has been a compliance with the terms of the charter, whether the same be granted by special enactment, or under the provisions of a general law. If the corporation has a charter issued to it in the manner prescribed by law, and has in its organization complied fully with every requirement of the charter, then, even as against the state, the corporation has a right to exist, and is technically a de jure corporation. In order, therefore, to constitute a de jure corporation, when the power to create corporations is vested in the legislature, it is necessary that the legislature should consent to the existence of the corporation in the manner and form in which it is asserting its right to exercise corporate functions. If the lawmaking body gives its consent that a company of individuals may exercise corporate power in a given way, the right of such company of individuals to exercise such authority cannot be attacked collaterally by any one against whom the corporation may be proceeding within the limits of its organic powers; and not even the state itself will be permitted to question the right of the corporation to exist and exercise the powers which the legislature has consented it should exercise, so long as the corporation is not guilty of any act which would be a sufficient reason for the state to institute a proceeding and forfeit the charter of the corporation. If a corporation has been formed, and is exercising corporate authority under color of a charter irregularly granted, or under a law authorizing the grant of corporate powers to such a corporation, it is well settled that defects in the organization of such a corporation can be cured by an act of the legislature which either expressly or impliedly declares that such corporation has a right to exist without regard to such defects. 1 Thomp. Corp. § 512; 1 Mor. Priv. Corp. § 20; Tayl. Priv. Corp. § 157; Central Agricultural

& Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120. This has been held to be true even in cases where the lawmaking power of the state was prohibited by the constitution from creating the corporation in the first instance. See *Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co.*, supra. If the lawmaking power of the state can, by giving its consent to a company of individuals to exercise corporate functions, confer upon such a company corporate authority which it would not have in the absence of legislative consent, on account of the failure to comply with the requirements which the law imposed upon persons desiring to form corporations, we can see no good reason why a company of individuals assuming to be a corporation, under an erroneous impression as to their right to exercise corporate powers, might not become a corporation de jure by subsequent legislative consent. A company of individuals who assume to act as a corporation, when they have not complied with the law providing for the organization of such a corporation, are as guilty of a usurpation as would be a company of individuals who assume to act as a corporation without any authority of law whatever. As against the state, neither company has become a corporation, nor can become one without the consent of the state; and, if one can become so with such consent, it would seem to follow that the legislature has authority to declare that the other might, also. In the absence of constitutional limitations, the lawmaking body of the state has authority to declare upon what terms individuals may exercise corporate powers, and also that an existing company of individuals shall be thereafter a corporation; and, if such company of individuals proceed under the authority thus granted, they will be, even as against the state itself, a legally organized corporation. The important thing to be ascertained is whether the state, through its constituted authorities, has given its consent that the company of individuals shall be a corporation and exercise corporate powers. The manner in which the lawmaking power gives its consent is, in the absence of constitutional restrictions, entirely immaterial. Any act of the legislature from which its consent can be inferred that a certain body of individuals shall be a corporation and exercise corporate powers of a certain character is all that is necessary to confer upon such individuals these powers. The legislature can give its consent that those who have usurped corporate power in the past may lawfully exercise such power in the future; and this is true whether such usurpation has been done under color of a charter issued pursuant to a law, or under color of a charter issued by an officer in violation of law. Even if the general assembly, as was contended in the argument, had no authority at the time that the general railroad act of 1881 was passed to declare that charters to rail-

roads could be issued by the secretary of state, and such act was violative of that provision of the constitution which prohibits the general assembly from devolving upon officers of the executive department either legislative or judicial duties, this would not prevent the general assembly from afterwards expressly recognizing and giving its consent to the existence of corporations formed under this alleged invalid law.

By an application of the principles above announced it is to be determined whether the Atlanta Railway & Power Company is a corporation of this state authorized to exercise the corporate powers claimed by it as a street-railway company. On the 16th day of May, 1891, what purported to be a charter under the general railroad law of 1881 (Code 1882, § 1689a et seq.) was granted to the Atlanta Consolidated Street-Railroad Company. The name of this company was afterwards changed to the Atlanta Railway & Power Company. On August 31, 1891, an act was approved declaring that all general laws of this state for the incorporation of railroads were applicable to all street and suburban railroad companies to be thereafter incorporated. 1 Acts 1890-91, p. 168. On the same day an act was approved which declared that "all charters heretofore granted by the secretary of state to street and suburban railroad companies are hereby confirmed and declared to have had full effect from their dates." 1 Acts 1890-91, p. 169. In *Dieter v. Estill*, 95 Ga. 370, 22 S. E. 622, it was held that in 1889 the general assembly could constitutionally grant a special charter to a street-railroad company, even if the act of 1881 providing for the incorporation of railroad companies was a general law, within the meaning of that provision of the constitution which declares that no special law shall be passed in any case for which provision has been made by an existing general law, for the reason that the act of 1881 did not apply to street-railroad companies. There was on May 16, 1891, no law of this state authorizing the secretary of state to grant a charter to a street-railroad company. It is unnecessary to determine what was the legal status of the Atlanta Consolidated Street-Railroad Company between the date of the alleged charter issued to it by the secretary of state and the date of the act of the general assembly purporting to confirm such charter. The question to be determined is, what was the legal status of this alleged corporation after the passage of the confirmatory act of 1891? It is not claimed that it is a corporation by estoppel as against the plaintiff in error, for he has had no dealing with the persons composing this alleged corporation which would estop him from bringing in question their right to exercise corporate powers. If they are exercising such powers under color of the confirmatory act of 1891, their company would, under the principles above referred

to, clearly be a de facto corporation from the date of the passage of that act, and as such entitled to exercise the powers sought to be exercised by it as against any one except the state. But does not the confirmatory act of 1891 do more than merely furnish color of authority to this company? When the general assembly convened in 1891 the condition of affairs in reference to street-railroad companies in this state was this: There were street-railroad companies claiming to be corporations under authority of charters issued to them by the secretary of state, which conferred upon them such of the powers embraced in the general railroad law of 1881 as were applicable to companies of that character. There must have been doubt in the mind of the general assembly at that time as to whether the general railroad law of 1881 was applicable to street-railroad companies. The above-mentioned legislation during that session on the subject of street railroads is all that is necessary to show the existence of this doubt. Street-railroad companies were in existence, assuming to exercise the corporate powers mentioned in the general law of 1881 under charters granted by the secretary of state; and it could be easily foreseen that other street-railroad companies were to be organized in the future. It was incumbent, therefore, upon the general assembly, in order to relieve doubt and avoid confusion in reference to the matter, to pass legislation which would fix the legal status of the existing street-railroad companies, and also provide for the incorporation of such companies in the future. It is to be kept in mind that at the time this session of the general assembly convened there was nothing in the constitution of the state which at all restricted the power of the general assembly as to the manner in which charters to street-railroad companies should be granted; and there was in existence no general law on the subject which could, in any view, have the effect of prohibiting the passage of even special charters, if the general assembly saw proper to do so. This being true, the general assembly was in complete control of this matter. In the exercise of the power it thus had, it passed, as above appears, two acts, each approved by the governor on the same day,—one providing that in the future all street and suburban railroad companies might be incorporated under the provisions of the general railroad law of 1881, and the other that the charters theretofore issued by the secretary of state under that law should be confirmed and made valid. Both of these acts are general laws. One applies to all street-railroad companies thereafter organized; the other, to all street-railroad companies theretofore organized under charters granted by the secretary of state. See *Trust Co. v. Dottenheim*, 107 Ga. 608, 34 S. E. 217. The power of the general assembly to pass these two general laws at that time cannot be at all questioned. The

street-railroad companies organized prior to the confirmatory act of 1891 were not organized under any charter which could be lawfully issued to them, nor was there any law for the incorporation of such companies, and it may be that they were not even corporations de facto. But, be this as it may, they were in existence, and were assuming to exercise corporate functions which could only be granted by the state; and, even treating them as bald usurpers of every power they attempted to exercise, the general assembly, the body vested with authority to create corporations, had ample power at that time to forgive the usurpation and say to them, "For the future you may legally exercise corporate powers of that character which you have in the past merely usurped." Is not the true construction of the confirmatory act of 1891 one which would make the general assembly simply say to these usurping corporations, "Henceforth you have the consent of the state to exercise powers which heretofore you have never had"? Whether the general assembly could at that time confirm and render valid acts of these corporations performed prior to the passage of the confirmatory act it is not necessary in the present case to decide, but that the general assembly had authority to say to them that they might in the future exercise the corporate powers attempted to be conferred in the invalid charter which they obtained is beyond all question. If this is true, every street-railroad company organized under a charter granted by the secretary of state prior to the passage of the confirmatory act of 1891, would, upon the acceptance of the provisions of that act, become, not only as to every person who dealt with it, and every person against whom it proceeded under the authority of the general railroad law of 1881, but also as against the state itself, a de jure corporation. The acceptance by the corporation of the provisions of the confirmatory act may be expressed by resolution upon its minutes, or implied from the fact that after that date it sought to exercise powers which could be lawfully exercised only under the provisions of the act. A street-railroad company, after the date of this act, found attempting to exercise corporate powers, would be presumed to be doing so legally; the presumption being that it was acting under the confirmatory act of 1891, rather than under the prior invalid charter, without regard to the confirmatory act. And this presumption would prevail until it was shown that it had expressly repudiated any right conferred upon it by the confirmatory act of 1891.

2. The constitution declares that "the general assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities." Civ. Code, § 5782. It is contended that one effect of this provision of

the constitution is to prohibit the general assembly from delegating to any public officer the authority to grant a charter to a street-railway company, but that this authority must be exercised directly by the general assembly. If it is meant by this contention that the general assembly cannot constitutionally vest in any public officer a discretion with reference to what corporate powers shall be given to street-railway companies, the contention is probably well founded. But if it goes to the extent of asserting that it is beyond the constitutional power of the general assembly, after providing what powers shall be granted to street-railway companies, and what shall be done by them in order to acquire such powers, to vest in some public officer of the state simply the duty of granting a charter authorizing corporations to exercise the powers set forth in the legislative act upon conforming to certain regulations, then the contention would not be well founded; and there seems to be no good reason why an act providing for the incorporation of street-railway companies, and authorizing the secretary of state to grant them a charter, could not have been constitutionally passed in 1891, though it was within the power of the general assembly at that time—certainly prior to the passage of the act of August 31st of that year, providing a general law for the incorporation of street-railway companies—to grant by legislative enactment a special charter to a street-railway company. It is further contended that the provision of the constitution above quoted prohibits the general assembly from granting, either by a special law, or under the operation of a general law, a charter to a street-railway company which was to operate within the limits of an incorporated town or city, until the consent of the town or city was obtained to the incorporation of the company. The provision of the constitution does not so declare. The consent of the authorities of a city is not a condition precedent to the granting of a charter to a street-railway company. The consent of such authorities is, under the constitution, simply a condition precedent to the exercise by the company of the charter power to construct a railway upon the streets of the city. The general assembly could in 1891 incorporate, either by a special or a general law, a street-railway company; and, no matter how broad the act of incorporation was with reference to the power of the company to construct a street railroad, it would give the company no authority to construct the road upon the streets of an incorporated town or city until permission had been obtained for that purpose from the corporate authorities. The corporation might be organized, and might be in full legal existence and able to exercise all the corporate powers granted; but, under the constitution, before it could exercise any power with reference to using

the streets of any town or city it was required to obtain permission from the municipal authorities. But the permission of these authorities is not, under the constitution, a condition precedent to the obtaining of the charter, but is only a condition precedent to the use of the streets.

3. It is contended that, even if the effect of the confirmatory act of 1891 would in any case make a street-railroad company theretofore existing a legal corporation, it will not in the case of the Atlanta Railway & Power Company, for the reason that the charter granted to it by the secretary of state, and claimed to have been afterwards confirmed by the act above mentioned, contained provisions in reference to the purchase of lines of railway which were in contravention of that provision of the constitution declaring that the general assembly should not have any power to authorize any corporation to buy shares in any other corporation, or to make any contract or agreement whatever which might have the effect, or was intended to have the effect, of defeating or lessening competition or encouraging monopoly. There are no provisions in the charter of the Atlanta Railway & Power Company in violation of that provision of the constitution referred to, and, even if it could be shown that the company had entered into contracts or agreements which would be held in violation of the constitution, this would not interfere with its right to exist as a corporation, or to exercise all the legitimate powers which had been conferred upon it, or to hold and enjoy property to which it had acquired title, so long as the state itself did not see proper to proceed against it upon the ground that it had acquired its property, or some part thereof, in a manner which was opposed to the policy of the law as it is set forth in the constitution of the state. The state alone can raise questions of this character. They cannot be raised in a controversy between the corporation and a private citizen. See *Mortgage Co. v. Tennille*, 87 Ga. 30, 13 S. E. 158.

4. It is further contended that, as the constitution declares that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid (Civ. Code, § 5729), the court erred in refusing to grant the injunction in this case; the plaintiff making a *prima facie* case, and showing that his property would be damaged by the operation of the street railway in the street adjacent to his residence. In reference to this contention it is to be said that the evidence before the judge was conflicting on the question as to whether the building and operation of the street railroad would damage the plaintiff's property; and the refusal to grant the injunction being, in effect, a finding that it would not be damaged, this court will not interfere with the discretion of the judge in refusing to grant the injunction. In addition to this, it is to

be said that since the decision of this court in *Moore v. City of Atlanta*, 70 Ga. 611, it has been the settled law of this state that the court would not by an interlocutory injunction interfere with a public improvement in which no part of the property of the citizen was actually taken; and attention is called in the opinion in that case to the fact that the supreme court of Illinois had rendered a decision to the same effect when dealing with a constitutional provision similar to ours, and from which ours was taken. See, also, in this connection, *Hurt v. City of Atlanta*, 100 Ga. 280, 28 S. E. 65.

5. It is further contended that the charter of the Atlanta Railway & Power Company is invalid because it attempts to confer upon it the right to carry freight, for the reason that there is no law authorizing the granting of a charter to a street-railroad company to become a common carrier of freight. Even if there is contained in the charter of this company the power to become a common carrier of freight, so far as the present record is concerned, it does not appear that the company is attempting to exercise this power; and there is nothing to which our attention has been called in the present record to indicate that it is the intention of the railway company to use for this purpose the line of railway being constructed adjacent to the plaintiff's property. If the power to authorize such a company to carry freight does not exist in the general assembly, so much of the charter as refers to this power would be simply inoperative, and certainly would not affect its right to exercise the powers lawfully conferred,—at least, so long as it does not attempt to exercise the power to carry freight.

6. By reference to the statement of facts which precedes this opinion, it will be seen that there were two lines of railway from the center of the city of Atlanta, going out in the direction in which the plaintiff's property is located; one formerly owned by the Atlanta Street-Railroad Company, which, after going a short distance on Washington street, left that street at Woodward Avenue, and the other, formerly owned by the Metropolitan Street-Railroad Company, which entered Washington street at Clark street, and then proceeded along Washington to the city limits; the plaintiff's residence being located on Washington street, between Clark street and Woodward avenue. The property of both of the companies above named having been acquired by the Atlanta Railway & Power Company, it is its purpose to build its railway along Washington street from Woodward avenue to Clark street, so as to have a continuous line along Washington street from the point where the Atlanta Street-Railroad Company entered that street. As the Atlanta Railway & Power Company has authority to construct a street railroad along the streets of the city of Atlanta, if it has the permission of the city authorities, the fact that the construction of the line on Washington street from Wood-

ward avenue to Clark street would have the effect of uniting lines formerly belonging to two separate and distinct companies would furnish no sufficient reason for enjoining the construction of this line at the instance of an owner of property situated between Woodward avenue and Clark street, even though such property owner might be the holder of a share of stock in one of the companies whose property had been acquired by the Atlanta Railway & Power Company. There was evidence before the judge showing that this company had acquired the property of the other two companies, and, having acquired this property, there necessarily went with it the right to use it for any purpose and in any way in which the purchaser saw proper, not prohibited by law or by its charter; and the fact that these two lines of railway had been formerly owned by two separate and distinct companies would constitute no reason for preventing a third company, which had become the owner of the property of both, from laying an additional line of track, and connecting the two tracks of the other companies, and using the tracks so connected in such a way as was for the interest of the company, provided no obligation imposed upon the company by their charter, or the terms of the purchase, or by the law of the state was violated.

7. In the confirmatory act of 1891 it was provided that "when any street railroad company, by incorporation or otherwise under general law, as aforesaid, has succeeded by purchase, or by such incorporation under general law, to the franchise or road of any other or former company or road, such successor company shall be liable for and shall carry out and discharge any and all obligations of such former company or road as to schedule, line or route as such former company was liable for or subject to." It is contended by the plaintiff that if the Atlanta Railway & Power Company should build the line from Woodward avenue to Clark street, and thus connect the lines formerly owned by the two companies whose property it acquired, there would be a change in the line or route of these old companies, which would necessarily bring about a change in the schedule, and that this would certainly be the case if the company abandoned the line on Woodward avenue and the line on Clark street, as well as the line on Pulliam street connecting therewith. The record does not disclose either any effort or intention on the part of the Atlanta Railway & Power Company to abandon the lines above referred to. This is probably why the judge refused to grant an injunction to restrain them from abandoning these lines; being of the opinion that there was not a sufficient showing before him that such abandonment was so probable that an injunction should issue to prevent it, even if the plaintiff would be entitled to an injunction if such abandonment was attempt-

ed. It is therefore not necessary to determine in this case whether, if the Atlanta Railway & Power Company were to attempt to abandon the lines on Woodward avenue and Clark and Pulliam streets, the plaintiff would have a right to complain, either as owner of property adjacent to one of these lines, or as the holder of stock in the company which was the former owner of one of the lines. But certainly an actual abandonment by the railway company of the Woodward avenue line and the Clark and Pulliam street lines would not be a sufficient reason for enjoining the company from building a line from Woodward avenue to Clark street, if the building of such line was authorized by the charter of the railway company, as well as by the city authorities of Atlanta. The building of this line, and the operation of cars thereon, would not in any way affect the rights of the plaintiff as the owner of property on Pulliam street, or as a stockholder in the company formerly owning the line of road on Pulliam street, or any right, if there is any, in the Woodward avenue line. If he has any rights, as property owner or otherwise, in the other lines, such rights are not to be protected by preventing the construction of the additional line, but may be asserted whenever there appears to be a present purpose on the part of the railway company to abandon the lines in the continuance of which he may have a legal interest. What will therefore be determined in the present case is whether the Atlanta Railway & Power Company has authority to build its line along Washington street from Woodward avenue to Clark street; and what will be the rights of the plaintiff, if he has any, under the confirmatory act of 1891, in reference to the lines, routes, and schedules of the Woodward avenue line, and the lines of which the Pulliam and Clark street lines formed a part, will not now be determined. It is entirely possible for the Atlanta Railway & Power Company to build a line from Woodward avenue to Clark street, and operate its cars upon that as a part of its Washington street line, and at the same time operate cars upon the route of which the Woodward avenue line formed a part, as well as upon the route of which the line along Pulliam and Clark streets formed a part, in exact compliance with the obligations which rested upon the companies which were the former owners of these lines, as to schedule, lines, and routes.

8. Another reason urged why the court erred in not granting an injunction is that the ordinance of the city of Atlanta under which the Atlanta Railway & Power Company claims the right to construct its line between Woodward avenue and Clark street is void, for the reason that it is in conflict with a prior ordinance of the city declaring upon what terms the right to use the streets by street-railway companies shall be grant-

ed. If there is anything in the charter of the city of Atlanta which prohibits the mayor and general council from passing a special ordinance in conflict with a prior general ordinance, our attention has not been called to it; and, unless there is a provision in the charter to that effect, the municipal legislature would have a right to pass an ordinance granting to a street-railroad company the right to use the streets upon certain conditions, or without conditions, notwithstanding the fact that there was in existence at the time of such grant an ordinance providing generally that street-railroad companies should be required to conform to certain named conditions. Especially would this be true in the present case, where the conditions from which the Atlanta Railway & Power Company was relieved, and which is the subject-matter of the plaintiff's complaint, were matters in which the city authorities, representing the entire people of the city, alone were interested, and which did not concern any individual citizen.

9. When a street-railway company is authorized to construct a line of railway in the streets of a town or city, after permission of the municipal authorities has been obtained for that purpose, and there is nothing in the charter of the company which expressly restricts it to building a single track along a street, such charter would authorize the building of a double track, provided the consent of the city authorities was obtained to the construction of the double track along its streets. There is no merit in the contention that a double-track railroad is two railroads, and that a single track is one railroad. The Atlanta Railway & Power Company may, under its charter, build as many double tracks along the streets of the city of Atlanta as it may lawfully obtain the consent of the city authorities to construct.

10. The evidence which was rejected by the judge does not seem to have been either material or relevant. After a careful consideration of the case as a whole, the conclusion is reached that the judge did not err upon any matter of law which was passed on by him, and did not abuse the discretion vested in him as to any matter of fact where the evidence was conflicting. Judgment affirmed. All the justices concurring.

(113 Ga. 609)

BUNN et al. v. HENDERSON.

(Supreme Court of Georgia. May 24, 1901.)

CERTIORARI—NOTICE TO DEFENDANT—TIME OF GIVING.

1. The notice which section 4644 of the Civil Code requires a plaintiff in certiorari to give to the defendant therein must, in order to be legally complete and sufficient, affirmatively show that the petition for certiorari has been sanctioned by the judge.

2. It is too late to give the notice required by that section after the expiration of the term

of the superior court to which the certiorari was returnable and at which it was triable.
(Syllabus by the Court.)

Error from superior court, Ware county; Joseph W. Bennet, Judge.

Application of J. R. & T. Bunn for a writ of certiorari against J. J. Henderson. Petition dismissed, and plaintiffs bring error. Affirmed.

Simon W. Hitch, for plaintiffs in error.
J. Walter Bennett, for defendant in error.

LEWIS, J. J. R. & T. Bunn presented to the judge of Ware superior court their petition for certiorari against J. J. Henderson. This petition was sanctioned on March 18, 1899, and filed on March 20, 1899. On August 16, 1900, the case came on to be tried, and the defendant moved to dismiss the petition for certiorari on the ground that no notice of its sanction had been served upon him, as required by law. The bill of exceptions states that the evidence of service was as follows: "Georgia, Ware County. I have this day served the plaintiff, J. J. Henderson, with written notice that the within certiorari would be heard at the April term of Ware superior court, this 1st day of August, 1899. T. J. McLellan, Sheriff Ware County." Presumably this was an entry made upon the petition for certiorari, though there is nothing in the bill of exceptions, which was unaccompanied by any record, to enlighten us on the subject. The court granted an order dismissing the petition on the ground stated, and the plaintiffs excepted.

1. Section 4644 of the Civil Code declares: "The plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of certiorari, and also the time and place of hearing, at least ten days before the sitting of the court to which the same shall be returnable, and in default of such notice (unless prevented by unavoidable cause) the certiorari shall be dismissed." This provision of law has been upheld by numerous decisions of this court. See *Ayer v. Kirkland*, 65 Ga. 303; *Ware v. Fambro*, 67 Ga. 515; *Bryans v. Mabry*, 72 Ga. 208; *Franke v. May*, 86 Ga. 659, 12 S. E. 1068; *Asher v. Cape*, 95 Ga. 31, 22 S. E. 41. The cases of *Ware v. Fambro*, 67 Ga. 515, and *Asher v. Cape*, 95 Ga. 31, 22 S. E. 41, are, however, to be distinguished from the other cases cited and from the case at bar. In *Ware v. Fambro* it was held that a notice that the judge of the superior court had granted a certiorari was equivalent to a notice that he had sanctioned it, and was in substantial compliance with the Code; while in *Asher v. Cape* this court decided that an acknowledgment in these words: "Due and legal service of the within petition for certiorari and certiorari acknowledged; notice of time and place of hearing waived,"—indorsed on the petition, and signed by the

attorney for the defendant in certiorari,—was sufficient notice that the defendant in certiorari had not only waived written notice of the time and place of hearing, but had also received due and legal notice of the judge's sanction. There is nothing in these two cases conflicting with what is laid down in the others cited. All recognize the principle that it is the right of a defendant in certiorari to have written notice of the sanction of the writ of certiorari in the manner and within the time prescribed by the Code section which has been quoted. In this case the bill of exceptions, which is our only source of information, does not show that the defendant was ever notified of the sanction of the writ by the judge of the superior court. Even if the service by the sheriff is to be treated as the proper manner of giving the notice required by the statute, the sheriff's return does not show that the petition was ever sanctioned or acted on by the judge at all. The trial court did not err, therefore, in dismissing the certiorari for the reasons stated.

2. It appears that the petition for certiorari was filed March 20th, and ought to have been returnable to the April term of Ware superior court, which met on the third Monday in April following. Presumably this was done, as it will be taken for granted, in the absence of proof to the contrary, that the clerk did his duty. Section 4642 of the Civil Code makes a writ of certiorari returnable to the next superior court after its issuance, unless the court sits within 20 days thereafter. In the present case more than 20 days elapsed between the time the writ was applied for and the sitting of the court. The notice given by the sheriff was dated August 1, 1899, several months after the return term of the writ, and, even if it had been in due form, it was served too late. Section 4646 requires the answer to the petition to be filed on the first day of the term to which it is returnable, unless further time be given; and section 4644, as has been seen, expressly requires that 10 days' notice be given the defendant in certiorari before the sitting of that term of the court to which the case is returnable. Thus, it appears that in the present case the notice given was, in any event, too late, and the judge, therefore, did not err, in any view which may be taken of the case, in dismissing the certiorari. Judgment affirmed. All the justices concurring.

(113 Ga. 392)

RIVES et al. v. RIVES et al.

BURT et al. v. SAME.

(Supreme Court of Georgia. May 21, 1901.)
CROSS BILL OF EXCEPTIONS — INJUNCTION —
CANCELLATION OF BOND.

1. When the supreme court has before it both a main bill of exceptions and a cross bill of exceptions, and the latter presents a question which is controlling upon the case as a whole,

it will be disposed of first; and, if the judgment therein excepted to is reversed, the writ of error issued upon the former will be dismissed.

2. The plaintiffs in the present case did not allege facts entitling them to any of the relief for which they prayed.

(Syllabus by the Court.)

Errors from superior court, Hancock county; S. Reese, Judge.

Equitable petition by J. H. Rives and others against George S. Rives, Frank W. Burt, and others. Judgment dismissing the suit as to Frances W. Burt and Lily W. Little on demurrer, and plaintiffs bring error, and for refusal to sustain the general ground of their demurrer Burt brings cross error. Writ of error on main bill of exceptions sustained, and cross bill reversed.

Hardeman, Davis & Turner, and R. H. Lewis, for plaintiffs in error. Hall & Wimberly and W. H. Burwell, for defendants in error.

LUMPKIN, P. J. An equitable petition was filed in the superior court of Hancock county by J. H. Rives and two others. The defendants therein named were George S. Rives and Mrs. M. E. Rives, of that county, as executor and executrix of the will of George S. Rives, deceased; Mrs. Frances W. Burt, as guardian of Miss Lily W. Little; Miss Little herself (these two being of Bibb county); and Thomas S. Reese, as ordinary of the county first named. The following embraces a substantial statement of so much of the contents of the petition as it is now material to consider:

Petitioners are children, heirs at law, and legatees of George S. Rives, deceased, and the executor named is their brother. In 1879 or 1880 the said Frances W., being then the widow of Joseph F. Little and the administratrix upon his estate, received as such \$11,200, to which she and Miss Little, her daughter, were entitled as his heirs. She loaned the entire sum to Baker & Co., an insolvent partnership, and because of its insolvency the loan was never at any time after the making thereof collectible, but was in fact a total loss to Little's estate. Subsequently, Mrs. Little, by another marriage, became Mrs. Burt; and, having been appointed guardian of her said daughter, gave a bond as such in the sum of \$12,000, which George S. Rives, deceased, signed as surety. Notwithstanding the facts with respect to the loan to Baker & Co., Mrs. Burt charged herself as guardian with one-half of the \$11,200; but as no part of the same was ever in her hands as guardian, or could have been collected after she became guardian, she was not, as such, properly or lawfully chargeable therewith. Mrs. Burt and Miss Little assert and claim that because of the suretyship of George S. Rives, deceased, upon the guardian's bond, his estate is liable to the ward for divers sums, including one-half of the above-mentioned \$11,200, with interest there-

on, and she is threatening to bring suit upon the bond. George S. Rives, who is the managing executor of the testator's estate, has obtained from the court of ordinary of Hancock county an order authorizing him to settle Miss Little's demand by paying to her the sum of \$7,000, and he has agreed to do so. The order just referred to was granted upon an ex parte application made by the executor, and without evidence, other than his statement to the court, that in his judgment it was to the best interest of the estate, in order to save litigation, that said sum should be so paid. When George S. Rives, deceased, signed the guardian's bond, he was insane, and therefore incapable of executing any contract. "The said George S. Rives, executor as aforesaid, admits that his father, the said George S. Rives, was insane at the time he executed said bond, but sets up as a reason for his conduct in procuring said order of settlement that, as he had propounded the will of his father as executor, he was doubtful as to whether he could make said question of said bond being void by reason of the insanity of your petitioners' father. Your petitioners submit that this is no reason why he should pay said bond or any part thereof, and for him to do so would be a legal fraud upon your petitioners and the other heirs at law of your petitioners' father, and that it would be inequitable and unjust for him to do so." For the reasons stated, the testator's estate is not liable on the guardian's bond. Under the will of George S. Rives, deceased, "said executors are required to keep the estate together until the youngest child shall have reached his majority, but the will also gives said executors the right to pay off to the legatees under said will certain portions of said estate as they reach their majority. Your petitioners have reached their majority, but said executors refuse to account to them for any part thereof, as contemplated under their father's will, alleging as a reason therefor that they cannot do so as long as said bond is outstanding against them. Your petitioners charge that to keep them longer out of their patrimony under said will, by reason of the fact that there is a bond outstanding upon which there is no liability, and upon which said managing executor admits there can be no liability, by reason of the unfortunate condition of your petitioners' father's mind at the time he signed said bond, is inequitable and unjust." The prayers of the petition were for process; that "the said George S. Rives and M. E. Rives, executors as aforesaid, be restrained from paying out said sum of seven thousand dollars (\$7,000), or any other sum, to the said Lily W. Little on account of said bond"; that she "be enjoined and restrained from receiving said sum of money, or any part thereof, from said executors, and that she be enjoined and restrained from bringing any suit therefor whatever; * * * that said bond be delivered up and canceled, so

far as your petitioners' father's estate is concerned"; and that petitioners have "such other and further relief as to the court may seem meet and proper."

Before the court finally passed upon a demurrer filed at the appearance term by Mrs. Burt and Miss Little, the plaintiffs amended their petition by alleging that "the obtaining of said order from the ordinary and effort to pay said seven thousand dollars is collusive between the said executors and the said Lily W. Little and those who were then representing her; that the same is a fraud upon the rights of your petitioners, and is contrary to equity and good conscience." The grounds of the demurrer above referred to were as follows: "(1) That the petition referred to three papers, to wit, the guardian's bond, the will of George S. Rives, Sr., and an order alleged to have been passed by the ordinary of Hancock county authorizing George S. Rives, executor, to make a settlement of the demand of Lily W. Little against the estate of George S. Rives; but neither of said papers is set out in substance in the petition, nor is the petition upon which the order was obtained from the court of ordinary set out in said petition, nor are copies of any of said papers attached as exhibits to said petition. (2) There is no equity in said petition. (3) There is a full and complete remedy at law for all the matters and things set up in said petition. (4) The petition does not pray substantial relief against any defendant residing in the county of Hancock, the only defendants against whom substantial relief is prayed [being] Frances W. Burt and Lily W. Little, who reside in the county of Bibb, state of Georgia, as shown by said petition."

As will have been observed, the first ground of the demurrer presented the point that proper exhibits were not attached to the petition. "This was obviated by consent of counsel to the use of the documents in evidence which should have been attached as exhibits," leaving the three remaining grounds of the demurrer to be passed upon by the court. In other words the first ground was waived. The court passed the following order: "The above-stated case having been set for hearing on this day, and the same coming on to be heard on the demurrer filed by Frances W. Burt and Lily W. Little, the two defendants who reside in Bibb county, it is, after argument had on the demurrer, ordered and adjudged that said demurrer be sustained, and that the bill be dismissed as to the said two defendants on the third and fourth grounds of the demurrer." The plaintiffs sued out a bill of exceptions, alleging error in sustaining these two grounds of the demurrer, and in dismissing the petition as to Mrs. Burt and Miss Little. The defendants first named sued out a cross bill of exceptions, complaining of the refusal of the court to sustain the second, or general, ground of their demurrer. We

find in the transcript of the record what purports to be a copy of the will of George S. Rives, deceased; but it should not be there, for a copy of that document never became a part of the petition. Besides, it is now well settled that in dealing with demurrers nothing can properly be looked to but the pleadings. See *Anderson v. Lumber Co.*, 110 Ga. 263, 34 S. E. 365, and cases cited. We shall pursue that course in the present instance.

It is proper to state just here that on the 26th of last March we rendered judgments dismissing the writs of error issued upon both bills of exceptions. In the transcript of the record first sent up the word "collusive," appearing in the above-mentioned amendment to the petition, was improperly written "conclusive." Our attention not having been called to this error, we thought the main bill of exceptions was prematurely sued out, because we did not regard the petition as making a joint case against all of the defendants, and consequently were of the opinion that when that bill of exceptions was certified the case was still pending in the trial court between the plaintiffs and the defendants other than Mrs. Burt and Miss Little. We dismissed the writ of error issued upon the cross bill of exceptions because of the affirmance of the judgment below resulting from the disposition made of the first writ of error. On the hearing of a motion to reinstate the mistake in transcription was pointed out; and, upon the showing made by counsel for the plaintiffs in error in the main bill of exceptions, we concluded that, in failing to bring earlier to our knowledge the existence of this mistake, they were not in such laches as to relieve us of the duty of dealing with the case as it would stand upon a correct transcript of the record. Inserting the word "collusive" in the place of the word "conclusive," the petition, as amended, made a joint action against all the defendants. Therefore, under the rule laid down in *Sutherland v. Underwriters' Agency*, 53 Ga. 443, and followed in *McGaughey v. Latham*, 63 Ga. 67, the plaintiffs were entitled to sue out their bill of exceptions, in order, by reversing, if they could, the judgment of dismissal, "to restore the joint action below." We therefore have set aside the judgments dismissing the writs of error, and are now disposing of the case upon its merits. As it really turns upon, and is governed by, the controlling question presented in the cross bill of exceptions, we will deal first with it; pursuing, in so doing, the practice laid down in *Cheshire v. Williams*, 101 Ga. 814, 29 S. E. 191, and followed in *Jackson v. Warthen*, 110 Ga. 812, 36 S. E. 234, and the cases therein cited.

We think the court ought to have sustained the general ground of the demurrer. The petition does not allege the insolvency of either the executor or executrix, nor set forth any fact showing that the payment of the

\$7,000 to Miss Little would in the slightest manner interfere with the plaintiffs availing themselves of whatever right, if any, they have under the will of enforcing the payment to them of their legacies. Plainly, then, the plaintiffs made no case for an injunction. The payment of the \$7,000 to Miss Little could in no way injure them if George S. Rives and Mrs. M. E. Rives are financially able to respond to any judgment against them which the plaintiffs may hereafter obtain on account of their legacies. There is no hint in the petition that these two defendants are not so able.

Nor does the petition make a case entitling the plaintiffs to a cancellation of the bond. In view of the solvency of both George S. Rives and Mrs. M. E. Rives, which must be assumed, the plaintiffs have no more need of cancellation than of injunction. That the executor and executrix were refusing to exercise in favor of the plaintiffs "the right to pay off to the legatees under said will certain portions of said estate as they reach their majority," and giving as a reason for so refusing "that they cannot do so as long as said bond is outstanding against them," did not give the plaintiffs any substantial footing in a court of equity. They by no means make it clear that they are entitled to interfere with the requirements of the will that the executor and executrix shall "keep the estate together until the youngest child shall have reached his majority," or compel the making of any advance payments upon their legacies. Apparently, this is a matter within the discretion of the representatives of the estate. But grant that the plaintiffs could maintain a present action for amounts due to them as legatees, certainly, if the allegations of their petition are true, the existence of the guardian's bond would not afford the executor and executrix even a shadow of a ground of defense. According to these allegations, the testator was insane when he signed the bond. George S. Rives, executor, knows and admits this to be true. With this knowledge he fraudulently and collusively obtained an order authorizing him to pay Miss Little the \$7,000. He is the managing executor. Suppose the plaintiffs should sue for their legacies and make out a prima facie case; what court, on the facts above stated, would tolerate a defense predicated on the fact that the guardian's bond was outstanding? To state this question is to answer it. Furthermore, the plaintiffs do not, in their present proceeding, seek to compel an advance payment upon their legacies; and, even if they did, neither Mrs. Burt nor Miss Little would be necessary or proper parties to the litigation, being in no way concerned with the question of the propriety of the refusal by the executor and executrix to make to the plaintiffs advances upon their legacies in accordance with the provisions of the will under which they claim. We have therefore reached the conclusion that, under

the facts pleaded, the plaintiffs were not, so far as related to Mrs. Burt and Miss Little, entitled either to an injunction or to a cancellation of the guardian's bond, nor, indeed, to relief of any kind.

As the judgment we render on the cross bill of exceptions necessarily brings about a final disposition of the case which is adverse to the plaintiffs in error named in the main bill of exceptions, and as a reversal of the judgment of which it complains would not in any manner benefit them, we shall not undertake to deal with the questions thereby presented. Writ of error on main bill of exceptions dismissed; judgment on cross bill of exceptions reversed. All the justices concurring.

(113 Ga. 398)

SAVANNAH, F. & W. RY. CO. v. BEAVERS.

(Supreme Court of Georgia. May 21, 1901.)

NEGLIGENCE—DANGEROUS PREMISES—DUTY TO GUARD.

One who makes an excavation upon his land is not bound to so guard it as to prevent injury to children who come upon it without his invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the excavation and its surroundings.

(Syllabus by the Court.)

Error from superior court, Ware county. J. W. Bennet, Judge.

Action by A. A. Beavers against the Savannah, Florida & Western Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Chisholm & Clay, for plaintiff in error. Leon A. Wilson, for defendant in error.

FISH, J. A. A. Beavers obtained a verdict and judgment against the Savannah, Florida & Western Railway Company for the death of his minor child, and, upon the defendant's motion for a new trial being overruled, it excepted. There was but little conflict in the evidence, and that in behalf of the plaintiff conducted to establish the following facts: The defendant railway company undertook to construct a water tank upon its premises. The work was temporarily suspended, and an excavation 12 feet square, about 7 feet deep, and containing about 4 or 5 feet of muddy water, concealing its depth, was left uncovered, and guarded only by piling placed around it, some 18 inches in height. Upon the sides of the excavation, and 2 feet from the surface, there was a ledge or sill, 5 by 10 inches. There was a ladder and a long-handled pump left in the excavation, the ladder extending to the top. Near by there was a tram road upon which there was a small flat car, used for hauling away dirt taken from the hole. Eight and a half feet from the edge of the excavation, and along the outer line of the defendant's right of way, there ran a foot-path, much traveled by the public. Some

28 feet from the excavation there was a canal, along the banks of which there were berries and flowers, which children were accustomed to gather. There were no flowers nor berries immediately about the excavation. It did not appear that the officers of the defendant company knew that children frequented the locality. The foreman of the "gang," while making the excavation, saw children gathering flowers and berries along the banks of the canal and observing the progress of the work, but of this he never informed the officers of the company. No one lived nearer to the excavation than 100 yards away. The public street was about 100 yards distant therefrom. Plaintiff's two sons, one 9 and the other 5½ years old, went, with two other boys, the elder of whom was 11 years of age, to the excavation to play with frogs, and while the younger son of plaintiff was standing on the ledge, inside the hole, engaged in such childish sport, he fell into the water, and was drowned. All of these boys had been playing with the frogs in the excavation for several days prior to the accident, but there was no evidence that any of the company's officials had knowledge of this fact. A day or two before the accident a man passing by warned these boys to get away from the excavation or they would get hurt. In going to this place the boys did not use the footpath. Neither plaintiff nor his wife knew of the existence of the excavation.

Under the facts stated, was the defendant company liable in damages to the plaintiff for the death of his child? This question turns upon another; that is, whether or not the company owed the child any legal duty which it neglected to perform, for there can be no actionable negligence without the breach of a legal duty. The rule is too well settled to need the citation of authority that a landowner is under no duty to have his land in safe condition for an adult trespasser to enter thereon. Such trespasser has ordinarily no remedy for an injury happening to him by reason of the condition of the property upon which he intrudes. He takes the risk of the condition of the premises. Nor is the owner bound to warn him of non-apparent dangers, provided they were not prepared with intent to harm trespassers. Is there any difference in the case of a child entering upon premises without the permission of the owner? There is an irreconcilable conflict of authority, in this country at least, upon the question, and it is not easily determined which way the weight of authority inclines. There are many decisions by courts of great respectability to the effect that "when a child of tender years commits a mere technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger, but not so to a child, he is not debarred from recovering, if the thing instrumental in his injury were left exposed and unguarded, and were of such a

character as to be likely to attract children, excite their curiosity, and lead to injury, while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication." 7 Am. & Eng. Enc. Law (2d Ed.) pp. 403, 404. On the other hand, there are numerous cases wherein courts of the highest respectability enunciate the doctrine that an owner or occupier of land is ordinarily under no obligation to a trespasser so far as concerns the condition of his premises, and the fact that the trespasser is an infant of tender years affords no reason for modifying this rule, and charging the owner or occupier of land with a duty which does not otherwise exist; and, if for more beneficial user he creates upon his premises an instrumentality which happens to be attractive to children, he does not thereby extend to them an implied invitation to enter thereon. The tendency of the more recent decisions seems to be in favor of the doctrine last mentioned, and we are of opinion that, upon principle, it is the stronger side of the question. The principle involved has been so frequently and elaborately discussed by learned jurists that it is unnecessary to do more than refer to some of the decisions which are particularly applicable to the case which we have under consideration. Before doing so, however, we take the liberty of making a somewhat extended quotation from a monograph in 11 Harvard Law Review, pp. 349-373, 434-448, by the Hon. Jeremiah Smith, formerly one of the justices of the supreme court of New Hampshire, wherein the subject, "Liability of Landowners to Children Entering Without Permission," is very learnedly and exhaustively treated. In maintaining the proposition that the landowner is under no duty, so far as concerns the condition of his premises, to intruding children, that eminent jurist says: "Assuming, then, that the law is not only settled, but is also consistent, in holding that the owner of land is not liable for the condition of his premises to an adult who enters without permission, the next inquiry is, what difference is there between the case of the adult intruder and the child intruder? Are there considerations which do not exist in the case of an adult, and which, when put into the scale, ought to turn the balance in favor of the child? The two prominent arguments are: (1) That the child is innocent; (2) that the child is incapable of protecting itself. What force is to be allowed to these considerations, and do they, when estimated at their true value, outweigh the reasons against imposing liability upon the landowner? * * * Of course, the innocence of a plaintiff does not, per se, establish the fault of a defendant. The landowner cannot be liable unless he owed to the child a duty which he has neglected. Should the law, in view of the innocence of the child, impose on the landowner the duty here in

controversy? No doubt there are cases where a defendant is rightly held liable to a child plaintiff when he would not be liable to an adult plaintiff under similar circumstances. Where it is admitted that a duty exists to use care to avoid harm to both children and adults (e. g. in the use of the public highway), then, in point of fact, more care may be required towards a child than towards an adult. In view of the child's helplessness and unconsciousness of danger, more care may, as matter of fact, be required under the unvarying legal rule of 'due care under the circumstances,' just as more care, in fact though not in law, may be required to avoid colliding with an obviously lame or blind adult than with a vigorous man in full possession of all his faculties. But all this is true only where it is admitted or proved that a duty exists. 'In considering the question as to whether a duty exists, there is no distinction between the case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former.' [Citing *Denman, J.*, in *Dobbins v. Railroad Co.* (Tex. Sup.) 41 S. W. 62, 38 L. R. A. 573.] So, if it be conceded that the defendant was negligent, and that his negligence constituted part of the plaintiff's damage, then the incapacity or immaturity of a child plaintiff may furnish a good answer to the defense of contributory negligence. Conduct of the plaintiff, which would have been negligent in an adult, may not be held negligent in a child. But the fact that the child plaintiff was not 'capable of contributory negligence' does not necessarily establish that the adult defendant was negligent. It does not per se prove that the defendant owed to the plaintiff a duty, or that he failed to perform a duty, 'If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous.' [Citing *Lurton, J.*, in *Felton v. Aubrey*, 20 O. C. A. 436, 74 Fed. 353.] 'The fact that injury has resulted, and to a child himself incapable of negligence, will not import the negligence of the defendant, which is the sole ground of liability.' [Citing 1 *Bevin, Neg.* (2d Ed.) 183; *Culbertson v. Railroad Co.*, 48 La. Ann. 1380, 20 South. 902; *Emerson v. Peteler*, 35 Minn. 481, 29 N. W. 311; *Catlett v. Railway Co.*, 57 Ark. 461, 21 S. W. 1062.] Obviously, cases of the two foregoing classes do not furnish arguments from analogy in favor of creating a duty towards children in situations where no duty at all would exist towards adults. Why should innocent children have greater rights than innocent adults, in respect to damage resulting from the nature of the premises upon which they enter without permission? Remedy against the landowner for harm happening from the condition of the premises is denied to adults who are entirely free from intent to violate rights, and

whose presence upon the land is due to pardonable mistake or to irresistible external force. The test is not whether their motives were innocent, or even laudable, or whether their conduct was careful, but whether they entered without the owner's permission. If so, they cannot claim that the owner was under a duty to make things safe for their access, or to give warning of nonapparent danger. [Citing *Morgan v. City of Hallowell*, 57 Me. 375; *Gramlich v. Wurst*, 86 Pa. 74.] It may possibly be suggested that an adult trespasser is barred upon grounds inapplicable to a childish intruder. It may be urged that the adult is barred by his own wrong, both (1) because he must always be regarded as guilty of contributory negligence; and (2) because, even if not negligent, he is a tortfeasor in the technical sense, whereas a young child may be incapable of negligence, and ought not to be regarded as even technically a tortfeasor. But this argument entirely misconceives the true reason why an adult trespasser fails to recover in the case supposed. The decision turns, not upon the presence of fault in the plaintiff, but upon the absence of fault in the defendant. The plaintiff's action is defeated, not because his own wrong bars a recovery against the landowner who has neglected to perform a duty owing to him, but because he has not succeeded in establishing the primary proposition that the landowner owed to him the duty in question. His trespass is not necessarily and always a negligent act, and hence does not invariably bar him on the ground of contributory negligence. [Citing 1 *Shear. & R. Neg.* (4th Ed.) §§ 97, 98.] Nor does his tort, even when he is a conscious and morally excusable trespasser, prevent his recovering against the landowner for negligently bringing force to bear upon him by a positive act done after his entry, i. e. by what *Clark & L. Torts* (2d Ed.) 14, call 'a negligent act of commission.' But when an adult, who entered without permission, seeks to recover against the landowner for harm happening from the condition of the premises, he fails, even though he were morally blameless. He may be a technical tortfeasor, but recovery is not denied to him by way of punishment for his own 'wrong.' He fails because the landowner owed him no duty to have the premises in safe condition for his entry. [Citing *Shear. & R. Neg. supra.*] Why should the moral innocence of a childish intruder raise a duty on the part of the landowner which is not created by the moral innocence of an adult intruder? The youthful innocence of the child does not make restrictions on the right of user less damaging to the owner, or make the alleged duty of preventing entrance of an intruder, or of protecting him from harm after entry, less burdensome than in the case of an adult. * * * The child, it is said, is incapable of protecting itself, and hence it is eloquently contended that the law must impose the duty

of protection upon landowners. The apparent assumption is that all the children in the world are mere waifs and strays, and that the duty of caring for them must be imposed upon the landowners because the law can find no one else to bear the burden. [Citing the language of Mr. Justice Agnew in *Hydraulic Works Co. v. Orr*, 83 Pa. 336.] The fact is that the vast majority of children have protectors appointed alike by nature and by law, viz. their parents, who have legal power to control their actions, and whose moral duty to keep their children from entering upon dangerous premises is generally regarded as at least equal to the moral obligation of the landowner to fence them out. If the child, upon entering the premises, is hurt by the 'active negligence' of the owner in bringing force to bear upon him, it may well be that the negligence of the parent in failing to restrain the child's entrance does not bar the child's recovery for the force thus brought to bear upon him after his entrance. But it is going far beyond this to say that the child can recover for harm sustained by him through the condition of the premises without the immediate intervention of any human agency save his own. [Citing *Felton v. Aubrey*, supra.] When a child wakes up in the morning in his father's house, the duty of providing a safe playground for him during the day rests upon his parents. Is this duty shifted from the parent to private landowners because the child chances to escape from the parent's care? [Citing *Clark v. City of Manchester*, 62 N. H. 577; *Railroad Co. v. Dobbins* (Tex. Civ. App.) 40 S. W. 861.] If those who brought the child into the world are unable, by reason of poverty, to provide him a playground, this may afford an argument for the passage of a statute imposing that duty upon the municipality, in which case each landowner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate landowner the entire damages arising from the want of such a playground. [Citing *Ross v. Keith*, 16 Sc. Sess. Cas. (4th Ser.) p. 89.]

An early case, and one often referred to, is that of *Hargreaves v. Deacon*, 25 Mich. 1. There the plaintiff, as administrator, sought to recover damages for the death of his son, a child of tender years, who was killed by falling into a cistern which had been left uncovered on premises not immediately adjoining the highway. It was held: "Owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, where the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there." Mr. Justice Campbell, in delivering the opinion of the court, says: "Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence, on

private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort, held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." In *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, the 8 year old son of the plaintiff was drowned in a pond of water, not bordering on the highway, which had been formed in consequence of rock having been quarried on a lot owned by the defendant. It was ruled that the owner of the quarry was under no obligation to build a fence around it to keep trespassers away, nor liable to injury to them occasioned by the absence of such a fence. In *Klix v. Nieman*, 68 Wis. 271, 32 N. W. 223, the declaration alleged that the defendant was the owner and in possession of a vacant and uninclosed lot in a thickly-settled part of the city of Milwaukee, to which the public had free and unobstructed access; that for a long time there had existed upon the lot a deep and dangerous hole or excavation, partially filled with water, making a pond, which covered about the entire surface of the lot; that the water of the pond was roily, so that its depth could not be ascertained except by measurement, but that in places it was nine feet deep, so that the pond was dangerous to the lives of children who might be attracted thereto, for amusement or otherwise; that the defendant, well knowing that the pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently, and carelessly permitted it to remain unguarded by a fence or barricade; and that plaintiff's son, a lad nine years of age, "while playing upon and about said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said hole as aforesaid, fell and was precipitated into the same, and was drowned." A demurrer to the declaration was sustained in the trial court, which ruling, on appeal, was affirmed by the supreme court. Mr. Chief Justice Cole, speaking for the court, said: "The single question presented is, was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made, or caused to be made), when surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability, unless it was his duty to fence the pond. It surely is not the

duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold,"—citing 1 Thomp. Neg. 361.

The facts in the case of *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, are quite similar to those in the case under consideration. There the defendants "were the owners of a lot of ground in the outskirts of Philadelphia, upon which there was, and had for some time been, a deep well. The nearest paved highway ran 300 feet from the well, and the nearest road about 80 feet. There were houses about 300 feet off, but the built-up part of the city was nearly half a mile distant. Whether any paths led near the well was disputed. The well was uncovered, and was not hidden by bushes or shrubbery. It was not fenced around, nor was the lot in which it lay. The lot was a common place of resort for children and adults. A boy of a little less than 8 years of age was found drowned in the above well, his hat being found on the side, together with a few small fishes. In a suit by the boy's father against [the defendants] to recover damages for his death, held, that the boy was a trespasser, and that [the defendants] had not been guilty of any such negligence as would render them liable for his death." In delivering the opinion of the court, Mr. Justice Paxson said: "Nor do we assent to the broad proposition that 'the owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them as to protect those who stray upon them and are accidentally injured.' This doctrine rests chiefly upon the case above referred to (*Works Co. v. Orr*, 83 Pa. 332), which was not intended to decide any such principle, and is in direct conflict with the recent well-considered case of *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, in which it was held that 'where the owner of land, in the exercise of lawful dominion over it, makes an excavation thereon which is such a distance from the public highway that a person falling into it would be a trespasser upon the land before reaching it, the owner is not liable for an injury thus sustained.' * * * We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or dead fall, as in *Hydraulic Works Co. v. Orr*. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brick yards and open

lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it, or fill up their ponds and level the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of 8 years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

In *Clark v. City of Manchester*, 82 N. H. 577, the city of Manchester began filling a reservoir, but left a portion of the excavation, which contained water. The excavation was uninclosed. The plaintiff's boy, a little less than 4 years old, and living with his parents, about 150 feet from the reservoir, having followed, with a crowd of other boys, a band of music to the gate of a play or ball ground near by, and wandering by the reservoir excavation, fell into the water, and was drowned. On the facts stated, it was held that an action could not be maintained by the administrator of the child against the city, and the case was "discharged." Subsequently, the plaintiff amended his declaration by alleging "that the place of the reservoir, at the time of the injury, was an unguarded excavation, pit, and trap, near to the public street, and the residence of a large number of people, including that of the plaintiff, and the water therein, together with the work of filling the excavation, was calculated to and did allure to it young children; that the defendants had knowledge of the situation, and these facts were a license and invitation to the plaintiff's child to come there; and that, neither he nor his parents being in fault, he went there, fell into the pit, and was drowned." Mr. Justice Allen, rendering the opinion of the court, said: "If the facts stated in this court were proved, they would not establish the defendant's liability. The excavation for a reservoir was not made and filled with water for a trap, but for lawful use by the defendants on their own land. The averment of license and invitation to the child to go there is one of argument by inference from the facts stated, and the facts positively averred do not warrant and support the inference. The fact that children went to the reservoir

pit from curiosity or for pleasure, without objection of the defendants, was not an invitation or license to go there. The child was not upon the land by invitation, nor under circumstances which made it the duty of the defendants to protect him. He was there to gratify his curiosity, or for mere pleasure, and the defendants owed him no special duty. It was not a case of setting a trap for the children, nor one of wantonly and knowingly leading them into danger, and this one into destruction. It was the ordinary use of a landowner, managing, within the bounds of his own land, his own property, in his own way, for his own use and benefit; and though in doing this he might find occasion to construct reservoirs, provide fish ponds, plant and cultivate fruit trees, erect and maintain useful structures, instruments, machinery, all of which are alluring, attractive, and dangerous to children, yet it could not be claimed that he must constantly guard these things against the approach of persons coming without license or invitation, or suffer in damages for any injury they might receive. The rule that the owner of land may manage it in his own way, for his own benefit, and owes no duty to those who come upon it for no business purpose, but without license, express or implied, is too well established to need further comment, or to warrant a departure from it."

In *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, the allegations of the petition were, in substance, that the defendants had for a long time negligently permitted the surface water to accumulate on certain lots which they owned and were in possession of, thereby creating a deep and dangerous pond, and that they had failed and neglected to fence such lots, or to erect barriers of any kind, to prevent children, lawfully in the vicinity thereof, from falling into said pond; that the lots were situated in the vicinity of one of the public schools of the city of Omaha, and that the pond was not only dangerous to persons passing along a named street adjacent thereto, but was in a public and much-frequented place, and was attractive to children of tender age, many of whom were accustomed to play about and upon said water; that on a given day the plaintiff's intestate, a boy 10 years of age, yielding to the natural impulse of childhood, went on said pond, upon a section of a wooden sidewalk out of which he had constructed a raft, and while floating thereon fell into the pond and was drowned. A demurrer to the petition was sustained, upon the ground that it failed to state a cause of action against the owners of the land, the court holding: "The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises, not by invitation, express or implied, but for the pur-

pose of amusement or from motives of curiosity."

To the same effect, see *City of Omaha v. Bowman* (Neb.) 72 N. W. 316, 40 L. R. A. 531, where a boy 7 years old was drowned by falling off a raft floating on a pond, which had been made by the city in constructing and filling up a certain street.

So, in *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, it was held: "The owner of a vacant lot upon which a pond of water has accumulated, by reason of an embankment erected by the city in the grading of the street, preventing the flow of surface water from the lot, owes no duty to trespassers to keep the water from accumulating upon the premises, nor to keep the lot guarded against trespasses by children, and is not liable for the death of a child from drowning while trespassing in the lot." In that case a boy 11 years old was drowned by falling into the pond from a raft thereon.

In *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965, "where a child of tender years was taken by an older sister, to whose care it was intrusted, to vacant residence lots in a city, for recreation and pleasure, and was accidentally knocked down and killed by the caving in of an embankment, caused by excavations for sand, and which had been left unfenced, [it was] held that the landowner was not liable in damages, and that he owed no duty to persons coming upon the premises, without his invitation, to protect them from danger from excavations thereon." The court said: "There is nothing to take the case out of the general rule that where the owner of land, in the exercise of his lawful dominion over it, makes an excavation thereon, so far from the street that a person coming onto the land without his invitation, and falling into it, would be a trespasser before reaching it, such owner is not liable to an action for the injury sustained. * * * The maxim, 'Sic utere tuo,' etc., has no application to such a case. It refers to acts the effects of which extend beyond the limits of the property, and to neighbors who do not interfere with it or enter upon it. If the rule were otherwise, a landowner could not sink a well or dig a ditch or open a stone quarry on his own land, except at the risk of being made liable for consequential damages, which would unreasonably restrict its enjoyment."

It was held in *Grindley v. McKechnie*, 163 Mass. 494, 40 N. E. 764, that "an owner who digs a deep hole on his unfenced land about twenty-five feet from the street, which fills with water, and is concealed by boards and shavings floating on the surface, is not liable in damages for the death of a child five years old, who, without the consent of the owner, goes on the land, and is drowned in the hole."

Among the cases relied on by defendant in error is that of *Ferguson v. Railway Co.*, 75

Ga. 637 (Id., 77 Ga. 102), wherein this court held: "Where a railroad company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of such company; and where an infant of ten or twelve years of age resorted to the turntable, and in riding upon it was dangerously and seriously injured, the railroad company is liable for damages for such injuries to the infant." The rule of the so-called "turntable cases" has been adopted by many of the courts, by others it has been severely criticised, and by some wholly repudiated. Some of the courts which have recognized the rule have limited its operation strictly to turntables and other dangerous and attractive machinery. It has been repudiated by the courts of last resort in New Hampshire, Tennessee, Massachusetts, New York, and New Jersey. See *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Bates v. Railway Co.*, 90 Tenn. 36, 15 S. W. 1069, 25 Am. St. Rep. 665; *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248; *Walsh v. Railroad Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724; *Railroad Co. v. Reich* (N. J. Err. & App.) 40 Atl. 682, 41 L. R. A. 831. Liability was also denied in *Railroad Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269, on account of "the isolated position" of the turntable in question. The rule was recognized in *Keffe v. Railway Co.*, 21 Minn. 207, 18 Am. Rep. 393, wherein Mr. Justice Young pronounced perhaps the ablest opinion ever delivered in support of the doctrine. The same court, however, in *Twist v. Railroad Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626, clearly intimated that the doctrine of "the turntable cases" ought not to be extended; and in *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899, said: "We did not mean by [what was said in *Twist v. Railroad Co.*] that we would not apply the doctrine to any but turntable cases, but merely that we would not extend the doctrine to cases which, upon their facts, did not come strictly and fully within the principle upon which those cases rest. We would not extend it to an ordinary case of a landowner merely allowing a pool of water or pond to stand on a vacant lot. To bring a case of such a pond within the principle of these cases, it would have to be exceptional and peculiar in its circumstances." And in *Ratte v. Dawson and Dehanitz v. City of St. Paul* (Minn.) 76 N. W. 43, and in *Haesley v. Railroad Co.*, 46 Minn. 233, 48 N. W. 1023, 24 Am. St. Rep. 220, the principle was considerably limited in its application. In the last-mentioned case the court held: "A railway company, maintaining what is known as a 'gravity' yard or side track, has undoubtedly performed its duty as to a trespassing child of tender years, strictly not *sui juris*, when it secure-

ly fastens, by means of the ordinary appliance or brake, such cars as it may have occasion to place upon the grade of its track." In *Koons v. Railroad Co.*, 65 Mo. 592, the doctrine of "the turntable cases" was followed, but it was limited, as has been seen, in *Overholt v. Vieths*, supra; and again in *Barney v. Railroad Co.*, 126 Mo. 372, 23 S. W. 1069, 28 L. R. A. 847, where the court held: "Railroad cars and similar machinery are not 'dangerous machines,' within the meaning of the rule declaring turntables to be such;" and also in *Witte v. Stifel*, 126 Mo. 295, 23 S. W. 891, where it was held: "The owner of a building in process of construction in a city is not liable for injuries to a child playing thereat without his knowledge, and without any inducement or invitation, implied or otherwise, on his part to the child to go upon the premises." In *Railway Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203, and *Railway Co. v. Dunden*, 87 Kan. 1, 14 Pac. 501, the doctrine of "the turntable cases" is recognized; but in *Railroad Co. v. Bockoven*, 53 Kan. 279, 36 Pac. 322, where it appeared that a child was killed by falling off a defective gate of a railroad company, upon which it was swinging, the court said: "We are not willing to extend the rule declared by this court in the *Fitzsimmons* and *Dunden* Cases. In some of the courts the rule in those cases has been questioned, and in others denied." In *Evansich v. Railway Co.*, 57 Tex. 126, and other cases decided by the supreme court of that state, the turntable rule has been followed; but in *Railroad Co. v. Dobbins* (Tex. Civ. App.) 40 S. W. 861, affirmed by the supreme court of Texas (41 S. W. 62), the rule is sharply criticised, the latter court holding: "The common law does not impose upon the owner of property the duty to use care to keep his premises in such condition that a child of tender years going thereon may not be injured. * * * A railroad company which constructs a platform for the reception of freight and passengers, and a path of plank leading thereto, would not be liable to any one who fell from the path into an excavation, who was not going to or from the platform on business connected with the company." There it appeared that plaintiff's child, less than three years old, fell into such excavation, and was recognized also in *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; but, as we have seen, in *Peters v. Bowman*, supra, the rule was not extended to a case where a child trespassing upon an unguarded lot fell into a pond thereon and was drowned. The rule was also recognized in *Railroad Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; but, as we have already seen, in *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, it was not applied where the child of the plaintiff was trespassing upon the lot of the defendant, and was drowned by falling from a raft on a pond thereon. Adopting

what we believe to be the wise course of these courts in limiting the doctrine of "the turntable cases," we hold that the case of *Ferguson v. Railway Co.*, supra, is not authority which is applicable to the facts of the case under consideration. Our conclusion is that the evidence in this case does not disclose the breach of any duty lawfully due from the defendant railway company to the deceased child, and consequently did not warrant a finding that his death was occasioned by its negligence. Irrespective, therefore, of other questions presented, the verdict in favor of the child's father was without evidence to support it, and the trial court erred in not setting it aside.

As supporting the rule that the owner or occupier of land owes no duty of immunities to trespassing children, see the following cases and authorities therein cited: *Railroad Co. v. Henigh*, 23 Kan. 847, 38 Am. Rep. 167; *Green v. Linton* (City Ct. Brook.) 27 N. Y. Supp. 891; *Powers v. Oream* (Sup.) 48 N. Y. Supp. 21; *Newdell v. Young*, 80 Hun, 364, 30 N. Y. Supp. 84; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Sterger v. Van Sicklen*, 132 N. Y. 490, 30 N. E. 987, 16 L. R. A. 640; *Murphy v. City of Brooklyn* (N. Y. App.) 23 N. E. 887; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *McEachern v. Railroad Co.*, 150 Mass. 515, 23 N. E. 231; *McGuinness v. Butler*, 159 Mass. 233, 34 N. E. 259; *Gay v. Railway Co.*, 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448; *Holbrook v. Aldrich*, 168 Mass. 15, 46 N. E. 115, 36 L. R. A. 498; *Galligan v. Manufacturing Co.* (Mass.) 10 N. E. 171; *Breckenridge v. Bennett* (Com. Pl.) 7 Kulp, 95; *Rodgers v. Lees*, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216; *Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 123; *Talty v. City of Atlantic*, 92 Iowa, 135, 60 N. W. 516; *Ritz v. City of Wheeling* (W. Va.) 31 S. E. 993, 43 L. R. A. 148; *Fredricks v. Railroad Co.*, 46 La. Ann. 1180, 15 South. 413; *O'Connor v. Railroad Co.*, 44 La. Ann. 839, 10 South. 678; *Railway Co. v. Cunningham*, 7 Tex. Civ. App. 65, 26 S. W. 474; *Oil Co. v. Morton*, 70 Tex. 400, 7 S. W. 756; *Railway Co. v. Edwards* (Tex. Sup.) 36 S. W. 430, 32 L. R. A. 825; *Slayton v. Railroad Co.*, 40 Neb. 840, 59 N. W. 510; *Vanderbeck v. Hendry*, 34 N. J. Law, 467; *Phillips v. Library Co.* (N. J. Err. & App.) 27 Atl. 478; *Fitzpatrick v. Manufacturing Co.* (N. J. Sup.) 39 Atl. 675; *Benson v. TrACTION Co.*, 77 Md. 536, 26 Atl. 973, 39 Am. St. Rep. 436; *Kayser v. Lindell* (Minn.) 75 N. W. 1038; *Debanitz v. City of St. Paul* (Minn.) 76 N. W. 48; *Ruch v. Manufacturing Co.* (N. H.) 44 Atl. 809; *Robinson v. Railway Co.*, 7 Utah, 493, 27 Pac. 689, 18 L. R. A. 765; *Charlebois v. Railroad Co.*, 91 Mich. 59, 51 N. W. 812; *Moran v. Palace-Car Co.* (Mo. Sup.) 36 S. W. 659, 33 L. R. A. 755; *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; *City of Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155. Judgment reversed. All the justices concurring.

(112 Ga. 647)

PARK, Treasurer, v. CANDLER, Governor.

(Supreme Court of Georgia. June 12, 1901.)

CONSTITUTIONAL LAW—STATE BONDS—PAYMENT—RAILROADS OWNED BY STATE—SALE—REPEAL BY IMPLICATION—STATE WARRANTS—SCHOOL FUND—MANDAMUS AGAINST PUBLIC OFFICER.

1. Under the provisions of paragraph 1, § 1b, art. 7, of the present constitution of this state (Civ. Code, § 5900), which declares that "the proceeds of the sale of the Western and Atlantic, Macon and Brunswick, or other railroads held by the state, and any other property owned by the state, whenever the general assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatever, so long as the state has any existing bonded debt," no part of the fund derived from the sources therein mentioned can be lawfully laid out, paid out, or expended in the payment of any obligation or demand due by the state, other than the bonded debt of the state, or some portion thereof; and this is true whether such disposition of the fund permanently disposes of the same, or merely applies it to some other obligation or demand temporarily, and until the taxes levied for the purpose of paying such other obligation or demand can be collected.

2. The phrase "other railroads held by the state," in the paragraph of the constitution quoted in the preceding note, was intended to embrace all railroads constructed under "state aid" charters granted prior to the adoption of the present constitution, of which the state might at any time become the actual owner by reason of the seizure and sale of such railroads in consequence of default on the part of the companies constructing the same in paying the interest upon bonds indorsed by the state.

3. An act of the general assembly will never be so construed as to make it violative of the constitution, unless it is plain and manifest from the terms of the act that a construction having that effect was intended by the general assembly; and when an act is capable of two constructions, one making it violative of the constitution, and the other making it consonant therewith, the latter construction must be adopted.

4. While repeals by implication are not favored, when an act must be construed either as violative of the constitution, or as having the effect of repealing a former act by implication, the latter construction will always be adopted.

5. A warrant drawn by the governor upon the state treasurer, directing the latter to place the amount of such warrant "to the account of the school fund," is payable out of that fund, as derived from the sources authorized by the constitution and the law; and it is not only the right, but the duty, of the state treasurer to so construe such a warrant.

6. The state treasurer has no authority to pay out any money from the state treasury until there has been "an appropriation made by law," and then only upon a warrant drawn by the governor, specifying "on what appropriation or fund" it is drawn, except "for sums due to the members and officers of" the two houses of the general assembly, which may be paid on the draft of the presiding officers of the respective houses.

7. Even if an officer of the executive department of the state and the securities on his official bond will be protected from liability when he acts on the opinion of the attorney general, still such an officer will not be compelled by mandamus to do an act which would be a violation of the constitution, notwithstanding the attorney general is of opinion that such an act

would not be a violation of that instrument, and has so advised the officer upon his own application.

8. Whether the state treasurer is such a ministerial officer as would not be permitted to bring in question the constitutionality of an act of the general assembly, or is such a subordinate officer of the executive department of the state as that he will not be heard to question the authority of the governor to draw a warrant upon the treasury, are questions which, in view of the rulings made in the foregoing notes, are not involved in the present case.

9. A mandamus absolute should not be granted against a public officer, compelling him to do an act, when on the hearing of the application for mandamus it is an undisputed fact that such officer has never refused to perform the act, and in his answer avers his willingness to perform it.

(Syllabus by the Court.)

1. The constitutional provision embodied in section 5900 of the Civil Code, touching the application of the proceeds of the sale of public property to the payment of the bonded debt of the state, is not prospective, and applies only to such railroads and other public property as the state owned at the time of the adoption of the constitution. It follows that as the state did not own, possess, or hold the Northeastern Railroad at that time, the \$200,000 realized from the sale of that property does not constitute any part of the public fund intended by the constitution to be applied exclusively to the payment of the bonded debt.

2. When a warrant upon a fund in the treasury has been duly drawn by the governor and approved by the comptroller general, even if the treasurer has a right to question the constitutionality of the executive act in so doing, and to set up that the fund on which the warrant was drawn cannot, for the reasons mentioned, be applied to the warrant, the burden is on him to identify the specific fund in the treasury which he claims to be the proceeds of the sale of public property set apart from the general fund for the payment of the bonded debt.

(Per Lewis, J., dissenting.)

Error from superior court, Fulton county; John S. Candler, Judge.

Application by A. D. Candler, as governor, for a writ of mandamus directed to R. E. Park, treasurer. Judgment for plaintiff, and defendant brings error. Reversed.

Washington Dessan, Du Pont Guerry, and Orville A. Park, for plaintiff in error. J. M. Terrell, Atty. Gen., for defendant in error.

COBB, J. The constitution of this state declares: "The proceeds of the sale of the Western and Atlantic, Macon and Brunswick, or other railroads held by the state, and any other property owned by the state, whenever the general assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatever, so long as the state has any existing bonded debt." Paragraph 1, § 13, art. 7; Civ. Code, § 5900. The fund in the state treasury derived from the sources indicated in the paragraph of the constitution above quoted has been termed the "public property fund," and, for convenience, that expression will be used to in-

dicate such fund. The controlling question in the present case is whether, at a time when none of the public property fund is needed to pay any part of the public debt (that is, the bonded debt of the state), such fund can be applied to the payment of other obligations and demands due by the state, for the payment of which provision has been made by the levy of a tax, which has not been collected, but which, when collected, can be used to replace that part of the public property fund thus applied; the exact question in the present case being whether the public property fund can be lawfully applied temporarily to the payment of the amounts due the school authorities of the different cities and counties of the state for the pro rata due each from the sums to be collected by a tax already levied for school purposes. In other words, will the requirements of the constitution be infringed by temporarily converting the public property fund into the school fund, and then, when the school fund is collected, converting that into the public property fund? To determine this question, it is necessary to ascertain what is meant in the constitution by the word "used." The word "use" has been variously defined, as: "To employ for the accomplishment of a purpose; turn to account; make use of; to treat." Stand. Dict. "To make use of; to convert to one's service; to avail one's self of; to employ; to put to a purpose." Webster. Int. Dict. "To employ for the attainment of some purpose or end; to avail one's self of; to make use of; as, to use a plow; to use a book." Cent. Dict. Whether the word "use," as employed in the constitution, should be so construed as to provide that the public property fund should be kept separate and distinct from all other funds, and should lie idle in the treasury, and not be loaned out, as is distinctly declared may be done with the sinking fund provided for in paragraph 1, § 14, art. 7, of the constitution (Civ. Code, § 5901), it is certain that the constitution means that this fund shall not be applied to the payment and discharge of any other obligation than the public debt of the state. Whatever else the word "use" may mean in the provision of the constitution above quoted, it certainly means that the public property fund shall not be laid out, paid out, or expended in the discharge of any other claim for which the state is liable. The public property fund is set apart by the constitution for a particular purpose, and it is distinctly declared that it must be applied to no other, and that purpose is the discharge of the public debt of the state. When the time arrives for the public debt, or any part thereof, to be discharged, this fund must be intact, so that it may be used for that purpose. That the setting apart of this fund for a number of years, when it is not needed to discharge the public debt, and during a time when other demands due by the state must be discharged by taxation, which

demands could be temporarily met by the use of the public property fund, is an unwise policy and bad financiering, is an argument which cannot be considered, in the face of a plain and unambiguous provision in the constitution declaring that the fund can be used only in a given way. While there was a difference of opinion among the framers of the constitution as to whether it was wise or unwise to have this fund separated and set apart in the treasury for a given purpose during a term of years when it was not needed for that purpose, there was, as appears from the debates in the convention, no difference of opinion as to what the provision really meant; and the construction which we have placed upon the provision is that which seems to have been placed upon it by the members of the convention,—both those who opposed as well as those who advocated its adoption. See *Small, Debates Const. Conv.* p. 310 et seq. We have not undertaken to determine whether any portion of the public property fund can be lawfully applied to the payment of interest on the public debt, or whether the fund must be appropriated only in payment of the principal. Neither have we undertaken to decide whether the public property fund can, with other funds in the treasury, be deposited in the state depositories, for the simple reason that these questions are not involved in the present case, and anything said could not take the form of an authoritative ruling, would not bind any member of this court should such questions hereafter arise, and might have the effect of misleading those upon whom may devolve the duty of determining those questions. As to the question actually before us, we are clear that the use of the public property fund in the discharge of any obligation or demand due by the state, other than in the discharge of the public debt or some portion thereof, would be a violation of the constitution; and this is true whether the fund, or such portion thereof as is so used, is or can be replaced by funds arising by taxation and in the treasury before the public property fund is needed for any purpose for which it may be lawfully used under the constitution.

2. Are the proceeds arising from the sale of the Northeastern Railroad, now in the treasury, a part of the public property fund, so as to make them subject to the provisions of the paragraph of the constitution above quoted? The Northeastern Railroad Company was incorporated October 27, 1870. Acts 1870, p. 344. It was provided in its charter that, under certain conditions, the state would place its indorsement upon the bonds of the company for a given amount per mile of constructed railroad. This indorsement was placed upon the bonds of the company by the governor in 1878. The company having made default in the payment of interest on the bonds, the road was seized by the governor, under the authority given

in the charter of the company, and was exposed to sale and purchased by the state in 1895. The road was afterwards sold under authority of an act of the general assembly, and there is now in the treasury of the state \$200,000 derived from the proceeds of this sale, being a part of the purchase money due thereunder. Bonds of the state equal in amount to the bonds of the company which had been indorsed by the governor have been, under authority of the general assembly, issued to take up the indorsed bonds of the company, and the bonds so issued are now a part of the recognized public debt of the state. Title to the Northeastern Railroad having been acquired by the state long after the constitution went into effect, the question arises whether this railroad was at the time it was sold a railroad "held" by the state, within the meaning of the constitution. At the time of the adoption of the constitution the state was absolute owner of the Western & Atlantic and the Macon & Brunswick Railroads, and therefore the convention had a right to declare what disposition should be made of the proceeds of the sale of these two railroads. It is a well-known historical fact that the state constructed the Western & Atlantic Railroad, and in this way became the owner of that road. The ownership of the Macon & Brunswick Railroad grew out of the fact that the state had, under authority of the acts of December 3, 1866, and October 27, 1870, placed its indorsement upon the bonds of the company. See Acts 1866, p. 127; Acts 1870, p. 336. It was provided by the act of 1866 that the indorsement of the state vested the absolute title in it, until the bonds were paid, to all property of every kind which might be purchased with the proceeds of those bonds. It was further provided by the act that, in case of default by the company in the payment of the principal or interest of the bonded indebtedness when the same became due, the state should seize the property of the railroad company, apply its earnings to the bonded debt, and sell the property so seized at such time as the governor might deem proper. The state subsequently became, under the provisions of this act, the owner of the railroad, and held title to the same at the time the constitution was framed.

In declaring that a similar disposition should be made of railroads held by the state, other than the two specifically mentioned in the provision of the constitution above quoted, it was evidently contemplated that the other railroads referred to, in order to be subject to this provision of the constitution, should, when sold, be held by the state in the same manner in which the two railroads named were held; that is, as absolute owner. Were there any other railroads held by the state as absolute owner at the time the constitution was adopted? If this question is to be answered by looking

alone to the present record, the answer would be "No." If the question is to be answered in the light of the public history of the state, independently of the present record, the answer would still be "No." Neither at the time the constitution was promulgated by the convention, nor at the time it was ratified by the people, did the state hold, as owner thereof, any other railroad than those named in the constitutional provision. It is true that at the time the convention was in session the governor of the state, in his official capacity, was in possession of the North & South Railroad, but the state did not at this time own this railroad. The possession of the governor was due to the fact that the indorsement of the state had been placed upon the bonds of the company, default had been made in the payment of interest thereon, the road had been seized by the governor, and was in his possession for the benefit of the bondholders, and for the protection of the state, as indorser of the bonds. See House Journal 1878, pp. 30, 31. This road was sold by the governor, under the power given in the charter of the company, on the first Tuesday in September, 1877,—a few days after the convention adjourned. The purchasers at this sale having failed to comply with their bid, the governor negotiated a private sale of the railroad, which seems to have been authorized by the charter of the company, with other persons, for the amount bid at the sale. This private sale appears to have been made as of the date January 1, 1878; the purchase money to be paid on January 1, 1884. In the absence of evidence to the contrary, it possibly may be presumed that the amount for which this road was sold (\$40,500) was collected and applied to the payment of the bonds of the company, as was contemplated by the charter of the company. See Acts 1870, p. 350 (13); Acts 1868, p. 144. That the amount was collected and paid into the state treasury before the same was due, appears from the treasurer's report of 1881, published, as required by law, with the acts of the general assembly. See Appendix to Acts 1880-81. Whether it has ever been paid out, does not appear. It might have been lawfully paid out on the bonds of the railroad company, and to this extent have reduced the amount of the state's liability on account of the indorsement of its bonds. If it was not, and the state has issued its bonds for the full amount due on the bonds of the railroad company, and these bonds are still outstanding, the proceeds of the sale of this road in the treasury are a part of the public property fund, and subject to the provisions of the constitution in relation to that fund.

From the journal of the constitutional convention, it seems that some of the members were of opinion that the state did own the North & South Railroad. Mr. Tharpe introduced a resolution providing for the appointment of a committee to inquire into the pro-

priety of selling the Western & Atlantic, Macon & Brunswick, and North & South Railroads. See Journal Const. Conv. 1877, p. 68; Small, Debates, p. 47. This committee was appointed to inquire into the propriety of selling all the railroads belonging to the state, and recommended the adoption of an ordinance requiring the general assembly to create a commission which, with the governor, should be authorized to sell the three roads mentioned in the Tharpe resolution, and also the Memphis Branch Railroad. See Journal Const. Conv. 1877, p. 164; Small, Debates, 129. Consideration of this report was postponed, and, so far as appears, no further action was ever taken thereon. It is significant, however, that the first draft of the constitutional provision now under consideration mentioned only the Western & Atlantic and the Macon & Brunswick Railroads, thus showing that upon investigation it had been ascertained that the state owned those two roads only. See Journal Const. Conv. 209; Small, Debates, 183. As the North & South Railroad was not owned by the state, it could not be enumerated as one of the railroads the proceeds of the sale of which were to become a part of the public property fund. The proceeds of the sale of this road and other roads in a similar situation were to be applied primarily to the payment of the bonds of the company, not only for the purpose of discharging this debt of the company, but also to relieve the state, to the extent of the amount paid, from any liability on its indorsement. If any surplus remained after paying off the bonds, it went, of course, to the owners of the railroad. It was therefore manifest that this road could not be classed with the Western & Atlantic and the Macon & Brunswick Railroads. At the time the constitution was framed it could be foreseen that there was a contingency upon the happening of which the state might become the owner of this road. If the purchasers failed to comply with their bid, and the road was again exposed to sale, the state might be compelled, for its own protection, to become a purchaser at the sale. With the ownership of the road there would also come to the state a liability for the full amount of the unpaid bonds of the company, upon which the state had placed its indorsement. As this liability of the state as indorser upon the bonds of the railroad company would be a part of the bonded debt of the state, and as the scheme of the constitution was that the proceeds of the sale of public property should be set apart as a fund for the payment of the bonded debt, it was provided in furtherance of this scheme that, when the state became the owner of a railroad which was incumbered with a bonded debt upon which the state was liable as indorser, the proceeds of the sale of the railroad should become a part of the fund set apart by the constitution for the payment of the public debt.

The policy of the constitution was to prevent the increase of the bonded debt of the state, and it was therein provided that "the bonded debt of the state shall never be increased, except to repel invasion, suppress insurrection or defend the state in time of war." Civ. Code, § 5899. Construing this provision in connection with that provision in reference to the public property fund, it is clear that it was the intention of the framers of this instrument that if the bonded debt which was owed by the state as a principal debtor was increased on account of the state being compelled to assume, as principal, bonded debts for which it had become legally bound as indorser when the policy existed of lending state aid to the construction of public improvements, the debt brought about by the assumption of these obligations would take its appropriate place as a part of the public debt of the state, and the railroad property which came with this debt should take its appropriate place, and the proceeds of the same, when sold, be set apart for the payment of the public debt.

In view of the status of the North & South Railroad and other railroads similarly situated, the expression "other railroads held by the state" is language which must be held, at least, to apply to railroads which might, after the adoption of the constitution, be acquired by the state as a consequence of the indorsement of the bonds of these railroad companies; for in no other way, unless at a tax sale or other sale under a claim in favor of the state, could the state ever acquire railroad property, the direct acquisition of such property being prohibited by the terms of the constitution. As above stated, the bonded debt of the state could never be increased; and the state was prohibited from levying a tax to be used for any other purposes than those enumerated in the constitution, and none of those so enumerated were broad enough to include the acquisition of a railroad. See Civ. Code, § 5882. It would be a narrow construction, indeed, and one not at all warranted, when all the circumstances and the public history of the state are taken into consideration, to hold that the expression "other railroads held by the state" applied only to the North & South Railroad, simply because at the time the constitution was framed the state had actually seized this road under the power given in the company's charter, and was making efforts to sell the same for its protection and for the benefit of the bondholders. It was altogether probable that other roads would in the future be placed in exactly the same position. That the framers of the constitution meant to include only such roads as the state might, in some contingency, own, is absolutely certain; for in no other way could the state ever own the proceeds arising from the sale of any property. The constitutional provision is a

pledge of the proceeds arising from the sale of public property; that is, property owned by the state, and not property owned by other persons against which the state holds a claim or demand of some nature. Keeping this clearly in view, it seems entirely plain that it was intended to include those roads which might in the future be seized and sold by the state, as well as the one which had already been seized. Indeed, so far as the North & South road was concerned, the state had manifested a purpose not to become the owner of this road, for it had allowed it to be bid off at \$40,500,—a sum so much smaller than the amount of the bonds indorsed by the state as to indicate a purpose on the part of the state to allow the road to be sold to other purchasers at almost any price, rather than become the purchaser itself. This sale, it is true, took place after the convention adjourned, but some time before the constitution was adopted; and the people, when they came to vote upon that instrument, were consequently acquainted with the purpose of the state with reference to this road. There was also a contingency, doubtless well known to the members of the convention, that the state might become the owner of the Memphis Branch Railroad; that road having been seized by the governor under authority given in its charter, growing out of the fact that the state's indorsement was upon the bonds of that company, and the road had been sold upon credit extending to January 1, 1881, just a few days before the convention met. See House Journal 1878, pp. 31, 32. Under authority of an act approved September 28, 1868, the governor placed the indorsement of the state upon the bonds of the South Georgia & Florida Railroad Company. These bonds were outstanding at the time the constitution was adopted. Consequently there was also a contingency that the state might become the owner of this road. See Acts 1868, p. 145. The status of this railroad was known to the members of the constitutional convention. See Journal Const. Conv. p. 209; Small, Debates, p. 183.

The only railroad that the state could have become owner of, without at the same time becoming chargeable with a debt by reason thereof, at the time the constitution was framed, was the Marietta & North Georgia Railroad. By the act of February 24, 1877, the state loaned to the company operating this road the net amount received into the treasury from convict labor. Acts 1877, p. 29. To secure this loan, the state took a first lien on all of the property of the road then existing or thereafter to be acquired. It was provided that, in the event of default in the payment of the principal or interest of the loan, the governor, in behalf of the state, should seize the property of the railroad company, and, after advertisement for 80 days, sell the same to the highest bidder.

Whether or not, if this road had ever become the property of the state, it would have been subject to the provisions of the constitution under consideration in the present case, certainly the fact that the state might have become the owner of this one road only, without incurring a debt by reason of such ownership, when there were at least four others in such a condition that ownership of any of them by the state would bring ultimate liability upon the bonded debt of the companies, which would, on account of the liability of the state thereon as indorser, be a part of the bonded debt of the state, would not be a sufficient reason to justify a construction of the constitution which would exempt from the operation of this provision the proceeds of the sale of those railroads which did actually become the property of the state, and which brought with them a bonded debt, upon which the state was liable as indorser.

In the charter of the Northeastern Railroad Company there was, as has been stated, a provision that upon certain conditions the governor was authorized to place the indorsement of the state upon the bonds of the company. On January 9, 1877, a board of commissioners, which had been previously appointed by the governor, reported that 40 miles of this road had been completed and equipped and in running order, and, in effect, that the conditions prescribed by the charter to be complied with before the state's indorsement should be applied for had been substantially complied with. While the then incumbent of the governor's office had before the meeting of the convention declined to place the state's indorsement upon the bonds of this company, there was still outstanding this claim of the company to have such indorsement placed upon its bonds; and there was while the convention was in session pending in the supreme court of this state a case in which the company was asserting its right to have the governor place the indorsement of the state upon the bonds, and attempting to defeat the application of a citizen to enjoin it from applying to the governor. A decision holding that the company had a right to apply to the governor to have the state's indorsement placed upon its bonds was rendered on August 28, 1877, —just three days after the constitutional convention adjourned. *Railroad Co. v. Morris*, 59 Ga. 364. See, also, *House Journal* 1878, p. 33. It may be legitimately presumed from these facts that the members of the convention were at least aware that this railroad was still asserting its claim to the state's indorsement upon the bonds. If this claim was ever recognized by the state, and the bonds of the company indorsed, it could be foreseen that there was a possibility that the state might at some time in the future not only become the owner of the road, but become charged with a liability to pay the bonded debt of the company. When the framers of the constitution named all of the

railroads then owned by the state, and added to this enumeration the words "or other railroads held by the state," no other intention can be ascribed to the framers of this instrument than that these words should at least apply to railroads thereafter acquired by the state, when acquired in such a way that with them there came a bonded debt upon which the state was liable as indorser. There were no railroads owned by the state at the time of the adoption of the constitution, except the two named. It was known to the framers of the constitution that there were at least three which might, upon the happening of a given contingency, become in the future the property of the state. Certainly these, as well as all other railroads which were so situated, were in contemplation of the framers of the constitution, and, when acquired by the state, should be dealt with in the same manner as those which were then owned. The state having, through the governor, recognized the claim of the Northeastern Railroad Company to have the state's indorsement placed upon its bonds, and the governor having recognized the validity of this indorsement by seizing the road in the behalf of the state for the benefit of the bondholders, as well as to secure the state against loss on account of its indorsement, and the general assembly having recognized the validity of the indorsement by providing for the purchase by the governor of the property of the company at a sale had under authority of the company's charter, and having replaced the bonds of the company with bonds of the state, and the bonded debt of the state upon which it was liable as a principal being to that extent increased, the proceeds of the sale of this railroad, which came to the state at the same time with its liability upon the bonds, and in consequence of the state's indorsement thereon, come within the terms of the provision of the constitution in regard to the sale of railroads held by the state, and must be set apart and faithfully kept for the purpose indicated by the constitution, and used, laid out, and expended for no other purposes whatsoever, so long as the state has a bonded debt.

This view of the matter is much strengthened when all of the provisions of the present constitution of the state relating to the subject of state aid in matters of public improvement are read together, and in the light of the antecedent history of the state in relation to this subject. Prior to the constitution of 1868 the state had, by an act of the general assembly, loaned its aid in the construction of at least one railroad, by placing its indorsement upon the bonds of railroad company. As has been seen, the indorsement of a portion of the bonds of the Macon & Brunswick Railroad was under an act passed in 1866. The constitution of 1868 authorized the state to aid in works of public improvement under certain conditions; among them

being that the state should have a prior lien on all the property owned by the company to which the state's aid was granted, and that an amount equal to that loaned by the state should be invested by private persons. Paragraph 5, § 6, art. 3; Code 1873, § 5068. Under this authority the legislature granted numerous charters incorporating railroad companies, each of them containing a provision that the state's indorsement should be placed upon the bonds of the company upon the conditions prescribed in the constitution. An examination of the acts of 1868, 1869, and 1870 will show how freely charters of this kind were granted between the dates named. Under many of the acts just referred to, the state's indorsement was placed upon the bonds of the companies. In 1872 the general assembly entered into an investigation to determine whether the state was bound upon all of the bonds upon which the state's indorsement had been placed, and the result of this investigation was that the indorsement of the state upon bonds of several railroad companies was, by acts of the general assembly, declared to be null and void for several reasons. See Acts 1872, pp. 5-7. In 1874 the general assembly passed an act repealing that part of all charters to railroad companies which provided for the state's indorsement upon the bonds of such companies. Acts 1874, p. 98. In 1877 an amendment to the constitution of 1868 was adopted, declaring that the indorsement of the state upon the bonds of certain railroad companies was illegal and void, and should never be paid. See Code 1882, p. 1329. See, also, Const. 1877, par. 1, § 11, art. 7; Civ. Code, § 5898. This was the condition of affairs in reference to the matter of state aid when the convention of 1877 met. The purpose of the constitution framed by that body was to provide that every valid bond of the state should be paid, whether the state was liable thereon as principal or indorser, but that the state should never incur any new debt by aiding in the construction of any work of public improvement. State aid was entirely prohibited for the future. The consequences of state aid in the past, wherever it had been lawfully granted to any railroad company, were to be recognized, and the debt due by the state on this account was to be treated as a part of the public debt of the state. It was the intention of the framers of the constitution that this should be true, whether at the time the constitution was adopted the state had already become liable on account of state aid in the past, or might in the future become so liable. The bonded debt of the state was never to be increased, except for the purpose of defending the state. The bonded debt (using this term to include not only the debt the state owed at the time the constitution was adopted, whether as principal or indorser, but also whatever debt of that character it might thereafter owe on account of liabilities law-

fully incurred before the constitution was adopted) was to be recognized as a valid debt against the state, and its payment was provided for. One source from which the framers of the constitution intended that the fund for the payment of the bonded debt of the state was to be derived was from the sale of railroad property. The bonded debt of the state and the ownership of railroads by the state are no more intimately connected with each other in the history of this state than they are in the terms of the constitution. Ownership of railroads brought debt to the state. This property, when disposed of, must therefore go to discharge the liability which its ownership has imposed. This was undoubtedly the intention of the framers of the constitution, and railroad property acquired by the state as a result of state aid to railroads must, under the plain provisions of the constitution, be applied to the payment of the public debt, a portion of which has been incurred on account of the ownership of this class of property, and to no other purpose whatever. The framers of the constitution of 1877 intended that the provisions of that instrument should be exhaustive of the subject of state aid. There should be no state aid in the future, and debt incurred as a result of state aid in the past must be paid, as far as possible, by property which has come to the state as a result of state aid.

3. By an act approved December 21, 1898, it was provided that in order to make the apportionment of the common-school fund provided for in that act, "and in order to make quarterly payments to the teachers in the common schools of the state, the treasurer of the state is hereby authorized to draw, on the first day of April, on any funds in the treasury, three hundred thousand dollars to pay the teachers quarterly, the same to be repaid from the school fund when the same shall be paid into the treasury." Acts 1893, p. 59. On December 8, 1897, an act with the following title was approved: "An act to authorize the treasurer of the state to draw on any funds in the state treasury to the amount of \$400,000, to be used in paying the teachers as provided by law, and for other purposes." It was provided in the act "that in order to make the apportionment of the school fund as provided by law, and in order to make quarterly payments to the teachers in the common schools of the state, the treasurer of the state is hereby authorized and directed to draw on the first day of April of each and every year the sum of \$400,000 to pay the teachers quarterly, the same to be repaid from the school fund when the same shall be paid into the treasury." Acts 1897, p. 108. It will always be presumed that it is the intention of the general assembly to obey, and not to violate, the constitution. When one of its acts is susceptible of two constructions,—one violative of the constitution, and the other in con-

sonance therewith,—the latter construction must be adopted. An act of the general assembly will never be construed as violative of the constitution unless its terms are such as to absolutely demand such a construction. The propositions thus stated are rules of elementary law. Construing the acts of 1893 and 1897, above cited, in the light of these rules, neither act would authorize the appropriation of any portion of the public property fund to the payment of amounts due by the state to the teachers of the common schools of the state. Neither act in terms declares that the teachers shall be paid out of this fund, and, as such a use of this fund would be a violation of the constitution, it is to be presumed that it was not the intention of the general assembly that the fund should be so used. The expression "any funds in the treasury," appearing in the act of 1893, and the expression "any funds in the state treasury," appearing in the title of the act of 1897, mean any funds in the treasury which can be lawfully applied to the purposes indicated in the acts. So construing these acts, neither of them is violative of the constitutional provision now being dealt with. It is no reply to say that there are no other funds in the treasury to which the acts could apply; for it is better to assume that the legislature has done a vain and absurd thing than to convict it of a deliberate and willful violation of the fundamental law of the state. In the appropriation act for 1900 is found the following provision: "For the support of the common schools, eight hundred thousand dollars, in addition to the school fund derived from the sources referred to in article 8, section 3 of the constitution." Acts 1900, p. 13. This appropriation act provides further "that in making the appropriations hereinbefore mentioned, when said appropriations are to be paid to persons, or for particular objects, same shall be paid from the funds arising from the sources now provided by law." Page 16. There is nothing in the act which in terms declares that any part of the appropriation for the common schools shall be paid out of the public property fund, and the paragraph last quoted indicates the contrary intention on the part of the general assembly; for by that it is distinctly provided that the appropriation shall be paid from the sources provided by law, and the only sources from which the appropriation for the common schools can be derived, consistently with the constitution, is either a tax levied in the manner prescribed by law, or the school fund as made up of the items expressly enumerated in the constitution. Const. art. 8, § 3, par. 1; Civ. Code, § 5908.

4. The duties of the state treasurer are prescribed by law. Among those duties, we find it declared in the Code: "He shall pay all funds pledged to the payment of the public debt, or interest thereon, or to any object of education, and to those objects

only, and in no wise to any other purpose. All payments from the treasury shall be paid from the fund appropriated for such purpose, and not from any other." Pol. Code, § 199 (8). It is said that this section prohibits the treasurer from paying a claim against the school fund out of funds appropriated for other purposes, and that if the constitution prohibits the payment of such claims out of the public property fund, and this section prohibits the payment out of any other fund than the school fund, the act of 1897 has nothing upon which to operate. Of course, it will never be held, unless from necessity, that the general assembly has done either an absurd or a vain thing. The general assembly must not violate the constitution, and repeals by implication are not favored. If, however, an act of the general assembly is capable of being construed three ways,—the first making it violative of the constitution, the second having the effect to repeal a former act by implication, and the third making the general assembly do an idle or a vain thing,—either the second or third construction must be adopted; and, as between these two, it would seem that the second should prevail.

5. The warrants drawn upon the treasury in the present case were in the following form: "Atlanta, Ga., April 18, 1900. To the Treasurer of the State of Georgia: Pay to —, or bearer, the sum of — dollars for — months, ending —, 1901, and place to the account of school fund." The Code declares that the warrants drawn by the governor on the treasurer "shall always specify on what appropriation or fund" they are drawn. Pol. Code, § 140. There was no language in any of the warrants involved in the present case which expressly directed the treasurer to use any part of the public property fund in the payment of such warrants. The warrants were drawn payable out of the school fund, and were therefore payable out of that fund as derived from the sources authorized by the constitution and the law. As the public property fund could never become a part of the school fund, if the mandate of the constitution was obeyed, it will not be presumed that the governor intended by these warrants that the treasurer should pay the same out of the funds in his hands which the constitution distinctly declared should not be appropriated to such purposes. The law would construe these warrants to be drawn upon the school fund made up in the manner consistent with the fundamental law of the state, and the treasurer was warranted in placing upon them such construction as the law authorized.

6. The constitution declares that no money shall be drawn from the treasury except by an appropriation made by law. Paragraph 11, § 7, art. 3; Civ. Code, § 5774. The Code declares that all payments from the treasury, unless otherwise provided, shall be made upon the warrant of the governor

(Pol. Code, § 140), and also that the treasurer shall pay out money from the treasury "only upon the warrants of the governor, when countersigned by the comptroller general, excepting the draft of the president of the senate, and speaker of the house of representatives, for sums due to the members and officers of their respective bodies." Pol. Code, § 199 (1). The treasurer has no authority to pay out any money from the treasury until there has been an appropriation of the same made by law, and, with the exceptions stated in the section of the Code last referred to, even after an appropriation has been made by law he has no authority to pay out the same except upon the warrant of the governor, countersigned by the comptroller general. One holding a claim against the state, no matter how just the same may be, cannot demand payment of it at the hands of the treasurer unless he presents a warrant of the governor, countersigned by the comptroller general, and shows an appropriation made by law for the payment of his claim. The treasurer may refuse to pay if, with the exceptions above referred to in the Code, the claim has not behind it both an appropriation act and a warrant of the governor countersigned by the comptroller general. See *Gurnee v. Speer*, 68 Ga. 711.

7. The attorney general, in an opinion given to the state treasurer, advised him that under the act of 1897 he was "authorized and directed to transfer \$400,000 of the public property fund to the school fund, or at least so much thereof as may be needed to carry into effect the requirements of the statute providing for the payment of teachers." It is said that as the constitution creates the office of attorney general, and prescribes that it shall be his duty to act as the legal adviser of the executive department, any officer of that department acting under his advice will be protected, even if it should afterwards develop that the advice was erroneous; it being said that it would be unjust and unconscionable for the state to provide an executive officer with a legal adviser, and then hold such officer and his bondsmen liable for following the advice of such legal adviser. We have read carefully the opinion given by the attorney general to the state treasurer, and we also listened with interest and attention to the able argument made by the attorney general at the bar of this court, and have taken time to carefully consider the reasoning both of the written opinion and the oral argument. But, for the reasons which are set forth in the foregoing discussion, we have been compelled to take a different view of the matter from that presented by this able, learned, and conscientious public officer, whose opinions are always clear, and whose conclusions are generally correct. Even if it be conceded that the opinion of the attorney general, though erroneous, would have protected the treasurer and his bondsmen from liability if the

treasurer had paid the warrants presented to him out of the public property fund, an entirely different question is presented when it is sought by means of a writ of mandamus to compel the treasurer to act on this advice. Whether the treasurer would have been protected if he had voluntarily paid out, on the advice of the attorney general, a portion of the public property fund, is a question not involved in the present case. But certain it is that the courts should not by mandamus compel the custodian of the public funds of the state to pay out a portion thereof when such payment would be a violation of the fundamental law of the state.

8. It was insisted in the argument that the state treasurer was an officer whose duty in regard to paying warrants was purely ministerial, and that he would not be heard to raise any question as to the unconstitutionality of an act of the general assembly in appropriating money, and also that, being a subordinate executive officer of the state, he should not be heard to question the authority of the governor to draw a warrant upon the treasurer. Under the view we have taken of the case, these questions are not involved therein, and therefore no decision will be made as to any of them. If the general assembly had in terms appropriated the public property fund to the payment of sums due the teachers in the common schools of the state, and the governor had drawn warrants upon the treasurer directing him, in terms, to pay such sums out of the public property fund, and these warrants had been countersigned by the comptroller general, and the attorney general had advised the treasurer that he was authorized to pay such a warrant, then these questions would have been presented for decision. But whether or not, if all these facts had existed, the treasurer and the sureties on his bond would have been protected if the treasurer had paid the warrants, or whether or not the treasurer would have been permitted to question the validity of an act of the general assembly making the appropriation, or the correctness of the opinion of the attorney general, are questions which we do not think are presented in any way by the present record, and for that reason we will not now undertake to determine any of them. The general assembly has simply provided that the school fund shall be applied in payment of the amounts due the teachers in the common schools. The governor has drawn warrants upon the treasurer, directing him to pay these amounts out of the school fund. The treasurer has answered that he has a given amount less than a sum necessary to pay the warrants, which he is ready and willing to appropriate to such of the warrants as the governor may direct, and that he has no funds to pay the balance of the warrants. This seems to us to be not only a proper, but a complete and perfect, answer to the application for mandamus.

9. The general assembly never having attempted to appropriate any part of the public property fund to the payment of the sums due by the state to the teachers in the common schools, and the governor never having drawn any warrant upon this fund for the payment of such sums, the treasurer was authorized to refuse to appropriate any part of the public property fund in the payment of the warrants which were presented to him, payable out of another fund. As we have reached the conclusion that the proceeds of the sale of the Northeastern Railroad were a part of the public property fund, the court erred in granting a mandamus against the treasurer, compelling him to pay the warrants in question out of the proceeds of the sale of that railroad. As the treasurer admitted in his answer that there was in the treasury the sum of \$77,294.83, which he had offered to appropriate to the payment of such of the warrants as the governor should indicate, the court erred in making the mandamus absolute as to this amount. When a public officer has offered to perform a duty required of him by law, and this offer is rejected by those calling upon him to perform, there should not be placed upon the records of the court a mandamus absolute, compelling him to do that which he has never refused to do, and is still willing to do. Under such circumstances, the granting of a mandamus absolute is not only unjust to the officer in question, but involves him in the costs of the proceedings, which should be borne by the opposite party. The judge erred in making the mandamus absolute. Judgment reversed.

LEWIS, J. (dissenting). 1. I believe it is conceded that the law term "hold" ordinarily refers to the actual possession of property by lawful title, or the being invested with the legal right to have or claim such possession. See 15 Am. & Eng. Enc. Law (2d Ed.) p. 510. Article 7, § 13, par. 1, of the constitution (Civ. Code, § 5900) provides that the proceeds of the sale of the Western & Atlantic, Macon & Brunswick, or other railroads held by the state, and any other property owned by the state, whenever the general assembly may authorize the sale of the whole or any part thereof, shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatever, so long as the state has any existing bonded debt. A very important question involved in the decision of the present case is whether that provision of the constitution was intended to include any railroad or other public property that might subsequently be acquired by the state, or contemplated only such public property as was owned by it at the time of the adoption of the constitution. In other words, did the convention intend that that section should be prospective in its operation? The legal

construction of language creating a lien, pledge, or mortgage upon property is that it can only refer to property which was in existence and owned by the maker of the instrument at the time of its execution. Section 2723 of the Civil Code declares that a mortgage "may embrace all property in possession or to which the mortgagor has the right of possession at the time, or may cover a stock of goods or other things in bulk but changing in specifics." The following section declares that such a mortgage must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect. As a general rule of law, when one makes a contract touching the sale, mortgage, or pledge of his property, the instrument refers only to such property as he owns at the time of its execution. I do not mean to say that section 5900 of the Civil Code creates a mortgage against the state in favor of its bondholders therein mentioned, but the claim or interest which it does create in them is certainly of no greater dignity than that which would have been conveyed by a regularly executed mortgage. Now suppose that the convention of 1877 had, instead of enacting the provision contained in section 5900 of the Civil Code, given to the bondholders a mortgage on all the property held by the state. Unquestionably, such a mortgage could not have legally been made applicable to any other property than that owned by the state at the time of its execution. I do not wish to be understood as holding that the convention could not legally have adopted a provision prospective in its nature, and made it apply to all railroads or other public property subsequently acquired by the state, but I am unwilling to place by implication such a construction upon the language which was used. If such had been the intention of the framers of the constitution, it is certainly reasonable to suppose that they would have employed language which would have definitely conveyed that idea,—would have used, for instance, such an expression as "now held or hereafter acquired by the state." To my mind, it is quite manifest that the convention of 1877 had no intention of so incumbering the proceeds of after-acquired public property; for elsewhere in the constitution (see Civ. Code, § 5890) the same convention expressly declared that "the credit of the state shall not be pledged or loaned to any individual, company, corporation or association, and the state shall not become a joint owner or stockholder in any company, association or corporation." The state had been acquiring railroad property as a result of its indorsement of the bonds of certain companies. The convention intended that that practice should stop, and therefore it never expected that the state would own any more railroads.

The only two railroads mentioned in section 5900 of the Civil Code as being owned by

the state were the Western & Atlantic and the Macon & Brunswick. The section, however, mentions "other railroads held by the state, and any other property owned by the state." Under the act of 1870 (Acts 1870, pp. 338, 347), the state had indorsed the bonds of the North & South and the Memphis Branch Railroads. By reference to the message of Gov. Colquitt to the general assembly dated January 10, 1877 (see Senate Journal 1877, pp. 26, 27), it will be seen that the North & South and the Memphis Branch Railroads are mentioned as being the property of the state. Gov. Colquitt, in his message, set out that one of these railroads (the North & South) was being operated at a loss, and that, on account of default in the payment of interest on the bonds of the Memphis Branch Railroad, he had seized that railroad and placed it in the hands of Robert T. Fouché, as agent to hold and manage it for the benefit of the state. He concludes this part of his message with the following significant language: "I may remark, however, that I have seen no reason to change my opinion that the state will consult its best interest by ridding herself of all ownership in and responsibility for such property, even at a tolerable loss." The bonds of the North & South Railroad were indorsed by Gov. Smith, and the road was seized by him in default of interest in July, 1874. Gov. Colquitt ordered it sold on the first Tuesday in September, 1877. The purchaser failed to comply with his bid, and in January, 1878, Gov. Colquitt sold the property at private sale to L. F. Garrard, at the highest bid received on the first Tuesday in September, 1877. See Min. Ex. Dept. 1877-78. See, also, House Journal 1878, p. 30. The road was sold on six years' time, but the purchaser made earlier payments, having settled in full on July 1, 1881. See governor's message, Senate Journal, p. 38. The bonds of the Memphis Branch Railroad were indorsed May 12, 1874. The company defaulting, the governor in May, 1876, seized the road. Senate Journal 1877, p. 27. On June 6, 1877, the governor ordered the road sold on the first Tuesday in August, but only a portion of it was sold, being bid in by the Marietta & North Georgia Railroad Company for \$9,000. The governor ordered the balance of the property of the Memphis Branch sold on the first Tuesday in September, 1878. See Min. Ex. Dept. 1878, p. 31. It seems clear to me, in the light of these circumstances, that the words of the section of the constitution under consideration, "other railroads held by the state," referred to these two railroads, which were regarded by the governor at the time the convention was in session as being the property of the state, and the sale of which was evidently contemplated. These were the "other railroads held by the state" to which the section plainly referred, and I can see no ground, either in law or reason, to extend the application of the constitutional provision

to all subsequently acquired public property.

The \$200,000 involved in this case were the proceeds of the sale by the state of the Northeastern Railroad. Was this road held by the state of Georgia in 1877? The history of the state shows that it was not so held at that time, even as a pledge or by virtue of a mortgage. Atty. Gen. Hammond had given the governor an opinion that he could not legally indorse its bonds, and Gov. Smith had refused to indorse them. The company had applied to the general assembly in January, 1877, for an indorsement of its bonds, but that body had declined to direct the governor to so act. It follows, therefore, that when the constitution of 1877 was adopted the state did not own the Northeastern Railroad, had never held or operated it, and did not have even an inchoate lien against the company or its property. It was not until 1878 that the state acquired even a mortgage upon this property. The road was successfully operated until 1898, when, the company having defaulted, the governor took possession. Then, for the first time, was the road held by the state. It was afterwards sold by the governor, and bid in by him for the state for \$100,000. That sale was for the purpose of collecting the mortgage, and, even if the constitutional provision before quoted can be held to apply to this property, \$100,000 (the proceeds of the first sale) is all that the bondholders can claim under that section, and not \$200,000 (the amount realized by the state after the property had greatly increased in value). If the subsequent sale had been for \$50,000, the bondholders would certainly have had the right to claim that the state was liable for \$100,000, the amount of the first sale; and if, after being sold, the property increases in value, and a greater amount is realized, they cannot claim any greater amount than was realized on the first sale. But I think that the proper construction of the constitution is that the section in question does not include the proceeds of the sale of the Northeastern Railroad, and that therefore the judgment of the trial court was absolutely demanded, under a fair construction of the law, and should consequently be affirmed.

Mr. Justice COBB, in his able and exhaustive opinion delivered on behalf of the majority of the court, uses the following language: "That the setting apart of this fund for a number of years, when it is not needed to discharge the public debt, and during a time when other demands due by the state must be discharged by taxation, which demands could be temporarily met by the use of the public property fund, is an unwise policy and bad financiering, is an argument which cannot be considered, in the face of a plain and unambiguous provision in the constitution declaring that the fund can be used only in a given way." This is undeniably true, as a legal and ethical proposi-

tion. But my position is that the proceeds of the sale of the Northeastern Railroad constitute no part of the public property fund referred to in the constitution, and I see no reason for encouraging the "unwise policy" and "bad financiering" alluded to by extending the application of the section of the constitution to property which I do not believe the framers of the constitution had in contemplation when they adopted this provision. Presumably, the present bonded indebtedness of the state was in existence when the constitution was adopted. All the bonds which were then in existence were held by the owners upon the faith of the honesty of the state in making provision to meet its debts by taxation. This additional pledge was therefore merely a gratuity, without any consideration whatever, and a construction of it should not be extended beyond a fair legal interpretation of its language. I cannot see the force of the reason given in the majority opinion why the constitutional provision under discussion included the Northeastern Railroad. It is stated that: "The Northeastern Railroad Company was incorporated October 27, 1870. * * * It was provided in its charter that under certain conditions the state would place its indorsement upon the bonds of the company for a given amount per mile of constructed railroad. This indorsement was placed upon the bonds of the company by the governor in 1878." That certainly did not constitute a holding of the railroad at the time. The fact that the state had the power to indorse the bonds, if it so desired, can in no event give it the ownership of the property. As before seen, the convention must have known that at that time the efforts made to secure the indorsement by the state of the bonds of this company had been unsuccessful. But, even if the bonds of the company had been indorsed before the meeting of the convention, the railroad could not, under the definition of the word "hold" given in the beginning of this opinion, and which I think is unanswerable, have been "held" by the state; and hence it could not have been included in the constitutional provision pledging the proceeds of the sale of public property to the payment of the bonded debt of the state.

2. When the constitutional convention drafted the law contained in section 5900 of the present Civil Code, the state owned not only the Western & Atlantic and Macon & Brunswick Railroads, but also the property enumerated in sections 960-1016 of the Code of 1873. Among this property were the old capitol situated in Atlanta, the Okefenokee swamp, and the Western & Atlantic Railroad lands. Some of it was afterwards sold, and brought amounts aggregating \$232,068.58. The proceeds of these sales, as I understand it, unquestionably form a part of the public property fund which the treasurer claims to hold. By reference to Acts 1898, p. 421, it

will be seen from the treasurer's report of that year that there was then in the treasury only \$120,004.57. To that report the treasurer adds a note stating that to the amount named should be added \$198,937.50, the net receipts from a temporary loan, making a total of cash on hand of \$318,942.07. He further states that of this amount \$100,000 was reserved for the sinking fund, and \$5,500 was held to pay past-due bonds. The note goes on to say: "On the 1st of October [the day following the date of the report] the following accounts are due, and must be met when presented, viz.: Salaries, \$37,000; contingent fund, \$3,000; department of agriculture, \$2,500; public building fund, \$1,500; public institutions, \$79,575; monumental fund, \$15,000; textile department of Technological School, \$10,000; and accounts due on military fund, \$15,000,—making a total of \$269,075, and leaving a balance of \$49,867.07 to meet demands on the treasury until taxes can be collected." Evidently, included in this statement of the money that had passed into the treasury were the above proceeds of the sale of public property, amounting to about \$232,000. From this public official record, it is manifest that before the present treasurer came into office that fund had gone into the general treasury, and been otherwise disposed of in the administration of the state government. Now to the point: I know of the sale of no other public property acquired since that time, save that of the Northeastern Railroad, which was bid in by the state at public sale in 1895. That road was afterwards sold, however, on time, for a little over \$300,000, \$100,000 of which was paid in 1899, and \$100,000 in 1900. This makes \$200,000, which is to be added to the \$232,000 above mentioned, which the defendant below claims to hold as the aggregate proceeds of the sale of public property. As I have already endeavored to demonstrate, the proceeds of the sale of the Northeastern Railroad have nothing whatever to do with the property which the constitutional convention intended to pledge for the payment of the bonded debt. Therefore practically all of this money must be a part of the general fund, constituting no part of the proceeds of the sale of public property. The legislature in 1897 evidently intended that the teachers' fund of \$400,000 should be paid out of the general fund in the treasury. In my opinion, the governor did right in issuing warrants upon these funds; and the attorney general was clearly correct in the opinion which he gave the treasurer when consulted,—that these warrants should be honored. I am not prepared to say that the constitutional convention of 1877 intended to direct that the proceeds of the sale of public property should be locked up or set aside and kept for 15 years, bearing no interest, to await the falling due of the principal of the state bonds. That section was directory to the legislature. Keeping the money in

that way would certainly be a financial folly, and I think that the purpose of the convention was to give the legislature some power in controlling that fund, investing it, and taking proper charge of it. Paying a temporary and current indebtedness, having as security therefor the income from taxation of all the property in the state, is certainly as safe as depositing the money in bank. It is not improper to regard as cash the taxes upon the property of the people during a current year, and the legislature can regard it as cash with as much propriety, if not more, than the treasurer can regard a deposit in bank; for taxes do not fail, and banks sometimes do.

I do not deem it necessary to express any decided view in regard to the question whether or not, when warrants have been drawn by the governor in accordance with an act of the general assembly, approved by the comptroller general, and their payment advised by the attorney general, the treasurer has the right to refuse to pay them upon the ground that their issuance is unconstitutional. The question, however, is at least a debatable one, and eminent authority exists in support of the contention that he has no such right. In the case of *State v. Heard*, 47 La. Ann. 1679, 18 South. 748, it is held that: "Executive officers of the state government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the constitution. Laws are presumed to be, and must be treated and acted upon by subordinate functionaries as, constitutional and legal until their unconstitutionality or illegality has been judicially established. Under our system of government, it was certainly never intended by its founders that an executive officer should nullify a law by neglecting or refusing to act under it." In *U. S. v. Jones*, 18 How. 92, 15 L. Ed. 274, a principle analogous to the one now under consideration was decided. In that case an accounting officer had put his opinion against that of the secretary of the navy and the attorney general of the United States. The court there held: "The secretary of the navy represents the president, and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions on subjects submitted to his jurisdiction and control by the constitution and laws do not require the approval of any officer of another department to make them valid and conclusive." It is true that there was a dissenting opinion in that case, but the majority opinion was approved in the case of *U. S. v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389, where the court, referring to certain officials who had attacked the constitutionality of an act of the secretary of the treasury, says: "In auditing those accounts, they would have been bound to re-

gard such action of the secretary as final." But conceding, for the sake of the argument, that the treasurer has the right to question the constitutionality of the act under which the appropriation was made, it follows, I think, from what has already been said, that he must then demonstrate that the fund which he claims to be exempt by virtue of the constitutional provision for the payment of the bonded debt is the specific fund in his hands, specifying its amount, from what property it came, and that he has held it ever since it came into his possession. That could be done by selecting a special depository for it, and, unless this is done, his plea under the constitution amounts to absolutely nothing; for certainly the state treasurer has no power to go upon the general fund and set apart a portion thereof for the purpose of meeting expenditures made under the administration of his predecessors in office.

By reference to the treasurers' reports published in the acts of the general assembly, it will be seen that the above-mentioned sum of \$232,065.58 was, no doubt, proceeds of the sale of the old capitol property, the Okefenokee swamp, lottery property, and Western & Atlantic lands, and that these proceeds went into the state treasury in the years 1890, 1891, and 1892. From the treasurer's report of 1898, above referred to, it is evident to my mind that this part claimed by the defendant to be proceeds of the sale of public property was disposed of in the administration of state affairs prior to 1899. In the absence of any proof to the contrary, the presumption is that there was a legal disposition of this fund. It may have been applied to the bonded debt of the state. So far as the facts of this case show, therefore, there is really in existence the proceeds of the sale of no public property contemplated by section 5900 of the Civil Code.

It is with great reluctance that I feel called upon to dissent from the opinion of my Brethren of the bench in this case, but I am impelled to put upon record my firm conviction that the judgment of the court below should not be reversed, but that, on the contrary, direction should be given that the mandamus apply to the entire fund, and not simply to a particular portion thereof; that the governor did no unconstitutional act in issuing these warrants; and that the attorney general was correct in the legal opinion expressed thereon.

(113 Ga. 441)

ALLRED v. TATE.

(Supreme Court of Georgia. May 25, 1901.)
RESCISSON OF CONTRACT—PLEADING—MULTIFARIOUSNESS—ELECTION.

1. When, by the prayers contained in an equitable petition, a rescission of a particular contract is sought, the fact that such petition bases the right to rescission on two distinct grounds does not render the petition objectionable as being multifarious; and this is true although one

of the grounds alleged is fraud and misrepresentation in procuring the execution of the contract, and the other is that defendant had no title to the property which was the subject-matter of the contract. (a) The allegations in the petition, when considered with the prayer, did not render the petition, or any part thereof, an action of deceit.

2. The trial judge erred in compelling an election by the plaintiff as to which of the two grounds for rescission he would rely on, and in dismissing the petition on the failure of the plaintiff to make such election.

(Syllabus by the Court.)

Error from superior court, Pickens county; George F. Gober, Judge.

Action by E. W. Allred against W. B. Tate. Judgment for defendant. Plaintiff brings error. Reversed.

Shepard Bryan, C. D. Phillips, C. Faw, S. A. Darnell, W. T. Day, and Z. D. Harrison, for plaintiff in error. Clay & Blair, R. N. Holland, Teasley & Hutcherson, and Spencer R. Atkinson, for defendant in error.

LITTLE, J. Allred filed a petition in the superior court of Pickens county against Tate, in which he tendered to the defendant a reconveyance of the mineral and marble interest in certain lands which theretofore Tate had conveyed to him under a contract of purchase, and prayed that the contract under which the purchase had been made be by decree of the court rescinded, and that he have a judgment recovering certain sums of money and certain specific property paid and turned over to Tate as the consideration of such contract of purchase. This petition and prayer was based on two grounds—First, it is alleged that Tate had procured the execution of the contract of purchase by fraud, and by colluding with one Mallard, who fraudulently, and by misrepresentations, induced Allred to purchase the land from Tate, in the doing of which Mallard was the agent and representative of Tate; second, because at the time Tate sold and conveyed to petitioner the mineral and marble interest Tate had no valid title to the land. It is not necessary, from the view we take of the case, to set out in detail the acts of fraud which are alleged in the petition, to which the defendant filed certain demurrers. The first of a general demurrer alleged that the petition set forth no such cause of action as entitled petitioner to any relief against the defendant; the second was a general demurrer to certain specified paragraphs of the petition, alleging that the matter contained therein was not pertinent or relevant to the other allegations in the petition, and should therefore be stricken; and a third ground of demurrer in these words: "Defendant further demurs and moves to dismiss said suit because of misjoinder of action, one count being an action *ex delicto* and the other count *ex contractu*." At the hearing the trial judge ruled that the petitioner should elect "upon which count in the petition he would proceed to trial, to wit, the action of deceit

or failure of title." The order dismissing the petition follows, in this language: "Petitioner's counsel having refused in open court to make the election and comply with the order of court, the demurrer is hereby sustained." The bill of exceptions assigns as error the decision of the judge requiring the election and the order sustaining the demurrer. It will be observed that the trial judge nowhere construed or passed upon the question whether the petition did or did not set out a cause of action, nor whether certain specified paragraphs of the petition should be stricken because they were not pertinent or relevant to the other allegations in said petition. In ordering an election by the plaintiff as to which of the two "counts" he would rely on for a decree in his favor, the trial judge evidently considered only the point made, that there was a misjoinder of actions; and when, in effect, he ruled that there was a misjoinder, and held that it was a case for election, he did not, in any manner, construe or pass on the merits of the case made by the allegations of the petition, and we are without his judgment on the legal sufficiency of such allegations. The real objection considered by the judge was that the petition was multifarious, which is a "blending in one bill in equity matters which in their nature are distinct and independent" (And. Law Dict.), as well as that it came under that rule which forbids the joining in one action causes arising *ex delicto* and those arising *ex contractu*. Inasmuch as the trial judge did not consider or pass upon the merits of the case made by the petition, nor whether there was a good cause of action set out, we will not do so, but confine ourselves to the question passed upon by him. It is our opinion that the petition was not multifarious, and that none of the allegations therein made can be so construed as to characterize the action as one of deceit.

If this construction be correct, it will follow that the trial judge erred in ordering the petitioner to elect upon which "count" he would proceed to trial. The prayer of the petition which indicates the character of the action is that, by a decree, the contract for the purchase of the mineral and marble interest in certain lands be rescinded. The causes which petitioner claims are sufficient to authorize this rescission are two,—fraud by, and want of title in, the other party to that contract. Petitioner says that he is entitled to such rescission on each of these grounds, and, while they are totally distinct and separate, their incorporation in one petition does not make the petition multifarious. The object of the petition is to cause a rescission of the contract, and we know of no reason why any number of separate and distinct grounds may not be set out and urged in one petition to cause this result. The allegations as to each seek but one end,—the rescission of the contract,—and,

if for all or any of the reasons set out the petitioner is entitled to such a decree, it would be so ordered. The allegations simply set up two reasons why the decree plaintiff prays for should be rendered. The matters set up are multifarious, but that, of itself, does not afford a legal objection to the petition. Judge Story (in his work on Equity Pleading [10th Ed.] p. 271) says: "There may be cases in which multifarious matters of distinct natures may be involved in the bill, and yet, from the objects of the bill, the objection of multifariousness, as to a particular defendant, ought not to prevail. * * * So, if the bill should contain several matters, all of which may come into consideration (as, for example, on taking an account) as prayed for, although relief may ultimately be given in respect to some of them only, yet the bill will not be deemed multifarious."

We also think that the trial judge erred in ruling that any of the allegations of the petition made an action of deceit. As we have seen, the main prayer of the petition was that the contract should be rescinded. The additional prayers have direct reference to a decree of rescission; that is, that the deeds be canceled, that uncollected notes be restored, and that judgment be rendered in his favor for the purchase price which he has paid. These are incident to and follow a decree of rescission, where money has been paid and title to land conveyed under the contract, and neither the prayer of the petition, nor any allegations thereof, are sufficient to characterize any part of the petition as an action for deceit. This being true, no cause for election existed, and the trial judge erred in dismissing the petition because of the refusal to so elect. Judgment reversed, all the justices concurring.

(113 Ga. 613)

KNIGHT v. ISOM.

(Supreme Court of Georgia. May 25, 1901.)

EJECTMENT—EVIDENCE—PRIOR POSSESSION.

1. One who bases an alleged right to recover land upon prior possession alone does not make out a prima facie case by merely testifying that he "went into possession of it only by leasing it to [a named person] for turpentine purposes for three years, and putting him into possession," and that the lessee "commenced cutting it about two years after [the plaintiff] leased it to him," and that "during the time [the lessee] sold it to" another person.

2. As the evidence in the present case demanded the verdict in favor of the defendant which the court directed, it was erroneous to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Early county; H. C. Sheffield, Judge.

Action by John Isom against Y. T. Knight. Verdict for defendant. From an order granting a new trial, defendant brings error. Reversed.

Arthur Gray Powell, for plaintiff in error.
W. O. Worrill and R. H. Sheffield, for defendant in error

FISH, J. Isom brought suit against Knight for the recovery of a certain tract of land situated in Early county. On the trial, upon the conclusion of the evidence, the court directed, and the jury accordingly returned, a verdict in favor of the defendant. The plaintiff moved for a new trial, which was granted by the court, and the defendant excepted. This is the first grant of a new trial in the case, and "the first grant of a new trial will not be disturbed by the supreme court, unless the plaintiff in error shows that the judge abused his discretion in granting it, and that the law and the facts require the verdict notwithstanding the judgment of the presiding judge." Civ. Code, § 5585. The assignment of error in the bill of exceptions is "that the court erred in granting a new trial in said case, because there was no other verdict which could legally have been rendered in said case, under the facts thereof, except a verdict for the defendant." Did the law and the facts of this case require the verdict which was directed by the court and rendered by the jury? We think that they did, and that therefore the judge erred in granting a new trial. The plaintiff showed no title in himself, and relied for a recovery solely upon prior possession. He plants himself in this court upon the proposition that "plaintiff in the court below, by showing prior possession, made out a prima facie case which put the defendant to the proof of paramount title." Did the plaintiff show prior possession, and thus make out a prima facie case in his favor? He introduced a deed, dated August 2, 1850, from Hutchins, as sheriff of Early county, to Joyner, and successive deeds, executed at various dates thereafter, making a complete chain from the sheriff down to himself. He did not show that any of his predecessors in this chain had ever been in possession of the land in dispute. Upon the question of possession he testified as follows: "I went into possession of it only by leasing it to Mr. Hilton for turpentine purposes for three years, and putting him into possession. He commenced cutting it about two years after I leased it to him. During the time Hilton was working the land for turpentine I sold it to Emily J. Tipton. She never went into possession of it, but sued me to set aside the sale. * * * I never abandoned my claim to the lot, and, after the suit Tipton brought against me terminated, I tried to place a tenant in possession of the lot, but did not succeed in doing it." We do not think this testimony was sufficient to show prior possession of the land in the plaintiff. "Actual possession of lands is evidenced by inclosure, cultivation, or any use and occupation thereof which is so noto-

rious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another." Civ. Code, § 3585. "Constructive possession of lands is where a person having paper title to a tract of land is in actual possession of only a part thereof. In such a case, the law construes the possession to extend to the boundary of the tract." Id. § 3586. There is nothing in the evidence which shows that this land, or any part of it, was inclosed or cultivated, or that there were any improvements whatever upon it. So far as appears from the evidence, when the plaintiff leased it to Hilton it was simply a tract of timbered land, uninclosed, unoccupied, and unimproved. The plaintiff's statement that he put Hilton in possession is a mere expression of opinion, which can amount to nothing, unless supported by facts which show that Hilton really did take possession of the premises. Evidently the plaintiff did not put Hilton in possession of the land at the time he leased it to him, for Hilton did not begin to cut the timber for turpentine purposes until about two years afterwards. The testimony upon which the plaintiff's claim of prior possession must stand or fall is that Hilton "commenced cutting it about two years after [the plaintiff] leased it to him," and "during the time Hilton was working the land for turpentine [the plaintiff] sold it to Emily J. Tipton." Does the fact that Hilton "commenced cutting it" show that he was in possession of the tract of land sued for? We think not. One might commence to cut timber upon a lot of land for turpentine purposes by merely cutting a single tree thereon, yet we apprehend that the cutting or boxing of one tree or several trees, without more, would not be sufficient to show that the one who did this was in possession of the entire tract upon which the tree or trees stood; nor do we think merely commencing to cut would even show that he was in actual possession of the particular spot of ground where he "commenced." Indirectly, the plaintiff swore that Hilton worked the land for turpentine, for he testified, "During the time Hilton was working the land for turpentine I sold it to Emily J. Tipton." But how much of the land Hilton worked for turpentine, or how long he worked it, does not appear from the testimony. He might have worked the land for turpentine purposes for three years, three days, or three hours. He might have worked the whole tract, or simply one acre or even a few square yards of the same. It seems almost useless to say that the evidence does not show actual occupation of the entire tract of land by Hilton. It does not show that he worked the tract of land so extensively and continuously as to prevent actual occupation by another. He might have simply worked one corner of the tract, while other portions of it were occupied by other people; and even the part that he did work

might not have been worked in such a manner as to render his occupation thereof so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another. If the evidence could be considered as being sufficient to show that the plaintiff had prior actual possession of any part of the tract, it is very clear that he could not recover the entire tract sued for, upon the ground of prior actual possession of the same. It is equally clear that he could not on this ground recover any part thereof; for the evidence utterly fails to identify the part that he had possession of, and to distinguish it from the parts that were not in his possession. So, even had he sought to have amended his pleadings for such a purpose, he could not have recovered any part of the land upon the ground of prior actual possession of the same. *Tripp v. Fausett*, 94 Ga. 330, 21 S. E. 572. Under the evidence, could he have recovered the land sued for upon prior actual possession of a part and constructive possession of the whole? Does the evidence show prior actual possession of any part of the land? As we have already intimated, there is nothing in the evidence which shows that Hilton worked any part of it in such a manner and for such a length of time as to make his use and occupation of such part so notorious and exclusive as to amount to actual occupation, as defined by the Civil Code. We do not think, therefore, that the testimony was sufficient to show prior actual possession of any part of the land. Without actual possession of some part, there could not, of course, be constructive possession of the whole. But, granting that the testimony did show that the plaintiff had prior actual possession of some undefined part of the land, was he, by reason of this fact, and the further fact that he held what purported to be paper title to the entire tract, constructively in possession of the whole tract described in the deeds? We think not; for, in order for actual possession of a part to be legally construed to extend over the whole, the paper title held by the person who is in possession of a part must have been duly recorded. "Possession under a duly recorded deed, will be construed to extend to all the contiguous property embraced therein." Civ. Code, § 3587. See, also, *Tritt v. Roberts*, 64 Ga. 156. It appears from the evidence that when Hilton was working the land for turpentine the deed to the plaintiff had not been recorded. In fact, although executed in November, 1871, it was not recorded until October 1, 1900, which was 10 months after this suit was instituted. The other deeds in the chain of deeds which the plaintiff introduced had all been recorded long prior to the date of the deed to the plaintiff. But, if Hilton was really in actual possession of a part of the land, he was there as the plaintiff's tenant; and, unless

the deed to the plaintiff was then on record, there was no implied notice to the world of the extent of the plaintiff's claim, and therefore no constructive possession by the plaintiff of the whole tract of land. As, under the evidence, the plaintiff could not legally have recovered the land sued for, or any part thereof, a verdict for the defendant was demanded. The court did right to direct such a verdict, and erred in granting the plaintiff a new trial. Judgment reversed. All the justices concurring.

(112 Ga. 637)

EASTMORE v. BUNKLEY et al.

BUNKLEY et al. v. EASTMORE.

(Supreme Court of Georgia. May 25, 1901.)

APPEAL—ASSIGNMENT OF ERROR—INTERVENTION—PLEADING—MECHANIC'S LIEN—EVIDENCE.

1. An assignment of error in a bill of exceptions, complaining that the court, "over the protest of the plaintiff," allowed named persons not parties to the original action to file an intervention therein, and excepting generally to the allowance of such intervention, without stating what, if any, objection was made thereto when offered, does not properly present any question for decision by the supreme court.

2. After persons not parties to an action have been allowed to intervene therein as defendants, it is their right to file pleadings denying the plaintiff's allegations, and setting up reasons why he should not have the relief sought by his petition.

3. The filing of such pleadings does not relieve the plaintiff of the burden of establishing his right to a recovery.

4. Even if constructing improvements on given realty will, in any event, entitle a contractor to a lien on other realty of the same owner which may be benefited or enhanced in value by reason of such improvements, it is incumbent on the contractor, in order to maintain a suit for the foreclosure of such lien on this latter realty, to clearly and distinctly identify it by evidence.

5. The evidence for the plaintiff did not, in the present case, establish his right to a foreclosure, either in whole or in part, of his alleged lien, and there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Camden county; Joseph W. Bennet, Judge.

Action by Thomas Eastmore against the New Cumberland Island Company. W. R. Bunkley and others intervene. From the judgment, plaintiff brings error, and interpleaders assign cross error. Affirmed, and cross bill of exceptions dismissed.

J. D. Sparks, for plaintiff. Atkinson & Dunwoody, for interveners.

LEWIS, J. This was a petition by Eastmore against the New Cumberland Island Company to foreclose a contractor's lien for a sum alleged to be due for constructing and repairing a certain dam and dock or pier on Cumberland Island. No defense was filed by the company, but at the trial term, over the objection of the plaintiff, the court allowed

the executors of W. R. Bunkley to intervene, and become parties defendant, on a petition in which they alleged that, as such executors, they held a mortgage on the realty against which the lien was sought to be established, which was for purchase money of the property, and was a superior lien; that the defendant company was insolvent, and the property insufficient in value to pay the mortgage debt, and that the holders of the mortgage would have to pay the plaintiff's claim if his alleged lien should be established; that these petitioners were not apprised of the foreclosure proceedings at the appearance term, and had just been apprised of it for the first time; and that the defendant company's failure to defend was due to its hope to impose a charge on the mortgaged property, and thereby save itself from further obligation to pay it, which was wrongful and fraudulent. An answer denying the allegations of the plaintiff's petition was filed by the interveners, and the plaintiff moved to strike the answer, because: (1) The interveners show no such cause as would entitle them to intervene. (2) The plaintiff is pursuing a statutory remedy, and is not proceeding on the equity side of the court. (3) It is not alleged that the defendant company is in the hands of a receiver, or likely to be so placed. (4) It is not alleged that there is a fund in hand over which a contest between the alleged mortgage and the plaintiff's lien could be had. (5) It is not alleged that the interveners have no remedy at law. (6) Their remedy is by money rule to contest for such funds as may be realized from a sale of the property under either their mortgage or the plaintiff's lien. The court overruled this motion. To this the plaintiff excepted. At the trial, before any evidence was introduced, the plaintiff contended that the burden in the case rested on the interveners, and not on him, because: (1) The foundation of the suit was a contractor's lien, which the law required to be in writing, and recorded; and, this being true, it assumed the dignity of a promissory note; and, being regularly declared on, if proper service was had, and no defense offered by the defendant, there was no burden on the plaintiff to make out his case; and, had the suit stood simply between the plaintiff and the defendant, no evidence would have been necessary in order that a verdict and judgment be had in favor of the plaintiff. (2) The case was in default as between the plaintiff and the defendant, and no burden to make out a complete case in favor of the plaintiff remained. (3) The interveners having been made parties defendant, and asserted certain facts in their answer, the burden of proving these allegations rested on them. The court overruled this contention, and held that the burden was on the plaintiff. At the conclusion of the evidence introduced for the plaintiff, the interveners moved for a nonsuit because (1) The evidence would not warrant a

recovery; (2) it was clearly shown that the contract to do work on the dam was disconnected from the property on which the plaintiff sought to foreclose his lien; (3) the plaintiff failed to prove the title of the property to have been in the defendant at the time the work was done; and (4) no compliance with his contract was shown. The court sustained the motion, and the plaintiff excepted, assigning error on each of the rulings stated. By cross bill of exceptions error is assigned on the overruling of a demurrer to the plaintiff's petition, because: (1) No cause of action is stated. (2) The contract is not set out. (3) It is not alleged whether the contract was in parol or written. If in parol, its terms are not stated; if in writing, no copy is set out. Error is also assigned on the refusal to exclude certain documents set out in the cross bill.

1. The only assignment of error in the bill of exceptions by which complaint is made of the allowance by the court below of the intervention referred to in the foregoing statement of facts is that it was allowed "over the protest of the plaintiff." It does not appear what objection, if any, was made to the allowance of the intervention at the time it was offered, and nothing more than a general assignment of error is made to this ruling. The bill of exceptions pendente lite, filed at the time the intervention was allowed, is equally vague in its assignment of error. According to the uniform rulings of this court, such an assignment of error does not properly present anything for our determination, and will not be considered. See *Truluck v. Peeples*, 1 Ga. 1; *Dunagan v. Dunagan*, 38 Ga. 554; *Jackson v. Jackson*, 47 Ga. 101 (15); *Thomas v. Parker*, 69 Ga. 284; *Mayor, etc., v. Moore*, 74 Ga. 409; *Hall v. Huff*, Id. 409; *Haywood v. State*, 90 Ga. 778, 16 S. E. 979; *Kehoe v. Hanley*, 95 Ga. 321, 22 S. E. 539; *Bush v. State*, 95 Ga. 601, 22 S. E. 284; *Morris v. Levering*, 98 Ga. 34, 25 S. E. 905; *Rodgers v. Black*, 99 Ga. 142, 25 S. E. 21; *Association v. Glessner*, 99 Ga. 747, 27 S. E. 187; *Deposit Co. v. Anderson*, 102 Ga. 551, 28 S. E. 382; *Peavy v. Atkinson*, 108 Ga. 167, 33 S. E. 956; *Railroad Co. v. Bond*, 111 Ga. 14, 36 S. E. 299; and many other cases which might be cited to the same effect.

2, 3. As a logical conclusion of the ruling just made, we must treat the intervention as having been properly allowed by the court below, and it follows that the defendants in error, having come into court in a legal manner, are entitled to file their pleadings denying the plaintiff's allegations, and setting forth their reasons why the relief prayed for in the petition should not be granted. The answer which the interveners filed was of this nature, and the motion to strike it was properly denied. Nor do we know of any rule of law by which the filing of such pleadings by the interveners would

relieve the plaintiff of the burden of establishing his right to a recovery.

4. It appears from the record that the plaintiff in error brought action in the lower court to foreclose a mechanic's lien for building a dam and dock or pier. He claimed a lien upon real estate, with which no connection whatever is shown by the testimony with this property, nor was there any evidence to show that the property upon which he claimed his lien belonged to the defendant company. It is not necessary to decide the question whether or not the construction of improvements on given realty will, in any event, entitle a contractor to a lien on other property of the same owner which may be benefited or enhanced in value by reason of such improvements, for, conceding that such is the case, it is certainly essential that the contractor, in order to maintain his suit for the foreclosure of his lien on the separate realty so benefited, shall clearly identify it by the evidence. Such, as has been seen, was not done by the plaintiff in error in this case.

5. We cannot see that the court below erred in granting a nonsuit. The evidence for the plaintiff did not establish his right to a foreclosure, either in whole or in part, of the lien which he claimed, and hence the judgment of the court below must be affirmed. Cross bill of exceptions dismissed. All the justices concurring.

(113 Ga. 584)

DOZIER v. McWHORTER.

(Supreme Court of Georgia. May 24, 1901.)

JUDGMENT LIEN—BANKRUPTCY—EXECUTION—ENTRIES ON DOCKET.

1. The sale of property set apart as exempt to a bankrupt under the bankrupt act of 1867 by virtue of a judgment against the bankrupt on a debt created after bankruptcy, the sale being had while the bankrupt is still the head of a family, does not divest the lien of a judgment against the bankrupt, rendered prior to bankruptcy, when the holder of such judgment did not prove his debt in the bankrupt court, or participate in any distribution of the estate of the bankrupt.

2. There is no law requiring that entries on an execution issued on a judgment rendered in 1876 shall be entered on the general execution docket before they will have the effect of preventing the judgment from becoming dormant.

3. The four-years possession of land which, under Civ. Code, § 5335, will divest the lien of a judgment, must be during a period of that length of time when the judgment could be lawfully enforced against the land.

(Syllabus by the Court.)

Exceptions from superior court, Greene county; F. C. Foster, Judge pro hac.

Action by E. J. Dozier against one Wilson. Judgment for plaintiff. On levy of execution W. P. McWhorter interposed a claim. Judgment finding the property not subject, and Dozier excepts, while McWhorter filed cross exceptions. Affirmed on cross bill of exceptions. Main bill dismissed.

Columbus Heard and Eb. T. Williams, for plaintiff. Saml. H. Sibley and Hamilton McWhorter, for claimant.

COBB, J. An execution in favor of Dozier against Wilson was levied upon a tract of land, and McWhorter interposed a claim. The case was submitted to the decision of the judge upon an agreed statement of facts, from which the following appeared: Dozier obtained judgment against Wilson on November 23, 1876. Execution issued November 7, 1883. The following entries appeared on the execution: January 8, 1889, entry of levy, followed by these words: "Execution Docket A, page 256;" January 4, 1896, the following entry, signed by the clerk: "Entered on General Execution Docket No. 1;" January 4, 1896, entry of nulla bona, which, from entry signed by clerk, appears to have been copied "on docket" the same day; January 8, 1900, levy upon land in dispute. On August 7, 1878, Wilson was adjudged a bankrupt under the then existing bankrupt law, and discharged from the payment of all debts not excepted by law. The land in dispute was set apart to him as a homestead under the bankrupt law, but was never set apart as a homestead under the state law. Dozier did not prove his debt in the bankrupt court, and did not participate in any distribution of the bankrupt's estate. On January 23, 1891, Wilson conveyed the land to Moss to secure a debt. Moss sued upon the notes evidencing the debt, which notes contained a general waiver of homestead, and obtained judgment on February 16, 1894. The land was reconveyed to Wilson, and the execution issued on the judgment was levied thereon, which was, after due advertisement, sold by the sheriff in the manner prescribed by law, and purchased by Moss February 4, 1896. The claimant's title depends upon this sale, he having acquired the land from a vendee of Moss. Wilson is no longer living on the land, has no minor children, and his wife is dead. The judge rendered a decision finding the property not subject, and Dozier excepted, and McWhorter, by cross bill, excepts to other rulings of the judge.

1. Property set apart to a bankrupt as exempt under the bankrupt act of 1867 (14 Stat. 522, c. 176, § 14) remained subject to the lien of a judgment the holder of which did not prove his debt in bankruptcy, nor participate in any distribution of the bankrupt's estate; but the right to enforce the lien was withheld until such time as, under the state law, property set apart as a homestead could be lawfully levied upon. *Bush v. Lester*, 55 Ga. 579; *Barrett v. Durham*, 80 Ga. 336, 5 S. E. 102; *Hiley v. Bridges*, 60 Ga. 375; *Jeffries v. Bartlett*, 75 Ga. 230, and cases cited. The lien of the judgment was lost upon that interest in the property which corresponded to the homestead estate under the state law, and, while the lien still attached to that interest which corresponded

to the reversion under the state law, the right to seize the same by levy was taken away until the interest corresponding to the homestead ceased to exist. See *Dozier v. Wilson*, 84 Ga. 303, 10 S. E. 743, and cases cited. The property set apart as exempt remained the property of the bankrupt, and could be alienated by him. *Bush v. Lester*, 55 Ga. 581; *Farmer v. Taylor*, 56 Ga. 559; *Felker v. Crane*, 70 Ga. 485, and cases cited. The question now presented is whether this power of alienation was so broad that the bankrupt, either directly by his own conveyance, or indirectly by the conveyance of the sheriff under a judgment rendered against him on a debt contracted since his bankruptcy, could alienate his property during the time that the holder of a judgment lien against him which was not discharged by his bankruptcy is prohibited by law from seizing the property as well as claiming the proceeds of a sale thereof, so as to vest in the alienee a title free from the judgment lien. Such a judgment lien is undoubtedly subject to the rules governing judgment liens generally as to dormancy, and must be kept in life just as other judgment liens, or it will cease to exist as a lien. See *Anderson v. Kilgo*, 81 Ga. 699, 8 S. E. 189. As a general rule, a sheriff's sale under a junior lien will divest other and senior judgment liens. *Brunswick Savings & Trust Co. v. National Bank*, 102 Ga. 776, 778, 29 S. E. 688, and cases cited. If the senior judgment lien could, at the time of the sale, have been lawfully levied upon the land, the sale under a junior lien divests the senior lien. If the senior judgment lien could, at the time of the sale, have lawfully claimed the proceeds of the sale under the junior lien, a sale under such a lien divests the senior judgment lien. It may be safely laid down as a general rule that a sale under a junior lien will not ordinarily divest the senior judgment lien, when such lien could not, at the date of the sale, either be enforced against the property, or claim the proceeds of the sale. See *De Vaughn v. Byrom*, 110 Ga. 904, 906, 36 S. E. 267 (6), and cases cited. As Dozier, at the date of the sheriff's sale to Moss, could neither lawfully levy his execution on the property nor claim the proceeds of the sale, the sale did not divest the lien of his judgment, but Moss and those claiming under him took the property subject to the lien of the judgment, but with the right to prevent the enforcement of the same to the same extent that Wilson could prevent its enforcement, and no more. The purchaser at the sheriff's sale acquired no more right in the property, as against the lien of Dozier's judgment, than he could have acquired by a conveyance direct from Dozier. The sheriff, in conducting a sale under execution, acts as the agent and representative of the defendant in execution, and can sell no greater interest in the property than the defendant in execution could convey. See *Ellis v. Smith*, 10 Ga. 262 (10); *Ousley v. Bailey*,

111 Ga. 787 (bottom page), 86 S. E. 750, and cases cited. It certainly cannot be the law that the bankrupt, by a simple conveyance, can divest the lien of a judgment which the bankrupt act distinctly declares shall not be affected by the discharge in bankruptcy. If this is the law, the provision of the bankrupt act just referred to is meaningless. We do not think that provision of the act is capable of any other construction than that the lien of the judgment adheres to the property set apart to the bankrupt as exempt until the same is satisfied or discharged by law, and that the bankrupt cannot, by his own act, directly or indirectly divest the same. While the case of *Barrett v. Durham*, 80 Ga. 336, 5 S. E. 102, is not in all its facts exactly similar to this case, we think the principle of that case is controlling here, and, as we are entirely satisfied that the ruling there made is correct, we must refuse the request of counsel to have the same brought under review.

It is said that the ruling now made will conflict with the rulings heretofore made in cases where it was held that a sale of a homestead under a junior lien founded upon a debt which is superior to the homestead, or one founded upon an evidence of debt waiving the homestead, will divest the lien of a senior judgment as to the entire interest in the property, both the homestead estate as well as the estate in reversion. See *Moore v. Frost*, 63 Ga. 296; *Walker v. Johnson*, 64 Ga. 363; *Palmer v. Simpson*, 69 Ga. 792. Even if the cases cited go to the length claimed, there is a clear distinction between them and cases like the present. In the present case the ruling is that the lien of the judgment cannot be divested by any act done by the bankrupt, nor by an execution sale under a judgment founded on a debt created after the property is set apart as exempt. In the other cases the ruling is simply that, when a homestead is set apart, and there are debts then in existence which are superior to the homestead, as well as debts inferior to the homestead, a sale under an execution founded on a debt to which the homestead is subject passes the whole estate in the property divested of all pre-existing liens. As against a debt which antedates a homestead, to the payment of which the homestead can be subjected, there is neither homestead nor reversion. It is simply property of a debtor, subject to levy and sale to the extent of his interest therein; and it does not, as against a creditor holding such a debt, lie in the mouth of the debtor or his other creditors against whom a homestead may be taken to claim there is any division of interest in the property. When a debt of the character above referred to is paid in full by a sale of the debtor's property, the residue (but only the residue) will be treated as homestead property. See *Pratt v. Atkins*, 54 Ga. 569.

2. The execution in favor of Dozier was

not dormant at the time it was levied upon the property in dispute. There is nothing in the act of 1885 (Acts 1884-85, p. 95), nor in the act of 1889 (Acts 1889, p. 107; Civ. Code, § 2779), nor Civ. Code, § 3761, requiring that entries on executions issued on a judgment rendered in 1876 must be entered on the general execution docket before they will have the effect to prevent the judgment from becoming dormant.

3. The possession of the property in dispute by Moss and those claiming under him for four years prior to the levy would not divest the liens of the judgments. The four-years possession which, under the provisions of Civ. Code, § 5355, will divest the lien of a judgment, must be during a period in which the judgment could be enforced. See *Hart v. Evans*, 80 Ga. 330, 5 S. E. 99 (2). Judgment on main bill of exceptions reversed; on cross bill affirmed. All the justices concurring.

(113 Ga. 627)

RADFORD et ux. v. GEORGIA & A. R. CO.
(Supreme Court of Georgia. May 25, 1901.)

EVIDENCE—SECOND TRIAL.

Where a plaintiff dismissed his action and brought another in renewal thereof, answers to interrogatories duly sued out, executed and returned while the first action was pending, and which were introduced in evidence on a trial thereof, are admissible on a trial of the second action.

(Syllabus by the Court.)

Error from superior court, Telfair county; C. C. Smith, Judge.

Action by W. F. Radford and wife against the Georgia & Alabama Railroad Company. Verdict for defendant. Plaintiffs bring error. Reversed.

Thos. E. Watson, E. D. Graham, and Jas. K. Hines, for plaintiffs in error. Mackall & Anderson and Eason & McRae, for defendant in error.

LUMPKIN, P. J. An action was brought in the superior court of Telfair county against the railroad company by Radford and his wife for personal injuries alleged to have been sustained by her in alighting from a train of the defendant upon which she was a passenger. Subsequently this action was by the plaintiffs dismissed, and renewed within less than six months. It came on for trial at the October term, 1900, of that court, and a verdict was rendered in favor of the defendant. The plaintiffs made a motion for a new trial, which was overruled, and they excepted. The controlling ground of that motion is based upon alleged error in refusing to admit in evidence the answers to certain interrogatories, embracing pertinent and material testimony, which had, at the instance of the plaintiffs, been sued out, duly executed, and returned while the original suit was pending, and which had been read in evidence on a trial thereof, at the

close o" which the action was voluntarily dismissed. This testimony was rejected solely "on the ground that these interrogatories were not sued out in the present suit"; the court holding that "interrogatories taken and used in the trial of former suit, of which the present suit was a renewal, were not admissible." We think the court erred in rejecting the testimony. In *Gaulden v. Shehee*, 24 Ga. 438, this court decided that "where two suits are pending between the same parties, upon separate notes, which are parts of the same contract, and the defense to each is precisely the same, interrogatories taken in one of the cases may be read in both." The court certainly went to the extent of holding in that case that it was not essential to the admissibility of answers to interrogatories that they should have been sued out in the identical case in which they were offered. In speaking of the right of the party to read in the case on trial a set of interrogatories taken out in the other case, Judge Lumpkin said (page 442): "Why not allow it to be done? The parties were the same; the subject-matter or issues the same, precisely, in both cases. No good reason can be assigned why they should not have been read." The case of *Singer v. Scott*, 44 Ga. 659, is even more closely in point. There it appeared that two suits were pending between the same parties for the same cause of action, one of which, to wit, that which had been first brought, the plaintiff, on the call thereof, dismissed. After this was done, the defendant moved for a continuance of the action last brought, on the ground that certain interrogatories which had been sued out by him in the first case had not been returned to court. The trial judge "refused the continuance solely on the ground that they were not sued out for the second case." This ruling was by this court held to be erroneous. Had the decision been rendered by a full bench, it would be authoritative and controlling in the case now before us. It appears, however, that only two judges participated in the judgment rendered. Nevertheless, we think the ruling sound, and that it should be followed. Judge McCoy, after remarking that interrogatories taken in either case ought to be competent evidence in the other, added (pages 660, 661): "They are upon the same matter, between the same parties. Full opportunity to cross exists, and it would be sticking in the bark, indeed, to say that they cannot be used in either case, accordingly as the plaintiff may select either one as his action." The following from 6 Enc. Pl. & Prac. 579-581, is pertinent in this connection: "The rule is that depositions taken in one suit cannot be used in another suit unless the parties are the same or are in privity, and the subject-matter involved is also the same; but, when a deposition is taken in a suit other than the one in which it is offered, it is nevertheless admissible, if it appears that the parties and

the subject-matter are the same in both suits, and that the party against whom it is proposed to introduce the depositions had an opportunity to cross-examine the witnesses." In *Crawford v. Word*, 7 Ga. 445, "it did not satisfactorily appear that the subject-matter was the same in both" suits (see page 456), and the same thing was true in *Broach v. Kelly*, 71 Ga. 698. The statement in the third headnote to the case in 7 Ga., repeated substantially in 71 Ga., to the effect that, even where the parties and the subject-matter are the same, interrogatories taken in one case cannot be used in the other unless the witness be dead or inaccessible, was apparently obiter; and certainly no such rule was followed in the case cited from 24 Ga., the opinion in which was delivered by the same judge who spoke for the court in *Crawford v. Word*. Counsel for the defendant in error relied upon the decision rendered by this court in *Bowie v. Findly*, 55 Ga. 604, wherein it was held that, "where a case is dismissed before trial, the interrogatories taken therein which have not been read in evidence are also out of court, unless there is some order or agreement of parties to the contrary." In the opinion, delivered by Chief Justice Warner, considerable stress was laid upon the fact that the case in which the interrogatories were taken out had been "dismissed before trial," and that the interrogatories had never "been read in evidence." It is to be observed that this objection does not exist, so far as the present case is concerned, but that upon its facts it falls within the ruling made in the case cited from 44 Ga., and not within that announced in *Bowie's Case*. We hold accordingly. Judgment reversed. All the justices concurring.

(118 Ga. 495)

LESTER et al. v. STEPHENS et al.

(Supreme Court of Georgia. May 21, 1901.)

WILL-CONSTRUCTION-LIFE ESTATE-TRUST-ASSENT OF EXECUTOR.

1. A trust created by a will executed in the year 1900 for the benefit of the testatrix's brother and sisters (naming them), who, at the time of the execution of the will and at the time of the death of the testatrix, were sui juris, and had no intemperate, wasteful, or profligate habits, and without limitation over, was executed at the time of the death of the testatrix, and as against the trustee the beneficiaries were entitled to the property.

2. The third item of the will, which appoints the husband of the testatrix the trustee for her brother and sisters, which directs him to take charge of all the property given them as such trustee, and as executor of the estate, and to keep the real estate together, and which forbids his disposing of it, but provides that he shall have the sole and exclusive control and management of it during his life, to be managed as he may deem best, with power to purchase stock, and "run the farm," sell any personalty he may deem advisable, and dispose of timber on the land, does not give the husband a life estate in the property, nor any use or interest in the same as an individual.

3. As the title to the devises and legacies did not pass to the beneficiaries until the executor

had assented thereto, they could not recover the property from him without alleging an assent or a refusal to assent, although the estate owed no debts. (a) A court of equity may compel the executor to assent in a case where he unreasonably refuses to do so.

4. The time allowed by the Code in which executors and administrators are exempt from suit does not apply to suits by legatees and devisees to restrain the executor and others co-operating with him from wasting the estate by cutting and selling timber from the land, the executor being insolvent, and having given no bond, and claiming a life interest in the estate antagonistic to the claims of the plaintiffs and to a proper construction of the will.

(Syllabus by the Court.)

Error from superior court, Webster county; Z. A. Littlejohn, Judge.

Bill by J. H. Lester and others against Peter Stephens, executor, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

The following is the official report:

Petitioners are devisees under the will of Mattie J. Stephens. As such they file a petition against Peter Stephens, the executor, and seek to set aside such of the will of testatrix as gives to the executor control of the property devised during his lifetime. They pray for an accounting by him, for an injunction against management of the property, and for the appointment of a receiver to take charge of the property. They allege that the executor is insolvent and incapable; that there is no necessity for administration, there being no debts of the estate. The defendant demurred to the petition on the grounds that no cause of action is stated; that defendant is entitled to possession of the property; that less than one year had elapsed since probate of the will; and that petitioners' remedy, if any, is by petition to the court of ordinary. The defendant also answered denying the allegation of insolvency and unfitness. After hearing evidence, the court held that petitioners had failed to show any waste, and refused the prayers for injunction and receiver. The material parts of the will are as follows: "Item 2d. It is my will and desire that all of my property of every kind of which I may die seised and possessed shall belong to and be the property of my brother and sisters [naming them], who share in the distribution of my estate share and share alike. Item 3d. It is my will and desire that my husband, Peter Stephens, shall take charge of all my property of every kind hereinbefore mentioned in item second of this, my will, as trustee for the beneficiaries therein mentioned in said item second, and also as executor of my estate, who shall keep my real estate together, and in no wise dispose of the same; but he shall have the sole and exclusive control and management of all my property during his natural life, to be managed by him as, in his judgment, he may deem best; and to this end he may purchase stock, and run the farm, replace any stock that may die off which I now own out of my state, and may sell off any personalty he

may deem advisable, or dispose of timber on my lands. Item 4th. It is my will and desire that my husband, Peter Stephens, as trustee for the beneficiaries of this, my last will, and as executor of my estate, shall not be required to make any returns of expenditures to any court, nor shall there be an inventory of my property, nor be required to answer to any court for his actings and doings as trustee or executor; nor shall my husband be required to make bond and give security as trustee or executor, but his control shall be absolute as herein specified; nor shall the said Peter Stephens be required to answer to or be responsible to any person or persons whatsoever as to his acts and doings as trustee or executor."

Hatcher & Carson, for plaintiffs in error. J. H. Martin and E. T. Hickey, for defendants in error.

SIMMONS, C. J. In May, 1900, Mrs. Stephens made her will. She died in the following July. So far as the will is material to the present case, its exact terms are shown by the official report, supra. By it she gave her brother and sisters all of her property. In the third item she undertook to create a trust in the property given, and to appoint her husband, Peter Stephens, trustee. Her husband was also appointed executor. She directed that her husband should have full control and management of the property for the term of his natural life. The husband qualified as executor, and took possession of the property. In December, 1900, the brother, two of the sisters named in the will, and the husband and children of the other sister (who had died subsequently to the death of the testatrix) filed an equitable petition against Stephens, as executor and trustee, and two others. The petitioners claimed to be the sole devisees and legatees under the will, alleged that the estate owed no debts, and that there was no necessity for administration, and claimed that the trust attempted to be created was executed at the death of the testatrix, as all of the beneficiaries were sui juris, and had no intemperate, wasteful, or profligate habits. They also alleged that Stephens claimed a life interest in the property, that he was insolvent, and had given no bond, and was incompetent to manage the estate. They also alleged that he was wasting and mismanaging the estate, having made a contract with his co-defendants to cut, saw, and sell the trees and standing timber upon the land, and that he was in other respects mismanaging the estate. They prayed for a construction of the will, that the trust be declared to be executed and void, that the executor be compelled to turn over the property to them as there was no necessity for administration, and that the defendants be restrained from committing the acts of waste and mismanagement alleged. Stephens answered, claiming that under the will he had a life estate in the property devised

and bequeathed, admitting his insolvency, but denying his incompetence to manage the estate, and denying that he was committing the acts of waste and mismanagement set out in the petition. His answer also admitted that the estate owed no debts, but claimed that he could not be sued before the expiration of 12 months from his qualification as executor. The other defendants answered, denying that they, in conjunction with Stephens, were committing waste, and claiming that they were improving the property. Affidavits were submitted by each side, but it is unnecessary to set them out here. At the hearing the trial judge refused the injunction, and the plaintiffs excepted.

1. The testatrix, by her will, undertook to create a trust for her brother and sisters, who were *sui juris*, and had no intemperate, wasteful, or profligate habits. This, under section 3149 of the Civil Code, she could not do. When, therefore, she died, the trust became immediately executed.

2. The trial judge, whose opinion appears in the record, took the view above announced, but decided that the husband, under the will, took an interest for life in the use of the property, and that the intention of the testatrix was to postpone the vesting of the devises and legacies to the brother and sisters until the death of the husband. The real intention of the testatrix may have been, as decided by the judge below,—that the brother and sisters should not take possession until after the death of the husband; but the words used in the will do not express such an intention. The will gives the husband the right to the possession of the property, but the use of it is not for his benefit, but for the benefit of the brother and sisters. The possession and control of the property is not given to the husband as an individual, but as trustee and executor. The language of the will shows clearly that the husband, as an individual, was not to receive any of the rents or profits for himself, but was to receive them as executor and as trustee for the brother and sisters. If the testatrix had any right to create a trust for persons *sui juris*, the trust was immediately executed, and the title passed to the beneficiaries. They were entitled upon her death to full control of the property, subject to the right of the executor to administer the estate; and their possession could not be postponed to the death of the trustee. To allow the trustee to retain possession and control during his life, and postpone the possession of the beneficiaries until his death, would be to do indirectly what the law says could not be done directly. While the intention of the testatrix should, if legal, always govern the construction of his will, yet, if this intention is illegal, or contrary to public policy, it must yield to the rules of law. See *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409, and cases cited.

3 The petition filed by the plaintiffs in

error was for the purpose of compelling the defendant to turn over the property to them immediately, and to restrain him from interfering with certain portions of the property, and for the purpose of having a receiver appointed. While it is true that the testatrix had no power to create a trust in favor of her brother and sisters, it is also true that she did have full power to appoint her husband her executor. It appears that her husband qualified as executor, and is in possession of all of the property mentioned in the will. While the title to the property may have vested in the brother and sisters as against the trustee, yet the law is well settled that the devisees and legatees cannot enter into possession of the property devised and bequeathed without the assent of the executor. Indeed, section 3319 of the Civil Code declares that the title does not pass to them until the executor gives his assent. The petition in the present case nowhere alleges that the executor has assented to the devises or legacies, nor does it allege that he has refused his assent as executor. It does allege that the husband claims a life estate in the property, and he so admits in his answer; but we think, in view of the construction put upon the will by the executor and his counsel and by the court below, that this cannot be construed into a refusal as executor to assent to the devises and legacies. After the executor is informed of the construction put upon the will by this court, he may voluntarily assent. If he refuses to do so, then a court of equity may compel him to assent. Civ. Code, § 3320.

4. It was claimed by the executor in his answer that under sections 3421 and 3439 of the Civil Code he had 12 months within which to ascertain the condition of the estate, and that during that time he was exempt from all suits. Whether these sections apply to any one but a creditor it is not necessary for us to decide. The petition alleges waste and mismanagement, insolvency of the executor, and that he is under no bond. We are clear that, under these allegations, an equitable petition will lie against him even before the expiration of the 12 months after his qualification as executor. An insolvent executor, protected for 12 months from his qualification, could squander and waste the whose estate, and the heirs and legatees could do nothing to prevent it. The rule generally adopted by courts in construing statutes which give such an exemption from suit is that, where the suit does not seek to fix or establish a liability against the estate, it does not come within the statute. In the case of *Bank v. Glass*, 82 Ala. 278, 2 South. 641, the supreme court of Alabama, after quoting a statute which is similar to ours, said: "It is not, however, every suit against an executor or administrator which falls within this statutory prohibition. To fall within its provisions, it must be against the personal representative as such. By

this we understand, not only that the suit must be against the representative in his representative capacity, but that it must seek to fasten or establish a liability upon or against property of the decedent." See, also, *Torrey v. Bishop*, 104 Ala. 548, 16 South. 422. The present suit was not one to establish a liability against the estate. One of the main allegations in the petition was that the executor was wasting and mismanaging the estate. While he denied the waste and mismanagement, the allegations were made, and, in our opinion, gave the court jurisdiction, although the 12 months had not elapsed from the time of his qualification. Inasmuch as there was no allegation that the executor had assented to the legacies and devises, and inasmuch as the trial judge decided at the interlocutory hearing that no waste had been committed, we affirm the denial of the injunction, although we do not concur in the reason upon which the judge based his judgment. Judgment affirmed. All the justices concurring.

(113 Ga. 384)

MCCOWAN et al. v. BROOKS.

(Supreme Court of Georgia. May 22, 1901.)

WRIT OF ERROR—ABATEMENT—DEATH OF DEFENDANT IN ERROR—LEGAL REPRESENTATIVES—SUBSTITUTION—PROCEDURE—NON-RESIDENT EXECUTORS.

1. The death of the sole defendant in error in a bill of exceptions, after the same has been duly filed in the office of the clerk of the supreme court, does not cause the writ of error to abate.

2. The supreme court, in such a case, having acquired jurisdiction, may compel the legal representative of the deceased defendant to come in and be made a party in such manner as may be in conformity to the law and the rules of court bearing on the subject.

3. In the absence of a statutory provision, the court will, when no rule has been prescribed by it which will apply to the facts of a given case, either promulgate a rule to cover such cases, or will in the particular case, by order, direct that a rule nisi calling upon the legal representative to show cause why he should not be made a party be served upon him in such manner as will be most effective in giving notice of the application to have him made a party.

4. When it appears in this court that one who was a nonresident of the state instituted an action of ejectment in a court of this state, and obtained a judgment in his favor, and the case is brought to this court on writ of error sued out by the defendant, and the defendant in error dies after the bill of exceptions has reached this court, and the executors of the last will of such deceased party, themselves nonresidents of the state (the will having been admitted to record in the state of their residence), appeared in the court of ordinary of this state and had the will recorded in the manner provided by law, and thus defeated the application of a resident of this state to be appointed administrator of the estate of the deceased in this state, and such executors fail and refuse to voluntarily come in and be made parties in this court, and when it also appears that a rule nisi calling upon them to show cause why they should not be made parties has been served personally upon the counsel of record for the deceased defendant in error and counsel for the executors in the proceeding in the court of ordinary, and upon the executors by having a copy of the rule nisi mail-

ed to their address, and in response to such rule the only cause shown is that the court has no right to serve them in the manner above indicated, the court will, upon motion, grant an order that such executors be made parties to the case, and that the same be heard when reached in its order on the docket, and that notice of the passage of this order be given by mailing a copy of the same to such executors and counsel at their respective places of residence.

(Syllabus by the Court.)

Action by T. B. Brooks against C. M. McCowan and others. Judgment for plaintiff, and defendants bring error. On the death of plaintiff, it was moved that his personal representatives be made parties. Motion granted.

B. B. Bower, for movants. Townsend & Westmoreland and Z. D. Harrison, opposed.

COBB, J. T. B. Brooks, a nonresident of the state, brought an action of ejectment in the superior court of Decatur county against McCowan as tenant in possession, and Bower and Donaldson were made parties defendant thereto on their own motion. Pending the trial an equitable amendment to the petition was allowed, and the plaintiff recovered a judgment under the allegations of the amendment. A motion for a new trial filed by the defendants having been overruled, they tendered and had certified a bill of exceptions, which was filed in the office of the clerk of this court on April 7, 1900. Subsequently to that date T. B. Brooks, the plaintiff, and the sole defendant in error, departed this life. His death was suggested of record at the October term, 1900, of this court, and the case was continued. On the first day of the present term the plaintiffs in error presented a petition setting forth that, when it appeared that the estate of T. B. Brooks was not likely to be administered upon in this state, they had caused the county administrator of Decatur county to apply for letters of administration on the estate; that on this application citation was duly issued and published, and at the return term of the citation Alfred H. Brooks and Rufus S. Woodward, as executors of the last will and testament of T. B. Brooks, deceased, late of Orange county, state of New York, filed objections to the granting of administration on the ground that T. B. Brooks was a citizen and resident of the state of New York at the time of his death, that he died testate in that state, and that the objectors were his executors, duly qualified in the state of New York, and were residents of that state. With these objections they filed with the ordinary a certified copy of the will, and probate and qualification and acceptance of the trust by the executors in the state of New York. They prayed that the will might be proven and admitted to record in this state. The ordinary, after having admitted such foreign will to record in the manner prescribed by law, refused to grant either permanent or temporary letters of adminis-

tration to the county administrator, holding that there was no necessity for any administration after the executors had filed the will and caused the same to be entered of record in this state. See Civ. Code, § 3297 et seq. It was alleged that the executors in the proceedings before the ordinary were represented by the same counsel as appeared of record as representing the defendant in error in this court. The prayer of the petition was that a rule nisi issue, calling upon the executors to show cause on a day to be fixed by the court why they should not be made parties defendant in error, and that, as the executors reside out of this state, the court direct in the order that service of the rule nisi be made by serving the same upon the attorneys of record for the executors, and, if the above cannot be done, such order be served in whatever manner is consistent with the law and the practice of the court. The averments of the petition being supported by evidence satisfactory to the court, on March 28, 1901, an order was passed directing the executors above named to show cause on a given day why they should not be made parties defendant in error, and that a copy of the order be served personally upon the counsel of record for the defendant in error, and a copy be sent by mail to the post-office address of the executors. On the day fixed in the order just referred to it was shown for cause against the granting of an order making the executors parties that the order of March 28th was improvidently granted, for the reason that there is no rule of court or statute authorizing such service as is directed to be made in the order, that there was no authority of law compelling one to come in and be made a party in the manner indicated in the order, and that, no order having been taken at the October term with reference to service, it is too late at the present term to make parties, and the case should be dismissed for want of parties.

At common law a writ of error did not in any case abate by the death of the sole defendant in error, whether it happened before or after errors were assigned. 2 Tidd, Pr. (4th Am. Ed.) § 1163, and cases cited; 2 Enc. Pl. & Prac. 200, and cases cited; Works, Jur. p. 307; Elliott, App. Proc. § 166. It necessarily follows from this that, when a court having jurisdiction to determine the questions made by a writ of error has acquired jurisdiction of the case, it does not lose the power to render a decision in the same on account of the death of the sole defendant to the writ of error. If there is no law prohibiting such a court from making the legal representative of the deceased defendant in error a party to the case, and if there is no statute prescribing the manner in which such representative shall be made a party, and how notice of the fact that he is to be made a party shall be served upon him, the court may, by the promulgation of

a general rule or the passage of an order in the particular case, direct the method to be adopted in making the representative a party, and declare what shall be sufficient notice to him of that fact. This seems to have been the view entertained by the supreme court of the United States in *Green v. Watkins*, 6 Wheat. 260, 5 L. Ed. 256, in which Mr. Justice Story uses this language: "The death of neither party produces any change in the condition of the cause or in the rights of the parties. It would seem reasonable, therefore, that the suit should proceed, and not be dismissed or abated. In the absence of all authority which binds the court to a different course, we are disposed to adopt this doctrine, and shall promulgate a general rule on the subject." See 6 Wheat. v., rule 31. The same view seems to have been entertained by the supreme court of this state when it was first organized. There was nothing in the statute organizing the court with reference to the subject of making parties to writs of error when a party should die. Among the first rules adopted after its organization was the following: "Whenever, pending a cause in this court, either party shall die, the proper representatives of such party may voluntarily come in and be admitted parties to the suit upon motion; and thereupon the cause shall be heard and determined as in other cases; and if, on or before the first term succeeding the decease of a party dying, there shall be no representation of his estate, or if represented, parties shall not be thus voluntarily made, then and in either of said events, the other party may at that term suggest the death on the record, and thereupon, on motion, obtain an order that unless such representation be had, and parties made thus voluntarily, as hereinbefore authorized, on or before the second day of the term then next succeeding, the party moving such order, if defendant, shall be entitled to have the writ of error dismissed, and if the plaintiff, he shall be entitled to open the record and proceed to a hearing; provided, that a copy of every such order shall be published in one of the gazettes at the seat of government, three successive weeks, at least sixty days before the said last-named term of the court, or served on the adverse party thirty days before the first day of said term." See 1 Ga. xiii., rule 17. The rule just quoted is the same in all material respects as the rule promulgated by the supreme court of the United States after the ruling made in *Green v. Watkins*, supra; and the rule adopted by the supreme court of Georgia continued in force until February 18, 1895, when it was superseded by a rule of which the following is a copy: "The death of a party to a case pending in this court may be suggested, on the call of the case, by counsel for either party, and thereupon the legal representative of the party deceased may voluntarily become a party, in which event the case will proceed; otherwise, it

will be continued, and unless such representative be made a party on or before the last day for argument at the next term, the case will be dismissed." See rule 24 of rules adopted February 18, 1895. This rule continued in force until January 5, 1897, when it was, in turn, superseded by a rule of which the following is a copy: "The death of a party to a case pending in this court may be suggested by counsel for either side at any time in open court, and the court shall thereupon cause to be issued and served upon the legal representative of the deceased party, if there be one, a rule nisi requiring him to show cause, upon a day named, why he should not be made a party, and upon the return of such rule the court shall take appropriate action in the premises. The legal representative of the deceased party may voluntarily become a party to the case at any time. If he does so on or before the call of the case at the first term, it will, with his consent, be heard at that term, or, in the absence of such consent, will be continued. Where a representative of the deceased party has not been appointed and made a party in this court on or before the last day for argument at the second term, the case will be dismissed. A temporary administrator will be regarded in this court as a competent party." Civ. Code, § 5628, rule 31. Section 5561 of the Civil Code declares: "Should any party die after the bill of exceptions has been signed and certified, the death being suggested of record in the supreme court, parties shall be made by scire facias, in the manner heretofore prescribed by the rules of said court." This provision of law first appears in the Code of 1863, § 4177. It is argued that upon the adoption of the Code of 1863 the power of the court to make parties was limited by this provision to the manner in which the then existing rules of the court prescribed. We do not think this a proper construction of the section. It was certainly not the intention of the codifiers to give to the rule of court then existing on the subject of making parties the force and effect of a statute, and the true construction of the section seems to us to be that parties may be made in the manner prescribed by the rules of court at the time the Code of 1863 was adopted. It was not the intention of the legislature in adopting that Code to curtail the jurisdiction of this court in such a way that it could neither amend nor alter the existing rule as to making parties, nor by order in a particular case not covered by the rule provide how parties could be made and service perfected upon them. While this court has made no direct ruling upon the subject, it has asserted its right to modify the rule above referred to on two separate occasions, as has been shown. It is clearly apparent that it was the opinion of the members of the court as it was constituted at the time these changes were made that they were not bound by the rules as to making parties

passed when the court was first organized. Until 1895, when the rule of 1846 was superseded, when either party to a writ of error died it was incumbent on the opposite party to take steps to have service made in compliance with that rule, and a failure to do this would result in the dismissal of the writ of error. See *Lee v. Wheeler*, 4 Ga. 542; *Henderson v. Greer*, 45 Ga. 313; *Id.*, 46 Ga. 566; *Brewing Co. v. Hare*, 73 Ga. 18. If this rule were now of force, the present writ of error would have to be dismissed under the ruling made in the case last cited, because no legal steps were taken at the last term of this court for publication in the manner prescribed by the rule of 1846. But we do not think this rule is now of force. This court has authority "to establish, amend, and alter its own rules of practice." Civ. Code, § 5498, subd. 5. Under this authority it promulgated the rule of 1897 in reference to making parties, and that rule is subject to amendment or alteration at any time. If a case arises which is not within the exact terms of the rule now existing, the court may, without a formal amendment of the rule, pass an order which will accomplish the same purpose in the particular case as was intended to be accomplished by the rule adopted.

Under the views above presented, the court had authority to issue the order in the nature of a rule nisi which was granted on March 28, 1901. It is said, however, that, even if this court had authority to compel the legal representative of a deceased person to come in and be made a party to a pending writ of error, the authority does not extend to a legal representative of a deceased non-resident appointed in another state, when the legal representative is himself a nonresident. It is not necessary to determine now what would be the power of this court over non-resident executors and administrators generally; but we feel perfectly safe in holding that where a nonresident executor comes into this state, and has the will of his testator admitted to record in the court of ordinary, and claims the right to act as the executor of the will, and asserts his authority as such to administer property located in this state, the courts of this state, including this court, have the power to compel him to come in and be made a party to a case which was instituted by his testator in his lifetime, which was pending at the date of his death, on a proper proceeding by the adverse party to set aside the judgment in his testator's favor. By filing the will for record in the court of ordinary he submits himself to the jurisdiction of that court, so far as the administration of the estate of the testator situated in this state is concerned; and having, by so doing, prevented a citizen of this state from becoming the legal representative of that part of the estate of the testator situated here, he is to be dealt with as the legal representative, where a representative appointed

by the courts of this state would be required to act. He is not a nonresident executor, in the full sense of that term, after he has filed the will and submitted to the jurisdiction of the court of ordinary. He is an executor of this state, though he may as an individual be a nonresident thereof. This being true, when it is necessary for the legal representative of the testator to be made a party such executor can be forced to come in and be made a party in place of the decedent; and the only question to be determined is, what is the most satisfactory and effective method of notifying him of the fact that he is a party to such a proceeding? In cases where the courts of this state have jurisdiction of the subject-matter of litigation in which nonresidents are interested, it is provided by statute that such nonresidents shall be notified by publication of a specified notice, and by mailing a copy of such notice to the address of such nonresident, if it is known. Civ. Code, §§ 4978, 4979. The rule of 1846 recognized the fact that nonresidents might be notified by publication, even without any further notice. Notice by mail is recognized by the statutes of this state in certain cases. See Civ. Code, §§ 4979, 5548, 5571 (last clause). Having become satisfied that this court has the power to require these executors to come in and be made parties to the pending writ of error, the only question to be determined was how they were to be notified of this determination, in order that they might be given an opportunity to show cause, if any they could, why they should not be made parties. By analogy in other cases where service is made upon nonresidents, three methods were open to the court: hither to require service to be made by publication or by mail, or a combined service by publication and mail. Where the address of the nonresident was known, service by mail alone was as satisfactory, if not more so, than by publication, and hence this plan was adopted. And, in order to make it certain that the executors should have notice, it was further directed that a copy of the order should be served upon the attorneys of record for the defendant in error, who were also attorneys for the executors in the proceedings before the ordinary. Since the act of 1877 (Civ. Code, § 5571), and possibly prior to that date, notice by mail has been the recognized method of giving notice to litigants and counsel of the passage of orders affecting their rights in the cases pending in this court, and hence notice by mail which was required to be given the executors in the present proceeding was in conformity with a long-established and heretofore unquestioned practice. Upon the day fixed in the order for the executors to show cause why they should not be made parties, no cause was shown which would make it improper for the legal representatives of Brooks to be made parties in his place. The only cause shown was of the character above referred to, which simply

brought in question the right of the court to require them to come in and be made parties, and have service made upon them. If these executors had never appeared in the court of ordinary and filed the will of their testator, there would have been administration on his estate in this state, and the administrator could have been made a party to the case. Having defeated the plaintiffs in error in their efforts to have administration upon the estate, by assuming the administration themselves, they will not be heard to assert in this court that the courts of this state have no jurisdiction over them in reference to the affairs of the estate of their testator,—at least, so far as the property located in this state, and pending suits to which their testator was a party are concerned. Having jurisdiction of these parties, and, from the returns of service of file in the clerk's office, being satisfied that they have had notice of the proceeding to make them parties to this case, and no sufficient cause having been shown why they should not be made parties, an order will be passed making them parties, and a copy of this order will be mailed to them at their respective places of abode. Ordered accordingly. All the justices concurring.

(113 Ga. 532)

McCOWAN et al. v. BROOKS et al.

(Supreme Court of Georgia. May 22, 1901.)

WRIT OF ERROR—DISMISSAL—BILL OF EXCEPTIONS—RECORD—BRIEF OF EVIDENCE—AMENDMENT OF PLEADING—SUBROGATION.

1. When a bill of exceptions recites that there was "a judgment of the court for the plaintiffs against defendants," and in the caption to the motion for a new trial which appears in the record there is a statement that the case was "tried before the judge without the intervention of a jury," the writ of error will not be dismissed on the ground that it does not distinctly appear by what authority the judge rendered the judgment without the intervention of a jury, when there is nothing in the record to indicate that the judge wrongfully assumed authority to decide a case which should have been submitted to a jury.

2. When the recitals in the ground of a motion for a new trial sufficiently indicate the character of the judgment rendered to enable this court to determine the assignments of error, it is not necessary that a copy of the judgment rendered should be specified in the bill of exceptions and transmitted in the record.

3. When a judge has passed an order distinctly approving a document as a brief of evidence in the case, an order passed, subsequently to the date of the order approving the brief of evidence, reciting that the latter order is "extended for all purposes, and especially for the purpose of perfecting and filing for approval a brief of the evidence," will not alone have the effect to set aside the order approving the brief of evidence.

4. In order to authorize this court to reverse the judgment of the trial judge allowing an amendment to a petition, the record must distinctly disclose not only that objection to the allowance of such an amendment was made at the time the same was allowed, but also the ground of such objection.

5. An understanding between the owner of land and one who, having no interest to protect, pays off an incumbrance thereon, that the latter

shall be given "a deed to the land," and shall "hold the land as collateral security," will not, alone, have the effect of subrogating the person discharging the incumbrance to the rights of the holder of the same.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by Alfred H. Brooks and others against C. M. McCowan and others. Judgment for plaintiffs, and defendant McCowan brings error. Reversed.

B. B. Bower, for plaintiff in error. Townsend & Westmoreland and Z. D. Harrison, for defendants in error.

COBB, J. Brooks brought a common-law action of ejectment against McCowan. Bower and Donaldson were, on their own motion, made parties defendant. By an amendment to the petition the real plaintiff set up certain equitable claims against Bower and Donaldson. The trial resulted in a "judgment of the court ordering the land to be sold, and giving the plaintiff a first and superior lien on the proceeds, to the extent of his debt against McCowan." The evidence disclosed the following state of facts: Cox sold to McCowan the tract of land in controversy upon credit, giving to him a bond for title. On January 12, 1891, after a portion only of the purchase money had been paid, McCowan delivered to Bower and Donaldson a mortgage on the land, which was properly executed and recorded. This mortgage was foreclosed, and Bower and Donaldson became the purchasers at the foreclosure sale on December 4, 1894. On November 18, 1891, Cox conveyed the land in controversy to McCowan by a deed which was properly executed and recorded. On November 20, 1891, McCowan conveyed the land in controversy to Brooks by "a plain, absolute, unconditional warranty deed," which was properly executed and recorded. McCowan borrowed the money from Brooks to pay the balance of the purchase money due Cox, and, while the deed from Cox to McCowan and the deed from McCowan to Brooks bear different dates, they were delivered contemporaneously. Brooks had no actual notice of the mortgage of Bower and Donaldson. McCowan testified that when he got the money from Lytle, who negotiated the loan for Brooks, he told him he "wanted it to pay for that land, and Maj. Brooks was to hold the land for collateral security." Lytle testified as follows: "As to the security that Mr. McCowan was to give, the understanding was that he was to give Major Brooks a deed to the land." The defendant made a motion for a new trial, which was overruled, and he excepted. While the writ of error was pending in this court, Brooks died, and his executors were made parties to the case in his place. See 39 S. E. 112.

1, 2. A motion was made to dismiss the writ of error upon several grounds. It was

insisted that the bill of exceptions was defective, in that it failed to show that the case was submitted to the judge without the intervention of a jury, and that, even if it sufficiently appeared from the record that this was true, the writ of error should be dismissed because the bill of exceptions failed to specify the judgment rendered by the court as a part of the record to be transmitted. The bill of exceptions recites that there was "a judgment of the court for the plaintiffs and against defendants," and in the caption to the motion for a new trial the following appears: "Ejectment. Trial and judgment for plaintiff. Tried before the judge without the intervention of a jury." It is true that neither in the bill of exceptions, nor in those parts of the record which are specified in the bill of exceptions, is there contained any agreement between counsel that the case should be tried by the judge without the intervention of a jury, nor any statement by the judge that there was such an agreement; but it is necessarily to be inferred from the recitals in the bill of exceptions, taken with what is stated in the caption to the motion for a new trial, that the case was treated by the court below as one properly submitted to the judge to be decided by him without the aid of a jury, and the presumption is that everything necessary to be done was done to give the court authority to deal with the case in this way, in the absence of anything in the record to show affirmatively that the court had improperly decided a case which should have been submitted to a jury. The judgment rendered by the judge was not specified in the bill of exceptions, and a copy of the judgment was not transmitted with the record. The bill of exceptions, as has been seen, distinctly recites that there was a judgment, and one ground of the motion for a new trial complains that "the judgment of the court ordering the land to be sold, and giving the plaintiff a first and superior lien on the proceeds to the extent of his debt against McCowan, was error." The recitals of fact in the motion for a new trial having been certified by the judge to be true, enough appears from the recitals just made to show what was the general character of the judgment rendered; and such assignments of error as can be passed on, treating the judgment as of the character referred to in the recital just quoted, will be decided. The recital in the motion for a new trial as to the character of the judgment is in the present case, we think, sufficient to authorize this court to decide the assignments of error made in the motion.

3. The motion to dismiss the writ of error was upon the further ground that there was not in the record an approved brief of evidence. It appears that a motion for a new trial was filed during the term, and an order was granted allowing time to prepare a brief of evidence and present the same for

approval. An amendment to the motion having been made and allowed, the judge on November 15, 1899, passed an order reciting that the hearing of the motion had been continued to that date, and the movant had been granted until that time to perfect the motion and present for approval a brief of the evidence; the order containing the following language after the recitals above referred to: "The foregoing motion and all of the grounds, original and amended, are hereby approved and ordered filed; and said brief of evidence is also hereby approved and ordered filed." The hearing was continued until a subsequent date. On February 28, 1900, the judge passed the following order: "The foregoing order taken November 15, 1899, is hereby extended for all purposes, and especially for the purpose of perfecting and filing for approval and having approved brief of evidence, and for amending and perfecting motion for new trial." On March 21, 1900, the motion was overruled. It is contended that the order of February 28, 1900, was in effect an order revoking the approval of the brief of evidence contained in the order of November 15, 1899, and that when this approval was thus set aside the brief of evidence stood unapproved, and, there being nothing in the record to indicate that it was ever approved after February 28, 1900, the brief of evidence contained in the record is not an approved brief of evidence. We do not think that the order of February 28, 1900, had the effect of revoking the order approving the brief of evidence, but was simply a reservation by the judge of the right to revoke that order at the hearing, if he saw proper to do so, on the ground that the brief of evidence which had been approved was not, for any reason, a correct brief. While the judge has a right to set aside and revoke an order approving a brief of evidence, when there appears in the record a distinct approval of the brief of evidence, it must appear in distinct terms that this approval has been set aside. A judgment setting aside such an approval will never be implied from subsequent orders of the judge, unless it clearly appears that such was the intention of the judge. Whenever there is doubt as to whether a judgment approving a brief of evidence has been set aside, the doubt should be resolved in favor of upholding the judgment as it appears in the record. The judge has a right to correct a brief of evidence at any time before the motion for a new trial is overruled, and this is true notwithstanding he may have approved the brief of evidence before that time. The order of February 28, 1900, simply gave to the judge a right which he already had; and as it does not appear in the record that he has exercised this right to change the brief of evidence, and nothing appears to indicate his dissatisfaction with the brief of evidence as approved by him on November 15, 1899, the brief of evidence thus approved

will be dealt with as a correct brief of the evidence in the case.

4. The motion for a new trial contains the following ground: "The court erred in allowing the plaintiff to file in this case, by amendment or otherwise, equitable pleading setting up various equities by which he sought to overcome the legal title of defendants, as shown by said pleadings, over the objections of defendants." The amendment to the motion contains the following ground: "The court erred in allowing equity pleadings ingrafted on a plain action of ejectment, where only title was involved, and that title was attacked for usury." It does not appear in either of these grounds what was the objection made to the allowance of the amendment referred to at the time the same was allowed. If it was intended to make the point that an amendment by the plaintiff setting up grounds for equitable relief could not be properly allowed in common-law action of ejectment, an objection to the allowance of the amendment upon this ground should have been distinctly made, so that the court could have passed upon the objection thus raised. If it was conceded that under certain circumstances an amendment of this character might be allowed, and that the amendment offered was objectionable as setting up a new cause of action, or for some other good and sufficient reason ought not to have been allowed, then the record should show that this objection was distinctly made and passed upon by the trial judge. From the recitals in the motion for a new trial, it is as much a conjecture that the question intended to be raised was the one as it was the other; and, as we cannot know what question was made and decided by the trial judge in reference to the amendment, the grounds of the original and amended motion above quoted present no question for decision.

5. Treating the amendment to the petition as having been properly allowed, the question to be considered is whether the evidence offered by the plaintiff was sufficient to authorize a decree of the character therein prayed for. One who, having no interest to protect, voluntarily pays off an incumbrance upon the land of another, is not subrogated to the rights of the holder of such an incumbrance unless there is an agreement, either express or implied, between the person discharging the incumbrance and either the debtor or the creditor that he shall be subrogated to the rights of the incumbrancer. *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374. The testimony above set forth, which is all that appears in the record on this subject, does not show an express agreement to this effect, and is not of such a nature that an undertaking of the character required can be necessarily implied. To have a deed to land, and to hold the same as collateral, is not necessarily inconsistent with a prior incumbrance. The evidence did not

shall be given "a deed to the land," and shall "hold the land as collateral security," will not, alone, have the effect of subrogating the person discharging the incumbrance to the rights of the holder of the same.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by Alfred H. Brooks and others against C. M. McCowan and others. Judgment for plaintiffs, and defendant McCowan brings error. Reversed.

B. B. Bower, for plaintiff in error. Townsend & Westmoreland and Z. D. Harrison, for defendants in error.

COBB, J. Brooks brought a common-law action of ejectment against McCowan. Bower and Donaldson were, on their own motion, made parties defendant. By an amendment to the petition the real plaintiff set up certain equitable claims against Bower and Donaldson. The trial resulted in a "judgment of the court ordering the land to be sold, and giving the plaintiff a first and superior lien on the proceeds, to the extent of his debt against McCowan." The evidence disclosed the following state of facts: Cox sold to McCowan the tract of land in controversy upon credit, giving to him a bond for title. On January 12, 1891, after a portion only of the purchase money had been paid, McCowan delivered to Bower and Donaldson a mortgage on the land, which was properly executed and recorded. This mortgage was foreclosed, and Bower and Donaldson became the purchasers at the foreclosure sale on December 4, 1894. On November 18, 1891, Cox conveyed the land in controversy to McCowan by a deed which was properly executed and recorded. On November 20, 1891, McCowan conveyed the land in controversy to Brooks by "a plain, absolute, unconditional warranty deed," which was properly executed and recorded. McCowan borrowed the money from Brooks to pay the balance of the purchase money due Cox, and, while the deed from Cox to McCowan and the deed from McCowan to Brooks bear different dates, they were delivered contemporaneously. Brooks had no actual notice of the mortgage of Bower and Donaldson. McCowan testified that when he got the money from Lytle, who negotiated the loan for Brooks, he told him he "wanted it to pay for that land, and Maj. Brooks was to hold the land for collateral security." Lytle testified as follows: "As to the security that Mr. McCowan was to give, the understanding was that he was to give Major Brooks a deed to the land." The defendant made a motion for a new trial, which was overruled, and he excepted. While the writ of error was pending in this court, Brooks died, and his executors were made parties to the case in his place. See 39 S. E. 112.

1, 2. A motion was made to dismiss the writ of error upon several grounds. It was

insisted that the bill of exceptions was defective, in that it failed to show that the case was submitted to the judge without the intervention of a jury, and that, even if it sufficiently appeared from the record that this was true, the writ of error should be dismissed because the bill of exceptions failed to specify the judgment rendered by the court as a part of the record to be transmitted. The bill of exceptions recites that there was "a judgment of the court for the plaintiffs and against defendants," and in the caption to the motion for a new trial the following appears: "Ejectment. Trial and judgment for plaintiff. Tried before the judge without the intervention of a jury." It is true that neither in the bill of exceptions, nor in those parts of the record which are specified in the bill of exceptions, is there contained any agreement between counsel that the case should be tried by the judge without the intervention of a jury, nor any statement by the judge that there was such an agreement; but it is necessarily to be inferred from the recitals in the bill of exceptions, taken with what is stated in the caption to the motion for a new trial, that the case was treated by the court below as one properly submitted to the judge to be decided by him without the aid of a jury, and the presumption is that everything necessary to be done was done to give the court authority to deal with the case in this way, in the absence of anything in the record to show affirmatively that the court had improperly decided a case which should have been submitted to a jury. The judgment rendered by the judge was not specified in the bill of exceptions, and a copy of the judgment was not transmitted with the record. The bill of exceptions, as has been seen, distinctly recites that there was a judgment, and one ground of the motion for a new trial complains that "the judgment of the court ordering the land to be sold, and giving the plaintiff a first and superior lien on the proceeds to the extent of his debt against McCowan, was error." The recitals of fact in the motion for a new trial having been certified by the judge to be true, enough appears from the recitals just made to show what was the general character of the judgment rendered; and such assignments of error as can be passed on, treating the judgment as of the character referred to in the recital just quoted, will be decided. The recital in the motion for a new trial as to the character of the judgment is in the present case, we think, sufficient to authorize this court to decide the assignments of error made in the motion.

3. The motion to dismiss the writ of error was upon the further ground that there was not in the record an approved brief of evidence. It appears that a motion for a new trial was filed during the term, and an order was granted allowing time to prepare a brief of evidence and present the same for

approval. An amendment to the motion having been made and allowed, the judge on November 15, 1899, passed an order reciting that the hearing of the motion had been continued to that date, and the movant had been granted until that time to perfect the motion and present for approval a brief of the evidence; the order containing the following language after the recitals above referred to: "The foregoing motion and all of the grounds, original and amended, are hereby approved and ordered filed; and said brief of evidence is also hereby approved and ordered filed." The hearing was continued until a subsequent date. On February 28, 1900, the judge passed the following order: "The foregoing order taken November 15, 1899, is hereby extended for all purposes, and especially for the purpose of perfecting and filing for approval and having approved brief of evidence, and for amending and perfecting motion for new trial." On March 21, 1900, the motion was overruled. It is contended that the order of February 28, 1900, was in effect an order revoking the approval of the brief of evidence contained in the order of November 15, 1899, and that when this approval was thus set aside the brief of evidence stood unapproved, and, there being nothing in the record to indicate that it was ever approved after February 28, 1900, the brief of evidence contained in the record is not an approved brief of evidence. We do not think that the order of February 28, 1900, had the effect of revoking the order approving the brief of evidence, but was simply a reservation by the judge of the right to revoke that order at the hearing, if he saw proper to do so, on the ground that the brief of evidence which had been approved was not, for any reason, a correct brief. While the judge has a right to set aside and revoke an order approving a brief of evidence, when there appears in the record a distinct approval of the brief of evidence, it must appear in distinct terms that this approval has been set aside. A judgment setting aside such an approval will never be implied from subsequent orders of the judge, unless it clearly appears that such was the intention of the judge. Whenever there is doubt as to whether a judgment approving a brief of evidence has been set aside, the doubt should be resolved in favor of upholding the judgment as it appears in the record. The judge has a right to correct a brief of evidence at any time before the motion for a new trial is overruled, and this is true notwithstanding he may have approved the brief of evidence before that time. The order of February 28, 1900, simply gave to the judge a right which he already had; and as it does not appear in the record that he has exercised this right to change the brief of evidence, and nothing appears to indicate his dissatisfaction with the brief of evidence as approved by him on November 15, 1899, the brief of evidence thus approved

will be dealt with as a correct brief of the evidence in the case.

4. The motion for a new trial contains the following ground: "The court erred in allowing the plaintiff to file in this case, by amendment or otherwise, equitable pleading setting up various equities by which he sought to overcome the legal title of defendants, as shown by said pleadings, over the objections of defendants." The amendment to the motion contains the following ground: "The court erred in allowing equity pleadings ingrafted on a plain action of ejectment, where only title was involved, and that title was attacked for usury." It does not appear in either of these grounds what was the objection made to the allowance of the amendment referred to at the time the same was allowed. If it was intended to make the point that an amendment by the plaintiff setting up grounds for equitable relief could not be properly allowed in common-law action of ejectment, an objection to the allowance of the amendment upon this ground should have been distinctly made, so that the court could have passed upon the objection thus raised. If it was conceded that under certain circumstances an amendment of this character might be allowed, and that the amendment offered was objectionable as setting up a new cause of action, or for some other good and sufficient reason ought not to have been allowed, then the record should show that this objection was distinctly made and passed upon by the trial judge. From the recitals in the motion for a new trial, it is as much a conjecture that the question intended to be raised was the one as it was the other; and, as we cannot know what question was made and decided by the trial judge in reference to the amendment, the grounds of the original and amended motion above quoted present no question for decision.

5. Treating the amendment to the petition as having been properly allowed, the question to be considered is whether the evidence offered by the plaintiff was sufficient to authorize a decree of the character therein prayed for. One who, having no interest to protect, voluntarily pays off an incumbrance upon the land of another, is not subrogated to the rights of the holder of such an incumbrance unless there is an agreement, either express or implied, between the person discharging the incumbrance and either the debtor or the creditor that he shall be subrogated to the rights of the incumbrancer. *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374. The testimony above set forth, which is all that appears in the record on this subject, does not show an express agreement to this effect, and is not of such a nature that an undertaking of the character required can be necessarily implied. To have a deed to land, and to hold the same as collateral, is not necessarily inconsistent with a prior incumbrance. The evidence did not

authorize the court to decree that Brooks was subrogated to the rights of Cox, and a new trial should have been granted upon this ground. Judgment reversed. All the justices concurring.

(113 Ga. 444)

HEARD v. STATE.

(Supreme Court of Georgia. May 27, 1901.)
CITY COURT—ESTABLISHMENT—CRIMINAL LAW
—NEW TRIAL—DISORDERLY HOUSE.

1. The general assembly may, without regard to the population of a particular city, establish therein a "city court," and prescribe that a writ of error shall lie therefrom to the supreme court.

2. Overruling a demurrer to an indictment is not cause for a new trial.

3. Though an indictment for keeping and maintaining a disorderly house charges, conjunctively, that so doing was to the encouragement of divers specified vices, a conviction based upon evidence showing that the accused kept and maintained such a house to the encouragement of any one or more of such vices is maintainable.

Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Carrollton; W. C. Hodnett, Judge.

Nancy Heard was convicted of crime, and brings error. Affirmed.

Talbot Smith and Oscar Reese, for plaintiff in error. S. Holderness, for the State.

LUMPKIN, P. J. 1. On the call of this case, counsel for the state moved to dismiss the writ of error on the ground that this court had no jurisdiction to entertain the same because Carrollton, being a city of less than 2,000 inhabitants, was not one in which there could constitutionally be established a city court whose judgments could be reviewed upon a direct bill of exceptions therefrom to the supreme court. We have not referred to the United States census to ascertain what was the population of Carrollton, either when it was incorporated as a city or when the city court of Carrollton was established. In the view which we feel constrained to take of the question presented by the motion to dismiss, it may be conceded that the population of Carrollton has never exceeded 2,000. While, as was pointed out by Mr. Justice Little in *Wight & Weslosky Co. v. Wolff*, 112 Ga. 169, 37 S. E. 395, there is, according to lexicographers, a marked distinction between a city and a town,—the former being "more important" than the latter,—we are driven to the conclusion that from the standpoint of legislation in this state the distinction has ever been purely arbitrary, and the test of population has never been observed. Our general assembly has time and again, long before the ratification of our present constitution, incorporated as cities places whose inhabitants were counted by mere hundreds, and perhaps many more places having therein a limited number of thousands of people. The truth of this

statement is matter of such general knowledge that it is not necessary to cite numerous illustrations. It will suffice to refer to the cases of Atlanta and Savannah, the two cities expressly named in the constitution as those from whose city courts there may be writs of error to the supreme court. The former was incorporated as a city in 1847, when its estimated population was about 1,500. It was, in point of fact, a small town, in the proper sense of the term. While it had prospects of growth, and did grow apace, and continues to grow, its legal status as a city would not have been changed if it had failed to grow. Savannah was made a city by the act of December 23, 1789. Its population must have been small at that early day; for, according to *Sherwood's Gazetteer* (2d Ed.), it had, in 1829, 40 years later, "about 7,000." These two instances, and scores of others which might be mentioned, show conclusively that our legislatures have paid no attention to the definitions given in lexicons of the terms "city" and "town," or to the real difference between a city and a town. This being so, and "there being," as Mr. Justice Cobb remarked in the case cited supra, "nothing in the constitution defining a 'city,' it was left entirely to the general assembly to say what community of persons should be declared to be a city, and the general assembly may arbitrarily determine this question." This discussion might be closed here, but we wish to add that, though we cannot, in view of what is said above, hold otherwise than as we do, we are profoundly impressed with the belief that the framers of the constitution never intended or contemplated that villages and towns should be arbitrarily converted by mere legislation into cities for the purpose of establishing therein "city courts," and giving them writs of error to the supreme court. That our present governor was impressed with the same idea is evidenced by his last annual message to the general assembly. The following extract therefrom fully and clearly expresses what we cannot help feeling is the real truth of the matter: "In view of the large number of acts passed within recent years purporting to establish city courts with direct writs of error to the supreme court, the inquiry is suggested whether there is not danger of carrying legislation on this line beyond constitutional limits, if, indeed, this has not already been done. While it may be within the power of the general assembly to arbitrarily declare that a mere village or small town shall, from and after the passage of a particular act, be 'a city,' this certainly does not make the same a real city, as the term is commonly used and understood among our people; and, if this sort of a legislative declaration is made with reference to a particular village or town for the sole purpose of laying the foundation for establishing in the newly-created and so-called 'city' a court whose judgments may be directly reviewed by the

supreme court, the constitutionality of the measure may, as to this matter, well be questioned. Paragraph 5, § 2, art. 6, of the constitution (Civ. Code, § 5836), declares: "The supreme court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors from the superior courts, and from the city courts of Atlanta and Savannah, and such other like courts as may be hereafter established in other cities." Our present constitution was ratified by the people December 5, 1877. At that time Atlanta and Savannah were the two largest cities in the state, and each had many thousands of inhabitants. In each was a city court with broad jurisdiction and large powers. It cannot be doubted that the framers of the constitution, in limiting the jurisdiction of the supreme court to the correction of errors committed by the superior courts by the two city courts mentioned, and by "such other like courts" as might be established, meant that the phrase just quoted should apply to courts of a class having similar jurisdictions and powers with those already established in Atlanta and Savannah. It also seems clear that in declaring that these "other like courts" must, in order to come within the provisions of this paragraph, be "established in other cities," it was contemplated that they should be established in like cities—i. e. real cities—at least approximating in population and general characteristics the two existing cities specially named. In other words, the makers of the constitution must have had in mind cities whose size, importance, wealth, business, and litigation would render expedient or necessary the establishment therein of courts of like dignity and authority with the superior courts, save only as to matters over which the jurisdiction of the latter was by the fundamental law made exclusive. It cannot be fairly supposed that in using the language above quoted it was believed that the general assembly would ever attempt to so stretch its obvious meaning as to enact that a small town should immediately become a city, and, as such, be entitled to a constitutional city court. It is respectfully suggested that the time has come to call a halt in legislation tending in this direction, for it is surely the duty of the lawmaking power to conform not only to the letter, but to the spirit, of the constitution." Much of the opinion delivered by Mr. Justice Little in the case above mentioned is on the same line. He sets forth with great strength, force, and clearness the reasons why it is not to be supposed that the convention meant to authorize the general assembly to establish "city courts" in municipalities of small population, and limited business with writs of error therefrom to this court. Those reasons need not be repeated here. All of us, including even Mr. Justice Cobb and Mr. Justice Fish, who were not, for the reasons stated by the former, able to assent to all of the propositions laid down in

that opinion, felt then, and feel now, that from a moral standpoint the truth had been told therein. Four of us were also persuaded that when the question now before us arose, as was anticipated, this same truth could be made apparent from the standpoint of constitutional interpretation. After anxious deliberation, all of us except Mr. Justice Little are now forced to the conclusion that this cannot be done. While strongly believing that legislation like that under consideration violates the spirit of the fundamental law, and therefore gravely doubting the constitutionality of many of the city court acts, including that relating to Carrollton, in so far as they authorize writs of error, we cannot, because of this doubt, adjudge that they are, in the respect indicated, null and void. Mere doubt as to the constitutionality of a given enactment settles its validity. The motion to dismiss the writ of error must be overruled.

2. The accused was tried for keeping and maintaining "a common, ill-governed and disorderly house," upon an indictment which had been transferred to the city court from the superior court of Carroll county. Before pleading to the merits, she filed a demurrer to the indictment, which was overruled. After conviction, she made a motion for a new trial, in one ground of which she complained of the overruling of the demurrer. The denial of this motion is the only error assigned in the bill of exceptions, and the accused did not, otherwise than as above stated, attempt to bring to this court for review the refusal of the trial court to sustain the demurrer. It is now well settled that overruling a demurrer to an indictment is not ground for a new trial. *Taylor v. State*, 105 Ga. 846 (3), 33 Ga. 190; *Gaines v. State*, 108 Ga. 772, 33 S. E. 632; *Cleveland v. State*, 109 Ga. 265, 34 S. E. 572.

3. Though there are in the motion for a new trial 14 grounds, counsel for the plaintiff in error, who argued the case here exclusively by brief, did not insist upon, or even mention, any of them save that which is disposed of above, and two others; one alleging that the verdict was contrary to the evidence, and the other reading as follows: "Because the verdict is contrary to the evidence and the law, and totally without evidence, there not being one scintilla of evidence showing that there was any keeping and maintaining a common, ill-governed house by defendant to the encouragement of idleness, drinking, and gaming, collectively, and all must have been proved as alleged." The Code section on which the indictment was based reads as follows: "Any person who shall keep and maintain, either by himself or others, a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, or other misbehaviour, or to the common disturbance of the neighborhood or orderly citizens, shall be guilty of a misdemeanor." Pen. Code, § 392.

The exact charge which the indictment made against the accused was that she "did keep and maintain a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, and drinking, to the common disturbance of the neighborhood and orderly citizens." The evidence as a whole warranted the jury in finding that the accused kept and maintained a house which was "ill-governed and disorderly," in the sense in which these words are usually understood; that she did so for a sufficient length of time to render applicable to it as a disorderly house the descriptive term "common"; and that the noises made and improper acts committed therein disturbed the peace and comfort of quite a number of orderly citizens in the neighborhood. In all these respects the testimony for the state met the requirements of the rule laid down in *Palfus v. State*, 36 Ga. 280, to the effect that: "To constitute a house a disorderly house in law, the noises, etc., must be ordinary and usual, or common, and the disturbance must be general, and not of only one person, in a thickly-settled neighborhood." There was some evidence authorizing the conclusion that the manner in which the house was kept was calculated to encourage idleness and drinking, but no evidence at all that it had a tendency to encourage the vice of gaming. So the question for decision is narrowed down to this: Did the failure of the state to prove that the keeping of the house had every one of the vicious tendencies ascribed to it in the indictment render the verdict unlawful? We think not. If it was, in fact, a "common, ill-governed and disorderly" establishment, and the keeping and maintenance of it encouraged idleness, or gaming, or drinking, or other misbehavior, the keeper was guilty of a misdemeanor. So was she if she kept and maintained the house in such manner as to cause "common disturbance of the neighborhood or orderly citizens." In prescribing what consequences must result from the keeping of a disorderly house in order to render the act of so doing criminal, the law mentions them disjunctively. The indictment charged, conjunctively, that all of these consequences, save only the encouragement of "misbehavior" other than idleness, gaming, and drinking, resulted in the present instance. Must the conviction fall because there was no proof as to the encouragement of gaming? It was certainly not necessary to allege anything with respect to this point, and, if the indictment had been silent on the subject, no evidence concerning it would have been called for. The general rule is that the state will be required to prove all facts alleged, even though immaterial, and not such as it was necessary to set forth in the indictment. This rule, however, usually relates to facts which identify the transaction under investigation, and serve to distinguish the criminal act charged from any

other of a similar nature. In the present case the act charged was the keeping of a disorderly house. To the evidence tending to prove that the accused did keep in a disorderly manner a particular house, nothing as to the identification of the house or as to the fact of her keeping it would have been added by showing that her conduct in maintaining the establishment was "to the encouragement of * * * gaming." If the indictment had contained the unnecessary allegation that the house was a red house, the state would have been obliged to prove that it was "red," or else fail to make out its case. This is so because proof of every other allegation in the indictment, without proof that the house was of the color charged, would have left it uncertain whether the house kept was the house to which the indictment referred. An indictment charging the larceny of an animal with certain earmarks, or having a particular color, or belonging to a designated breed, cannot be sustained without proving the earmarks, or color, or breed, as alleged; for failure of proof in these respects would be failure to identify beyond a reasonable doubt the animal which the grand jury charged the accused with stealing. So the alleged burglary of the house of "A., No. 225 Jackson street," would not be sufficiently established by proving the burglary of a house of A. on that street, without proof as to number; for it might be that A. had two or more houses on that street, in which event the proof would not establish with the requisite legal certainty that the house actually burglarized was in fact the one with the number 225, to which alone the indictment related. If the indictment is not needlessly specific, or no question as to its sufficiency in the matter of description is raised by demurrer, evidence general in its nature will support a charge alike general.

There is another class of cases wherein a conviction may stand without literal proof of the charge as made. Thus, on an indictment for the larceny of 10 sheep, the accused may be properly found guilty upon proof satisfactorily showing that he stole one of these sheep, or on an indictment for embezzling \$500 a conviction may stand on evidence showing the embezzlement of any number of those dollars. In cases of this kind the evidence establishes the commission of an act covered by the charge in the indictment, the doing of which is a crime, and the evidence fixes this very act as one to which the indictment referred. Our present case, on principle, falls within the latter class. The criminal act was the keeping of a particular house in a disorderly manner. Both the house and the manner of keeping it were absolutely identified, and this is none the less true because one of the vicious tendencies of the manner of keeping was not shown. A second prosecution for the disorderly keeping of this same house during the period covered by

the present indictment would be barred, and this is the real test. As was remarked by Buller, J., *arguendo*, in *J'Anson v. Stuart*, 1 Term R. 754, "the offense is the keeping of the house." The following from 7 Enc. Pl. & Prac. 17, seems to be closely in point: "Under an indictment for keeping a disorderly house, which charges in the same count the various manners in which the house was disorderly, proof of any one of the manners mentioned is sufficient." The case of *People v. Carey*, 4 Parker, Cr. R. 238, cited in a note, directly supports the text. Under an English statute (23 & 24 Vict. c. 27, § 32) which made it an offense for a licensed keeper of a refreshment house to "knowingly suffer prostitutes, thieves, or drunken and disorderly persons to assemble at or continue in or upon his premises," one Belasco, the keeper of such a house, was charged with knowingly suffering "prostitutes to assemble at and continue in and upon his said premises." The magistrate before whom the accused was tried found as matter of fact that he permitted a number of prostitutes to assemble in his house; that some of them were served with refreshments, and that "it did not appear that those prostitutes who were not seen to take refreshment tarried in the house for a longer time than would have been needful to procure refreshment, had such been their intention." Belasco was convicted, and on appeal the point was distinctly made that the facts found did not constitute an offense under the statute, because it was "not proved that the appellant knowingly permitted the prostitutes to remain in or upon his premises." The conviction was, nevertheless, affirmed, and Blackburn, J., said: "The magistrate has found, and has stated the evidence upon which he has found, that the women assembled on the appellant's premises in furtherance of prostitution. That was more than he need have found. It would have been sufficient if he had found that they had assembled in the capacity of prostitutes." *Belasco v. Hannant*, 3 Best & S. 13-20. The charge was permitting the lewd women to assemble and remain on the premises. The proof was that the accused merely permitted them to assemble. This case, therefore,—which was apparently most carefully considered,—supports our present ruling. We have been unable, after some search, to find other authorities in point, but have, after considerable reflection, reached the conclusion that the mere failure to prove that the keeping of the house tended to encourage gaming was not fatal. Judgment affirmed.

LITTLE, J. (dissenting). While conceding that the general assembly may, without regard to the population of a particular city, establish a city court, I must dissent from so much of the judgment rendered in this case by my Brethren as rules that the general assembly may prescribe that a writ of error shall lie direct from such a court to the su-

preme court. In respect to the last proposition in the first headnote, I have to say that, for the reasons which I gave in the opinion rendered in the case of *Wight & Welosky Co. v. Wolff*, 112 Ga. 169, 37 S. E. 395, the constitutional provision which authorizes a writ of error from certain city courts contemplates that it shall not only issue from a city court established in a place which is a city in fact, and not one which is a city only in name. The latter the general assembly may create; the former it cannot. While it may incorporate a place of 10 inhabitants, and call it a city, such a place, even after it is incorporated, is not a city, except for legislative purposes; and the provision of the constitution prescribing from what city courts a writ of error will lie direct to this court deals with such cities as are real cities, and not mere nominal cities. The superior courts of this state are the only courts which, by the constitution, are invested with general original jurisdiction over all classes of cases. From these, writs of error lie direct to this court. They do not lie direct from all city courts; and in giving the right of a direct bill of exceptions to suitors in certain city courts, the constitution, without any doubt, as I think, prescribes that those city courts, whose judgments may thus be directly reviewed, are only those established in cities where the volume of business is large, and the rights of suitors therein would be delayed if the ordinary remedies of certiorari and appeal were the exclusive methods by which their judgments might be reviewed; and in restricting this right to a writ of error having this object in view the constitution designates that the writ shall lie in those cases only where the cities in which they are established bear at least some resemblance to the leading cities in this state both in population and business importance, to wit, Atlanta and Savannah. To say that the writ shall lie from any city court established in a place which the legislature has made a city for legislative purposes is, in my opinion, an erroneous construction of the constitutional provision. Not only so, but its effect is to take away the rightful jurisdiction of the superior court to correct by certiorari and appeal errors which may have been committed in such courts, and to impose upon the supreme court a burden never contemplated by the framers of the constitution.

(90 Va. 492)

STONE v. CALDWELL, County Clerk.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

COUNTY CLERK—COMPENSATION—SALE OF DELINQUENT LAND.

Under Code, § 686, as amended by Acts 1899-1900, p. 855, relating to the sale of land for delinquent taxes, and prescribing compensation for certain enumerated duties by the county clerk, and requiring him to perform other incidental duties for which no compensation is provided, the clerk is entitled to such

compensation for these incidental duties as is allowed by Code, c. 172, fixing the fees of officers; and on application for the sale of delinquent lands the applicant must tender not only the fees under Code, § 666, but the compensation provided by chapter 172.

Application by one Stone against one Caldwell, county clerk, for writ of mandamus to compel the filing of an application for the purchase of land delinquent in the payment of taxes. Application denied.

J. D. Smith, for petitioner.

WHITTLE, J. The petitioner, who desired to purchase certain lots in Radford, alleged to be delinquent for the nonpayment of taxes, presented his application to the clerk of the hustings court of that city, and tendered him \$3.18, being 10 per centum of the amount of the proposed purchase price of the property; also 60 cents, the fee prescribed for making three copies of the application; and the further sum of 50 cents, the fee allowed the clerk for compiling a statement and computing the interest due on the amount for which the taxes were returned delinquent. But the clerk refused to receive and file the application, insisting that he was entitled to other fees in addition to those tendered, his right to which the petitioner denied and declined to pay.

The prayer of the petition is that a peremptory writ of mandamus be awarded to compel the clerk to receive and file petitioner's application upon the payment by him of the aforementioned fees.

An application to purchase delinquent lands involves the issuance, service, and return of process (copies of the application), and judicial action on the part of the court. It partakes, therefore, of the nature of a suit.

The fees prescribed by section 666 of the Code, as amended (Acts 1899-1900, p. 855), are intended to compensate the officers for the services therein enumerated; but the statutes in relation to the sale of delinquent lands impose upon clerks the performance of incidental duties, compensation for which is not specifically provided for, and for which they have a right to demand the fees allowed for such services by chapter 172 of the Code.

Thus, they are entitled to a fee of 15 cents for filing application to purchase land; for entering name of attorney, 10 cents; for docketing application, 18 cents; for search, if one is made, 10 cents; for noting application and taking officer's receipt therefor, 18 cents; for taxing costs, 20 cents; for filing application among ended causes, 20 cents; and by section 666, as amended, for each copy of application, 20 cents (in this case, for three copies, 60 cents); and for statement and computing interest on amount of delinquent taxes, 50 cents, whether for one or more years. The statute does not contemplate that the clerk shall make separate statements and interest calculations for

each year the land is delinquent, and charge a fee therefor, but that he shall make one statement and one calculation of interest for the entire time, for which he shall charge a fee of 50 cents.

It appears that the petitioner, M. L. Stone, did not tender to the clerk, M. M. Caldwell, the fees to which he was lawfully entitled in this case. The prayer of his petition for a peremptory writ of mandamus is therefore denied, with costs. Refused.

(99 Va. 448)

CITY OF DANVILLE v. ROBINSON.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

DEFECTIVE SIDEWALKS—INJURY TO COUNCILMAN—LIABILITY OF CITY—CONTRIBUTORY NEGLIGENCE.

1. Laws inhibiting a councilman from contracting with a city do not prevent his recovering for injuries from a defective highway therein.

2. One injured by a defect in a sidewalk of a city bridge is not chargeable with notice of the defect merely because he is a councilman.

3. One is not chargeable with negligence in the failure to repair defective sidewalks in a city bridge, so as to prevent his recovery for injury therefrom, merely because he is a councilman, he not having been charged with the duty, or given the means or power, to make the repairs, or been a member of the street and bridge committee, and having, because of inability to attend, been at none of the council meetings at which the matter of repairs was brought to the attention of the council, except one at which the report of such committee was filed and went over under the rules.

4. One who starts to walk across a bridge, at night, in the driveway, because it is lighter, is not chargeable, as matter of law, with contributory negligence, because on the approach of teams he goes onto the sidewalk, where he is injured from a defect therein.

Error to corporation court of city of Danville.

Action by J. D. Robinson against the city of Danville. Judgment for plaintiff Defendant brings error. Affirmed.

Henry R. Miller, for plaintiff in error. Peatross & Harris and Christian & Christian, for defendant in error.

CARDWELL, J. This is a suit brought in the corporation court of the city of Danville by J. D. Robinson to recover damages for injuries to him, caused, as is alleged, by the negligence of the city in not keeping its streets, walkways, etc., in a reasonably safe condition, and the verdict and judgment is for the plaintiff for the sum of \$1,500, to which judgment the defendant city was awarded a writ of error by this court.

Forming a part of Main street, the most public thoroughfare through the city of Danville, in almost continuous use day and night, is an iron bridge spanning Dan river. The parts of the city lying on either side of the river are connected by this bridge, which is about 840 feet long, and as a highway across the river consists of a wagon or carriage

way 22 feet wide, with a sidewalk 5 feet wide for the use of pedestrians on each side of the wagonway. The floors of the wagonway and of the sidewalks and the sills on which they rest are of wood; the rest of the bridge is of iron and stone. There is no partition separating the wagonway from the sidewalks on either side, except the iron uprights of the framework of the superstructure of the bridge. On the occasion of the injuries for which this suit is brought, the defendant in error (plaintiff below), about 9 o'clock at night, was going from that portion of the city lying on the south of the river to his home on the north side. He entered upon the bridge on the east or right side thereof, and walked in the wagonway, because better lighted, as he says, till about two-thirds of the way across, when he discovered that a carriage following was gaining on him, and a wagon going in an opposite direction traveling on the west side of the bridge approaching; whereupon, and just as the wagon passed him, he stepped upon the sidewalk to his right, and, after walking thereon a distance of some 50 or more feet, one of the planks of the sidewalk gave way, or turned, letting his foot through the floor, and throwing him down, breaking his leg, and causing him other injuries.

Plaintiff in error, the city of Danville, had exclusive control of the bridge; it was wholly within the corporate limits of the city; and by its charter the city was charged with the duty of keeping the bridge in repair, and in a reasonably safe condition for the use of persons traveling over it.

August 25, 1896, the committee selected by the city's council, and known as the "street and bridge committee," reported to the council that the sidewalks on the bridge were in an unsafe condition and recommended that the committee be authorized to expend \$1,550 in repairing them. With this report was filed a report of the city's engineer, to the effect that, while the sidewalks of the bridge were not then dangerous, it was unsafe to allow them to be continued in use through the winter without renewal. Under the rules of the council, the report of the committee had to lie over 10 days, and no action was taken thereon till December 14, 1896, when it was recommitted to the committee for further investigation, with the view of having the cost of the repairs to the sidewalks of the bridge done at less expense than as proposed by the committee. At a meeting of the council January 12, 1897, the committee again reported that the costs of the repairs to the sidewalks could not be reduced below the estimate in their former report, specifying the unsoundness of the sills on and along which the handrailing runs, as being the special cause of danger. It was then provided that \$20 or \$25 be expended to put up an inner railing along the sidewalks to prevent persons from coming in contact with the outer iron railing, and thus relieve

the situation. This was done, and at intervals between that time and September, 1898, when defendant in error received his injuries, the decayed planks on the sidewalks at different places were taken out, and new planks put in their place; but the sills upon which they rested were not renewed, although the council were informed by its street and bridge committee, and by the city's engineer in 1896, that they were rotten, and in an unsafe condition, which was not an open and obvious danger to pedestrians crossing the bridge. It appears that the immediate cause of the injuries sustained by defendant in error was the decayed condition of the sills under the sidewalks of the bridge, as the plank which gave way and let him through the floor would not have done so had not the sill to which the opposite end was nailed been so decayed that it would not hold the nails.

Defendant in error was a member of the city council from July, 1896, till after this accident to him, but was at none of the meetings of the council at which the matter of the repairs to the sidewalks of the bridge was brought to the attention of the council except that of August 25, 1896, when the report of the street and bridge committee was filed, and went over under the rules; and he was at no time a member of that committee, nor had any duties to perform as a member of the council which brought to his special attention the condition of the streets and bridges of the city.

It is contended that defendant in error cannot, in any event, be allowed to recover in this action: First, because he was a member of the council from the time that the defects in the sidewalks of the bridge were first brought to the notice of the council till after the accident to him; and, second, because a councilman is not allowed to contract with his city, such contracts being, under the charter of the city and the general law of the state, void.

The authorities cited in support of this second proposition have no sort of application to this case, and those relied on to support the first do not sustain the contention. They are *Todd v. Inhabitants of Rowley*, 8 Allen, 51; *Wood v. Inhabitants of Waterville*, 4 Mass. 422, and the same case in 5 Mass. 294. The last two named only hold that a surveyor of highways may recover against his town damages happening to him through a defect in the highway, unless the defect arises from the surveyor's own neglect; in other words, that when a surveyor of highways, obliged by law effectually to repair the ways within his district, who has the means with which to do so placed at his disposal, or can obtain such means by applying to his town authorities, and sustains an injury by reason of his neglect of duty in these respects, he cannot recover in damages.

In *Todd v. Inhabitants of Rowley*, *supra*

it was held that a city, whose officers, in repairing a bridge, though acting in the honest exercise of their discretion, narrow the space for the passage of the water so as in times of freshet to set it back upon a mill, is liable for the injury thus occasioned, in an action of tort, even if the owner of the mill was a member of the committee of the city council on whose report the alteration was made. The opinion by Shaw, C. J., says: "That for the default in adopting a plan for the bridge, not contrived with sufficient skill and with a proper regard to the volume of water, the strength and rapidity of the current at all seasons, and the capacity of the waterways to discharge it, the members of the committee cannot be held personally estopped from asserting their rights."

There is nothing in the relation that defendant in error bore to the city government of Danville, when he sustained the injuries complained of, that makes the principle enunciated in *Wood v. Inhabitants of Waterville*, supra, applicable to his case. He was not charged with the duty, and given the means and power, to repair or renew the sidewalks of the bridge in question and neglected it. He was not even a member of the street and bridge committee of the council, which had special supervision of the streets and bridges of the city, but only one of the seventeen members of the council.

Whether or not defendant in error was guilty of negligence contributory to his injury was a question for the jury under proper instructions of the court.

The court gave five instructions, offered by defendant in error, to all of which plaintiff in error excepted, and gave four out of five instructions asked for by plaintiff in error.

The instructions given by the court correctly propound the law as to the liability of the city to persons lawfully using bridges constructed as a part of its highways or streets for injuries caused by the negligence of the city in keeping them in a reasonably safe condition, and that defendant in error could not recover unless he was exercising reasonable and ordinary care for his own safety in passing over and along the sidewalk of the bridge when he was injured.

It was in evidence that defendant in error, in 1890, broke the leg that was injured by the accident complained of in this suit, and it is argued that defendant in error's third instruction is erroneous, because it fails to direct the attention of the jury to a proper discrimination between the injuries arising out of the two accidents, and to the necessity of excluding from the estimate of damages the injuries to the leg resulting from the first accident.

The instruction is not amenable to the objection. It properly directed the jury as to the damages they might allow under the evidence in the cause, and they could not have done otherwise than consider all the evi-

dence before them as to the damages sustained by defendant in error resulting from the injuries for which this suit was brought.

The objection urged as to the fourth instruction for defendant in error proceeds upon the erroneous theory that he was, by reason of his being a member of the city council, to be held, as a matter of law, to have had notice of the defective condition of the sidewalks of the bridge, and therefore could not recover in this action.

Travelers are not forbidden by the law to use a public highway because its condition is unsafe, although that be known to them, unless the unsafe condition is such as to make the danger obvious and imminent. *Gordon v. City of Richmond*, 83 Va. 436, 2 S. E. 727, and authorities there cited.

The fifth instruction asked for by plaintiff in error and refused by the court sought to tell the jury, in effect, that, because the defendant in error was a member of the city council from the time the defect in the sidewalks of the bridge was first brought to the notice of the council till after this accident, no cause of action accrued to him.

It follows from what has already been said that this instruction was properly refused.

We are further of opinion that the instructions given by the court fully and fairly submitted the case to the jury, and could not have misled them to the prejudice of the plaintiff in error.

In considering the remaining assignment of error, which is to the refusal of the court to set aside the verdict of the jury and grant a new trial, the full statement of the case already made renders it unnecessary for us to go fully into the evidence.

No evidence was offered to show negligence on the part of the defendant in error touching the matter of repairing the sidewalks of the bridge. It is shown that when he was absent from the meetings of the council it was because of his being so situated that he could not attend. It is conceded that the sidewalks of the bridge were in August, 1896, in an unsafe and dangerous condition, and so remained until after the happening of this accident, with the full knowledge on the part of the officials of the city whose duty it was to see to their repair or renewal. It is clearly shown that the danger to pedestrians passing over the sidewalks of the bridge was not by reason of the condition of the planks thereon, but by reason of the decayed condition of the sills upon which they rested, which defect was not open and obvious to pedestrians using the sidewalks.

The only negligence on the part of the defendant in error at the time of his accident contended for is his being in the wagonway, and going upon the sidewalk, when, by remaining in the wagonway, he could have passed over the bridge safely. His uncontradicted statement is that he was walking

in the wagonway because it was better lighted, and only left it to go upon the sidewalk because of the near approach of a carriage in his rear; that, as he had noticed new plank put at a number of places in the sidewalks, and other repairs to them, he supposed them to have been put in a safe condition for use by the public, and that he was walking at a moderate gait, exercising ordinary and reasonable care, when he was injured.

Conceding that it would have been safer for defendant in error to have continued upon the wagonway, whether or not he was, by leaving it, and going upon the sidewalk, guilty of contributory negligence, as the proximate cause of his injury, was a question for the jury to determine from all the facts and circumstances of the particular occasion. *Kane v. Railroad Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Jones v. Railroad Co.*, 128 U. S. 448, 9 Sup. Ct. 118, 32 L. Ed. 478.

The state of facts presented by the evidence is, at least, such that reasonable men may fairly differ upon the question as to whether there was negligence or not, and, this being the case, the determination of the matter by the jury should not be disturbed. *Railroad Co. v. Ives*, 144 U. S. 419, 12 Sup. Ct. 679, 36 L. Ed. 486; *Kimball v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901.

The judgment complained of must be affirmed.

Affirmed.

(39 Va. 390)

SIMONS v. MILITARY BOARD OF VIRGINIA.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

MILITIA—COURT-MARTIAL SERVICES—COMPENSATION—MANDAMUS.

As Code, c. 21, regulating the government of the militia, makes no express provision for payment for service on courts-martial, and the matter is in the discretion of the military board, under section 377, providing that expenditures not specially provided for by the chapter may be made such board on the concurrence and order of all its members, mandamus will not lie to compel them to approve a claim for such services.

Application by one Simons for mandamus to the military board of Virginia. Refused.

A. S. Lanier, for petitioner. A. J. Montague, Atty. Gen., for respondent.

HARRISON, J. This application, which is addressed to the original jurisdiction of this court, prays that a writ of mandamus may issue directed to the military board of Virginia commanding them to approve a certain claim asserted by the petitioner against the commonwealth of Virginia for the sum of \$87.50, with interest thereon for three years; and that the auditor of public accounts be directed to issue his warrant in favor of the

petitioner for that sum, payable out of the "military fund."

The petitioner avers that in the year 1897 he was an officer, duly commissioned by the governor, with the rank of major in the 1st battalion of artillery of the Virginia volunteers; that in September of that year he was detailed, with other officers of said volunteers, to serve on a general court-martial in the city of Richmond for the trial of such persons as might be properly brought before it; that, in obedience to this order, he, during a period of many months, attended nine sittings of such court; and that his claim of \$87.50 is for nine days' service, being based upon the monthly rate of pay and allowance provided by law for an officer of his rank; and that his claim has been twice presented to the military board for its approval, and payment thereof refused.

The military board admits that the petitioner was detailed, and performed the services alleged, and that it declined to approve the account for such services. Respondent states that the petitioner was a resident of the city of Richmond, where the court-martial was held, and that it has been the unbroken practice not to pay for services rendered upon courts-martial when such courts are held at the place of residence of those serving thereon. Respondent further insists that it has full discretionary power in controlling and disbursing the military fund provided by statute, and that, in pursuance of such authority and discretion, respondent deemed it unwise and inexpedient to direct the payment of any sum for the services claimed; that no part of the military fund for the year 1897 is now in existence, or in any way available to meet an order drawn thereon by respondent.

Chapter 21 of the Code regulates the government of the volunteer militia of the state. There is no special provision therein for compensation to persons serving on a court-martial. Section 304 fixes the rate of compensation to be received by officers and privates "when called into the actual service of the state."

Section 305 prescribes the character of the service for which such compensation is made, and only contemplates payment of officers and enlisted men for services rendered pursuant to the call of the sheriff of any county, or the mayor of any city, "in cases of riot, tumult, breach of the peace, resistance to process, or whenever called out in aid of the civil authorities."

It seems clear that there is no provision made by either of these sections for the payment of a court-martial pay roll.

We are of opinion that section 377 of the Code reposes in the military board a discretion with respect to this matter that cannot be interfered with by mandamus. That section is as follows:

"For the purpose of controlling and directing the expenditures and disbursements pro-

vided for in this chapter, the governor, the adjutant-general, the senior officer of volunteers, the assistant inspector-general, and the secretary of the commonwealth shall be, and are hereby, created a board to be known as the 'Military Board,' upon the order in writing of any three of whom, but not otherwise, the auditor of public accounts shall issue his warrant for such sum as shall be directed, payable out of the military fund, but no bill, claim, or allowance shall be ordered for payment by said board unless it is itemized, and its correctness sworn to, for which purpose any member of the board may administer the oath. Expenditures not specially provided for in this chapter but manifestly in execution of its general purpose, and for the evident benefit of the volunteer service, may be made by said board, but only on the concurrence and the order in writing of all the members."

Under this section the board must determine whether the contemplated expenditure is manifestly in execution of the general provisions of chapter 21 of the Code, and whether or not the claim in question is for the evident benefit of the service. The discretion of the board is made still more apparent by the latter part of the section, which provides that there can be no disbursement in payment of a claim not specially provided for except upon the concurrence and order in writing of all the members of the board.

One of the marked characteristics of a proceeding by mandamus is that, if the functionary whose conduct is complained of is by law to exercise any discretion, that discretion will not be controlled by a writ of mandamus, for that would be to transfer the discretion which the law commits to the functionary to the court which undertakes to award the writ.

This court has so repeatedly of late stated the law on this subject and cited the authorities that it is not deemed necessary to do more than to refer to the recent case of *Broadbuss v. Supervisors* (Va.) 38 S. E. 177.

The writ is denied.
Refused.

(39 Va. 496)

**FIRST NAT. BANK OF RICHMOND et al.
v. HOLLAND.**

(Supreme Court of Appeals of Virginia. June 20, 1901.)

**GIFTS—CHOSE IN ACTION—DECLARATION OF
HUSBAND.**

1. A gift by husband to wife of stock is not affected by the dividends being passed to his credit on the books of the corporation, where the stock continued to stand in his name.

2. Acts 1897-98, p. 753, declaring a husband incompetent to testify for his wife in a proceeding by creditors to avoid a gift, does not prevent declarations of his, made when he was free from debt, inadmissible to prove a gift to his wife at such time.

3. Delivery of a certificate of stock with intent to transfer title by gift is effectual as an

equitable assignment, though there is no indorsement and transfer on the books.

4. A certificate of stock, a chose in action, is not within Code, § 2414, declaring that no gift of "goods or chattels" shall be valid unless by deed or will, or unless the donee have actual possession.

Appeal from circuit court of city of Danville.

Suit by Berryman Green, trustee, against creditors of John W. Holland and against Ola F. Holland, to determine right to property as between such creditors and said Ola F. Holland. From a decree for said Ola F. Holland the First National Bank of Richmond and other creditors appeal. Affirmed.

E. E. Bouldin, Blackford, Horsley & Blackford, and Peatross & Harris, for appellants. Berkeley & Harrison, Christian & Christian, and J. Sidney Smith, for appellee.

HARRISON, J. This controversy is between the creditors of John W. Holland, deceased, on the one hand, and Ola F. Holland, the widow of John W. Holland, on the other; and involves the title to 120 shares of the capital stock of the Merchants' Bank of Danville. The appellee, Ola F. Holland, claims the stock by virtue of a parol gift alleged to have been made to her by her husband prior to the creation of the debts, to the payment of which it is now sought to subject the stock. The claim of the appellee is resisted by the creditors upon the ground that no valid gift has been established, and in support of this general proposition several contentions are made, which will be considered in proper order.

It appears that in 1889 John W. Holland, then advanced in life, married the appellee, a comparatively young woman; that he was the owner of 120 shares of the capital stock of the Merchants' Bank of Danville, evidenced by a single certificate, No. 45, and that as early as January, 1892, he had delivered this certificate, without indorsement, to his wife as a gift to her of the 120 shares represented by it. It further appears that at the time of this transaction John W. Holland was a wealthy man, the value of the stock in question being but a small part of his estate, and that he was free from debt either as a principal or as surety for other persons. It further appears that on the 30th of January, 1892, the appellee bought and had delivered at her house an iron safe, with her name inscribed thereon, which she kept in her own room, and in which she placed, on that day, for safe-keeping, the certificate of stock No. 45; that no one but herself had the combination to this safe, or ever thereafter had in possession the stock scrip in question, or exercised any control over it. Some time in 1896 the appellee, having been advised that it was best to have the stock transferred to her on the books of the bank, produced the certificate for the counsel of her husband to write the assignment to her. This was done, and the assignment duly exe-

cuted by the husband. It further appears that on January 2, 1897, the original scrip, No. 45, was delivered to the bank, and scrip No. 72, in the name of the appellee, issued in its stead, and her name entered on the books of the bank as a stockholder. Up to January, 1897, the stock had stood in the name of John W. Holland, and he had retained his position as one of the directors of the bank, and all dividends declared on the stock had been passed to his credit with the bank, or a check given him therefor.

It further appears that John W. Holland made his will on February 8, 1892, in which the following disposition was made of the stock in question: "I also give, devise, and bequeath unto my said wife one hundred and twenty shares of the stock of the Merchants' Bank of Danville, Virginia, now held and owned by me;" providing, further on, that the stock should be in no way subject to the control of his personal representatives, except so far as it might be their duty to transfer the same to his wife. This will was prepared by Judge Berryman Green, a learned lawyer, who had been for many years the intimate friend and counsel of the testator. After testifying in clear and positive terms that at the time of the execution of this will the stock certificate in question was in the possession of the appellee, and that John W. Holland then told him he had already given the stock to his wife, Judge Green says, in explanation of the stock being referred to in the will, that Mr. Holland wished to mention specifically all the property he had given to his wife, and that, being entirely solvent and free of debt, he did not desire to make the gift public, because it would involve the surrender of his position as one of the directors in the bank. It further appears that on January 1, 1897, John W. Holland, having become heavily involved as indorser for a brother, executed a deed of trust for the benefit of his creditors to Judge Berryman Green. In that deed the stock in question is thus referred to: "Whatsoever interest, if any, said party of the first part may have in one hundred and twenty shares of the capital stock of the Merchants' Bank of Danville aforesaid. This stock having been given and transferred to his wife, Ola F. Holland, and possession thereof delivered to her long prior to the execution of this deed, the party of the first part makes no claim thereto, and believes that he has no interest therein; but, with a view of protecting her as far as possible in the event of any claim being asserted thereto by creditors, said party of the first part hereby assigns, transfers, and sets over all interest, legal and equitable, whatsoever, that may be in him in said stock, and directs that the same shall not be sold or disposed of unless the other property herein conveyed shall be insufficient to meet and pay off the liabilities secured hereunder."

In the bill filed by Judge Green, trustee,

asking the court's aid in the administration of his trust, after setting forth the foregoing clause of the deed, he says: "In spite of this plain and explicit disclaimer of the said John W. Holland of any and all interest in the stock as above set forth, some of the creditors secured in said deed have, through their counsel, demanded that your orator, as trustee, shall take immediate charge of the said stock and apply the same to the debts secured," etc. The foregoing facts are sufficient to make clear the several questions presented by appellants in contesting the validity of appellee's claim.

It is not necessary to pass upon the competency of Mrs. Holland as a witness in her own behalf, for, independently of her testimony, the fact of the gift of the stock as early as January, 1892, and the unqualified possession and exclusive control of the original certificate by Mrs. Holland until the same was surrendered and the new certificate issued in her name, is abundantly established by clear and conclusive evidence.

In the light of the convincing proof of the previous gift of the stock to the wife, the subsequent conduct of Holland in embracing the same property in his will and deed of trust is confirmatory, rather than derogatory, of her prior title. The language of the will, especially in view of Judge Green's explanation of the motive for mentioning the stock, and his testimony that prior to drafting the will the testator had advised him of the previous gift of this stock to his wife, makes it clear, we think, that it was not intended thereby to affect the previous gift, but to facilitate, in case of the testator's death, the due legal transfer of the stock on the books of the bank. The language of the deed of trust, which was made five years after the original gift, is a distinct and emphatic recognition of the gift as made long prior to the execution of the deed, and a disclaimer of all right to or interest in the stock. The language used in conveying the stock can bear no other construction than that, in the event of a successful adverse claim by creditors, the grantor desired to provide how the trustee should handle the stock to secure the best results for his wife. If, however, these instruments, made and executed by John W. Holland, subsequent to the gift of the stock, were susceptible of a different construction, they were his acts, and not the acts of his wife. She was not privy to either the will or the deed, and is not claiming under either, but holds her title superior to both, and her rights cannot be affected thereby. Nor could the payments of dividends to John W. Holland after the stock was given to his wife affect her right. The stock continued to stand in his name until January, 1897, and it was, therefore, natural that the dividends should be passed to his credit on the books of the bank. This may have been done with the wife's knowledge, and without objection on her

part; but, be that as it may, the circumstance is overcome by the clear proof of the gift.

It is contended by the appellants that all statements made by the witnesses Berryman Green, W. W. Holland, and Mary S. Fowlkes of admissions made by John W. Holland that he had given the stock to his wife are inadmissible, because, if he were now living, he would be incompetent to testify to the same fact. It must be borne in mind that the statements of John W. Holland, sought to be excluded, were made by him when he was entirely free from debt. The question is, therefore, whether declarations of a husband, who is free from debt at the time the declarations are made, are admissible to prove a gift in favor of his wife. Upon well-settled principles, we answer this question in the affirmative. Not only was the gift in question made when one donor was free from debt, but his declarations touching the gift were practically contemporaneous therewith, and made when, as shown by the record, from the nature of things, he could have had no suspicion of the financial difficulties in which he was subsequently involved by the speculations of his brother. The case *Massey v. Yancey*, 90 Va. 626, 19 S. E. 184, relied on by appellants, does not conflict with the conclusion that the declarations of John W. Holland were admissible. In that case Massey and his wife were living, and both were parties to the suit. The assignment there under consideration was made after the indebtedness was created, and the object of introducing the admissions of Massey was to show that he had no interest in the subject of the assignment made by him, but that it belonged to his wife. The court held that Massey could not have been a competent witness in his wife's favor, and that his declarations made under the circumstances were equally inadmissible. That case has no application to the one before us, where the declarations relied on were made at a time when the donor was free from debt, and therefore against interest, and without the slightest temptation to make such declarations falsely. Nor is the contention sound that such admissions are inhibited by Act 1897-98, p. 753, declaring that "neither the husband nor wife shall be competent to testify for or against each other in any proceeding by a creditor to avoid or impeach any conveyance, gift or sale from the one to the other on the ground of fraud or want of consideration," etc. It is clear that the policy of this statute was to prevent the husband or wife from testifying in favor of the other in support of a gift made when the donor was indebted, for the obvious reason that declarations or testimony given, after the donor was in debt, to sustain a prior transfer, are suspicious and dangerous. But neither the letter nor spirit of the statute forbids declarations made by the husband before he was in debt from

being introduced in proof of the gift. Such admissions are free from all suspicion, and are governed by the general principles of the law with respect to declarations against interest.

To hold inadmissible the declarations of the husband made under the circumstances of the case in judgment, would be, as said by the learned judge of the circuit court, to defeat a class of benefactions which, under certain conditions, are not only lawful, but are in a high degree commendable.

It is further contended by appellants that the gift of the stock by John W. Holland to his wife was not complete, because the certificate delivered to her was not indorsed, the power of attorney to transfer the shares not being signed by the donor. This position is not tenable. It is well settled by the modern authorities that choses in action not negotiable, and negotiable paper not indorsed, may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. The delivery, therefore, of a certificate of stock, unindorsed, by the donor to the donee, with intent to transfer title by way of gift, is effectual as an equitable assignment, although no legal title passes for want of an indorsement and transfer on the books of the bank. 3 Waite, Act. & Def. pp. 491, 506; *Thomp. Priv. Corp.* § 2930; *Grave, Tit. Pers. Prop.* p. 21; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; *Thomas' Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389. In the case last cited the gift under consideration was accomplished by the delivery to Bettie Lewis of the keys to a safety-deposit box, which was in a vault in the Planters' Bank. An inspection of the record shows that among the contents of the safety-deposit box were certain stocks, some of which had been bought by Thomas and not indorsed by him, and others stood in his name; and none of them had been indorsed or transferred on the back to the donee, Bettie Lewis. The court held that all the stocks in the box had been sufficiently delivered by the delivery of the keys to the box containing the certificates. It would seem that, if the delivery of the keys to a box containing unindorsed certificates of stock was sufficient to constitute a transfer of the equitable title to the stock represented by those certificates, that, a fortiori, the delivery of the certificates themselves would have been deemed a sufficient delivery to vest title in the donee.

In *Basket v. Hassell*, supra, it was regarded as unquestionable that a delivery of the certificate of deposit involved therein to the donee without an indorsement would have transferred the whole title and interest of the donor in the funds.

We hold, therefore, that it was not indispensable to the validity of the transfer of

the stock in question that there should have been any indorsement on the back of the certificate, or transfer on the books of the bank; that the delivery of the certificate, without indorsement, by John W. Holland to his wife, with intent to give her the stock, vested in Mrs. Holland the complete equitable title, and divested her husband of all present control and dominion over the same. The only effect of the subsequent indorsement of the certificate and transfer of the stock on the books of the bank was to vest in the donee the legal title to that in which she already had the beneficial interest. This she could have compelled if it had not been done voluntarily.

The remaining question is whether section 2414 of the Code applies to the gift in question, and renders it invalid, because the donor and donee were husband and wife, residing together, at the time of the gift. That section is in these words: "No gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

The answer to this question depends upon whether the words, "goods or chattels," in the section quoted, were intended to embrace choses in action. We have given this subject the earnest consideration it deserves, and have found the conclusion irresistible that the terms "goods or chattels," employed in section 2414, were not intended to include choses in action, but were only designed to cover tangible and visible property.

A chose in action is defined by Kent as a personal right not reduced into possession, but recoverable by a suit at law. Money due on bond, note, or other contract, damages due for breach of contract, for the detention of chattels, or for torts, are included under this general head or title of things in action. 2 Kent Comm. (11th Ed.) marg. p. 351. Any right which has not been reduced to possession is a chose in action. 1 Para. Cont. c. 14, § 1. A chose in action is a mere right of action to a personal chattel not in actual possession. *Purdue v. Jackson*, cited by Judge Allen in *Yerby v. Lynch*, 3 Grat. 494.

1 Bouv. Inst. p. 191, says that a distinction must be made between the security or the evidence of the debt and the thing due. A deed, a bill of exchange, or promissory note, may be in the possession of the owner, but the money or damages due on them are no less choses in action. This distinction is to be kept in view. The chose in action is the money, damages, or thing owing. The bond or note, etc., is but the evidence of it. There can, in the nature of things, be no present possession of a thing which lies merely in action.

Now, the "goods and chattels," the subject of the gift under section 2414, must, by the terms of the section, be capable of actual possession,—“shall have come to and remained with the donee, or some person claiming under him.” Such possession can only be predicated of some visible, tangible, movable thing, and hence the subsequent language serves to explain and limit the meaning of the general terms which go before, and excludes the idea that they were intended to include mere “choses in action,” which, as such, are incapable of actual possession.

The Code is one act, prepared and adopted as such, and therefore, in construing section 2414, we are not confined to the language of that section, but can look to other sections of the Code, where the same terms are employed. It would extend this opinion to a most unreasonable length to attempt a reference to each of the sections in which the words “goods or chattels” or “goods and chattels” are used. It must suffice to say that whenever it is intended to describe the whole interest or estate, the defined terms “real estate” and “personal estate” are generally employed, and, whenever less than the whole is intended, different language is used. An examination of the Code will show that in no instance are the words “goods and chattels” or “goods or chattels” used as the equivalent of “personal estate” as defined, but always in the limited sense of visible, tangible, movable personal chattels—such as are objects of the senses—deliverable in specie. For example, section 627 provides that, when the officer cannot find sufficient “goods or chattels” to distrain for taxes or levies, he may proceed to collect the same by garnishment; that is, by subjecting the choses in action of the delinquent taxpayer.

Sections 2414, 2461, 2462, 2465, and 2589 all relate to gifts, loans, sales, or partition of the same kind of property described by the same terms, namely, “goods or chattels,” or “goods and chattels.” They are closely connected in subject-matter and in the language employed, and it can hardly be doubted that whatever was meant by the words “goods or chattels” or “goods and chattels” in either one of these sections must have been intended of the same words in each of the other sections. This court has decided that the words “goods and chattels,” in section 2465, mean visible, tangible, personal property only; that they do not include choses in action. *Kirkland v. Brune*, 31 Grat. 126. This decision has since been repeatedly followed.

Sections 2414 and 2465 are so closely related as to the subject-matter of gifts that they may be said to be in pari materia, and should be construed together. Both relate to goods and chattels; section 2414 wholly, and section 2465 in part. There can be no good reason why the words “goods or chattels” or “goods and chattels” should have a meaning in section 2465 that they do not

have in section 2414. As to the rule of construing statutes in pari materia and the application of the rule in construction of the Code, see *Dillard v. Thornton*, 29 Grat., on page 396; *Basley v. Barksdale*, 75 Va., on page 281.

From our review of the several sections of the Code in which the words "goods or chattels" or "goods and chattels" are found, it seems clear that these terms in every instance are limited in meaning to corporeal personal property. If it was intended by their use in section 2414, or any other section, to comprehend all property not real, incorporeal as well as corporeal personal property, it is strange that the legislature did not make its meaning plain by the use of the terms "personal estate." Those terms are defined by the Code, and, as defined, include every possible property interest except real estate. Throughout the Code the terms "personal estate" are employed whenever personal property in its most extensive sense is intended.

The history of this legislation sheds light upon the question under consideration, and fortifies, we think, the view that chooses in action were not intended to be embraced by the terms "goods or chattels," used in section 2414. The first act was passed in 1757, and from that time until the revisal of the Code in 1849—nearly 100 years—the law was confined to gifts of slaves. At the revisal of 1849 two important changes were made. After the word "slave" were inserted "or of any goods or chattels," and a new clause was added at the end of the section in these words: "If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section." Code 1849, c. 116, § 1. With the words "of a slave or" stricken out, the law, as found in the Code of 1849, has been carried into section 2414 of the present Code. Slaves were chattels. Though not specifically named, they were always considered as embraced in the terms "goods or chattels," and under the rule ejusdem generis, which is applicable in this case, the goods or chattels mentioned in section 2414 must be regarded and treated as of the same class or kind of chattels to which a slave belonged; that is, visible, tangible, movable personal property. It was this kind of property—slaves—the language "actual possession coming to and remaining with the donee or some person claiming under him" was first applied in 1787. The same language remains to-day, and, though the word "slave" has been stricken out since the words "goods and chattels" were inserted, that circumstance does not render the rule less applicable. *Sedg. St. & Const. Laws* (1st Ed.) 250.

Counsel for the appellee have furnished us with the very learned and able brief of the Judge E. C. Burks in the case of *Thom-Adm'r v. Lewis*, supra, as their argu-

ment touching the proper construction of section 2414. That valuable paper has been freely used and quoted as the best means of expressing in a clear and satisfactory manner the court's view of the question under consideration.

Upon the whole case we are of opinion that there is no error in the decree appealed from, and it is affirmed.

Affirmed.

KEITH, P., and WHITTLE, J., absent.

(99 Ga. 472)

ALLISON v. ALLISON et al.
(Supreme Court of Appeals of Virginia. June 20, 1901.)

PAYMENT—BONDS.

A., in contemplation of marriage to M., gave a bond to W., as trustee for M., for \$50,000, reciting that it was made subject to the provisions of a deed of marriage settlement, providing that A. should have the right to substitute money secured in whole or part on other property, provided M. should first give her consent in writing, at a fair value, to be indorsed as a credit on the bond at time of substitution. A. made monthly payments to M. on account of interest, but less than the amount of interest. He made payments of over \$1,000, admitted not to be on account of interest or principal on the bond, and bought stocks amounting to \$3,000, and had them put in the name of W., as trustee for M., with no direction in regard thereto. The dividends thereon he appropriated to himself. He made a will giving her \$100,000, declared to be in addition to the \$50,000. Held, that the \$3,000 in stocks was not shown to be intended as a payment on the \$50,000, and therefore M. had not to elect whether she would accept it as a payment.

Appeal from chancery court of Richmond.

Suit by William H. Allison and another, executors, against Minnie C. Allison. Decree for plaintiffs. Defendant appeals. Reversed.

Christian & Christian, for appellant.
Leake & Carter, Meredith & Cocke, and J. Preston Carson, for appellees.

KEITH, P. James W. Allison, in contemplation of a marriage then about to take place between himself and Minnie C. Jones, executed and delivered to William H. Allison, as trustee for his intended wife, his bond for \$50,000, with Warner Moore as surety, dated December 4, 1890, to be held subject to the uses and trusts declared in a certain deed of marriage settlement of even date with said bond.

James W. Allison died in March, 1898, leaving as his executors William H. Allison and Warner Moore, who instituted a suit in the chancery court of the city of Richmond, one of the objects of which was to ascertain the amount due on the \$50,000 bond. The obligor in that bond during his lifetime made payments on account of interest to his wife, and in addition thereto purchased dividend obligations of the Richmond, Fredericksburg & Potomac Railroad, and caused them to be transferred on the books of that com-

pany in the name of William H. Allison, trustee for Mrs. M. C. Allison, and delivered the certificates of stock to William H. Allison. One of these certificates was purchased on October 6, 1894, and is of the face value of \$1,000. The other was purchased on February 4, 1895, and is of the face value of \$2,000. These two transactions gave rise to the only controversy involved in this appeal.

On the part of the executors it was claimed in the chancery court that these securities, when delivered by Mr. Allison to his brother as trustee for his wife, were intended as payments upon his bond, and that the widow and obligee would be required to elect to take them as payments, and credit them upon the bond for her benefit, or that she could not take them at all, but they would constitute a part of the estate of James W. Allison in the hands of his executors to be administered.

On behalf of Mrs. Allison it was contended that the purchase, transfer, and delivery of the certificates of stock to her trustee, unexplained and uncontrolled by other circumstances, imported a gift, and that there was no proof in the case showing that these securities were intended as a payment on the bond.

The chancery court adopted the view presented by the executors, and its decree upon that point is as follows: "The investment made by the late James W. Allison in the purchase of \$3,000 face value of Richmond, Fredericksburg & Potomac Railroad Company dividend obligations registered in the name of 'William H. Allison, Trustee for Mrs. Minnie Clemens Allison,' was intended as a part payment on said \$50,000 bond, and the said Minnie C. Allison must elect whether she will accept same or not. If she elect to receive the same, then the executors will credit the cost price of said dividend obligations on said \$50,000 bond as of the respective dates of the purchases thereof, and W. H. Allison, trustee, will transfer the certificates therefor to her, and said executors shall pay over to her all dividends thereon, not already paid to her, from the time of the purchase thereof to the time of said transfer, with interest from the time such dividends were received. Should the said Minnie C. Allison elect not to receive said dividend obligations as a credit on said bond, then said William H. Allison, trustee, will transfer the certificates to the executors of James W. Allison, to be accounted for as part of his estate."

The facts bearing upon the issue to be decided, in addition to those already stated, are as follows:

It is recited in the bond for \$50,000 that it is made subject to the provisions and reservations contained in the antenuptial deed of settlement, and the provision of that settlement material to the present inquiry is

"that said trustee shall hold said bond subject to the right of the said James W. Allison, hereby expressly reserved to him, to substitute in place of said bond, or of the sum of money secured hereby, wholly or in part, other property, real or personal, provided that the said Minnie Clemens Jones shall first give her consent thereto in writing, and at a fair value to be agreed upon by him and her; such value, when so agreed upon, to be indorsed as a credit on said bond at the time of such substitution, or in full payment thereof, if the same be equal to the balance then due on said bond."

It appears from one of the exhibits filed that James W. Allison paid to Mrs. Allison in person \$200 per month on account of interest upon that bond. It also appears that he purchased dividend obligations of the Virginia Trust Company, and paid the dividends to his wife directly. There is a written admission on the part of counsel that certain other payments, amounting to \$1,102.30, called "extra payments," were not made on account of either the principal or interest on the \$50,000 bond. On November 29, 1892, a paper was executed by James W. Allison, which was afterwards admitted to probate as his will, which is in part as follows:

"To provide against my sudden death, causing injustice to my dear wife, Minnie Clemens Allison, I hereby direct my executor or executors to invest one hundred thousand dollars in good income-paying real estate, or in some safe stock or bonds, preferably real estate, to be held by my said executor and my brother-in-law, Clemens Jones, as joint trustees for her sole and separate use and benefit during her natural life, and at her death to go to her child or children, if there should be any by me, and, if there should be no child or children by me, then to go to my legal heirs. I intend this legacy of one hundred thousand dollars for life to be in addition to the sum of fifty thousand dollars settled upon my said wife, Minnie Clemens Allison, by an antenuptial agreement between her as Minnie Clemens Jones and myself, executed at Fairfield, Conn., on or about December 10, 1890."

At the time the dividend obligations were delivered to William H. Allison as trustee there was no declaration of trust, verbal or written.

"Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both." 2 Story, Eq. Jur. § 1075; Bouv. Dict. (Ed. 1897) p. 646.

The facts before us do not present a case of election coming within this accepted definition. There is no question before us of alternative and inconsistent rights or claims. James W. Allison bound himself by his bond to pay to William H. Allison, trustee for his

wife, a certain sum of money. By the terms of a contemporaneous deed of settlement, to which the bond is made subject, he reserved to himself the right to substitute in place of said bond, other property, real or personal, provided that "said Minnie Clemens Jones shall first give her consent thereto in writing, and at a fair value to be agreed upon by him and her, such value, when agreed upon, to be indorsed as a credit on said bond at the time of such substitution." He purchased securities amounting to \$3,000. He caused them to be transferred upon the books of the company in the name of his brother as his wife's trustee, and delivered the certificates to the trustee without any contemporaneous direction with respect to them. By that act he parted with all interest in, and dominion over, the certificates. They were by that act vested in his brother as trustee for his wife. They do not constitute in law a payment upon that bond, and, if to be treated as a payment, it must be either by force of the provision of the deed just recited, or because there is some rule or principle of law or equity which requires us to declare that property far less in amount than the obligation due by the husband to the wife, when transferred to her or a trustee for her benefit, without any declaration of purpose or intention, but with the record silent upon that subject, is to be treated as a satisfaction in part of an established obligation. It is true that by the paper writing admitted as his will he bequeathed to trustees, to the use of his wife for life, with remainder to her child or children, the sum of \$100,000, which he expressly declares shall be in addition to the sum of \$50,000 settled upon her by antenuptial agreement, and it is argued that, if the dividend obligations in question had not been designed as a part satisfaction of the bond, a similar declaration would have been made. The will was made in 1892, and this legacy might have been deemed perhaps a satisfaction of the debt, and it was manifestly proper that he should guard against any such construction. It would seem from this circumstance that the testator was informed as to the equitable doctrine of election now invoked.

It appears that the semiannual dividends upon the certificates of stock were collected by James W. Allison, and were not placed to the credit of the wife, as was the case with the dividends of stock in the trust company.

The facts relied upon by the executors, to wit, the payment by the husband of an arbitrary monthly sum to the wife instead of the stipulated interest; the passing to her credit of the dividends upon the trust stock; the appropriation to his own use of the dividends upon the certificates of railroad stock; the provision in the will by which the legacy is declared not to be in satisfaction of the debt,—are not only inconclusive of his inten-

tion with respect to the disposition to be made of the certificates in question, but throw a very dim and unsatisfactory light upon it.

Mr. Allison was a man of large fortune, which had greatly increased after his marriage and the execution of the bond in suit. A son had been born to him, and he saw fit upon two occasions to invest \$3,000 in railroad stock,—a mere trifle as compared with his estate,—and placed the certificates in the hands of his brother, in whose name, as trustee, they had been registered. He owed that brother, as trustee for his wife, \$50,000 as principal, and a balance of interest. The delivery of the stock did not operate as a payment, and could not operate as such, except by the terms of the provision incorporated into the bond. It is not contended that that provision was observed. The consent of the wife was never asked or given in writing or otherwise. There was no agreement between them as to values, and, of course, no such agreement was indorsed as a credit upon the bond. He had the right to call upon her to accept or reject those certificates as a credit upon the bond at an agreed valuation, but that right he never exercised. He simply parted with his right of property in the certificates, transferred them to a trustee for her benefit without any contemporaneous declaration of intention, and with nothing in this record by which that intention can be discovered.

The testator was a careful man of business. He left no room for doubt or question as to the legacy of \$100,000, as to the "extra payments," as to the payments on account of interest, and as to the trust company dividends, but as to each and all of those items the accounts and memoranda which he kept conclusively establish his intention. The terms of his will indicate that he was advised as to the possible effect of a bequest to his wife, and he provided against any interpretation by which it might be treated as a payment upon his bond, but there is nothing in his accounts in which are items of payment running through several years, nothing in any memorandum left by him, nothing in the way of verbal declaration to his wife or trustee which throws any light upon his intention with respect to the certificates of stocks. That transaction stands alone upon the naked fact of the purchase, transfer, and delivery to the trustee of stock registered upon the books of the company in the name of the trustee.

The burden was upon the executors to show that the bond due by their testator had been satisfied in whole or in part. It was for them to prove by satisfactory evidence that the certificates of stock, when delivered by their testator to his wife's trustee, were intended by him in part satisfaction of his obligation. This has not been done to the satisfaction of this court.

The decree must be reversed, and the cause remanded, to be further proceeded with in accordance with this opinion.

Reversed.

(99 Va. 487)

SOUTH ROANOKE LAND CO. v. ROBERTS.
(Supreme Court of Appeals of Virginia. June 20, 1901.)

**BONDS—DEFENSES—MISREPRESENTATIONS
—VERDICT.**

1. Under Code, § 3290, authorizing the obligor of a bond to plead the obligee's fraud in inducing him to execute it as a defense to an action thereon, he, having pleaded that he was induced to give same for land by misrepresentations as to the value of the land, must prove such value as of the time of the purchase, not at the time of the trial.

2. There being a demurrer to defendant's evidence on the defense of false representations to an action on a note, the verdict should not be for a certain sum for plaintiff, subject to the opinion of the court on the demurrer, but, "We, * * * on the issues joined, find for defendant, and assess his damages at * * *, subject to the opinion of the court on plaintiff's demurrer; and if, on demurrer, * * * the law be with plaintiff, we find for plaintiff the issues joined, and assess his damages at * * *."

Error to circuit court, Culpeper county.

Action by the South Roanoke Land Company against J. J. Roberts. Judgment for defendant. Plaintiff brings error. Reversed.

Barbour & Rixey, for plaintiff in error.
G. D. Gray and Hay, Jeffries & Perry, for defendant in error.

KEITH, P. The South Roanoke Land Company sued J. J. Roberts in the circuit court of Culpeper county upon four negotiable notes, each for the sum of \$200, dated May 20, 1891, payable to the Crystal Springs Land Company, and by that company indorsed to the plaintiff.

The defendant went to trial upon special pleas. In plea No. 1 he states that the notes were made for the purchase price of four lots of land sold by the Crystal Springs Land Company to the defendant and one E. H. Stewart, which lots were represented to be in the city of Roanoke. The whole purchase price was \$1,600, of which Roberts paid one-third in cash, and gave his four notes for the balance, which are the notes in suit. Roberts then avers that the contract for the sale of the lots on which the notes were founded was procured from him by false and fraudulent representations made to him by the Crystal Springs Land Company, through its president, E. H. Stewart, who represented that the lots were valuable and salable; that the company had during one week in April, 1891, sold \$125,000 of its land in said city, and that in 30 days their sales had amounted to about \$500,000; that he (the president of the company) had been permitted to select 12 of the best lots for himself at the price of \$400 each, one-half interest in which he would sell to the defendant if said

defendant would make the cash payment, he (Stewart) to make the first deferred payment, and the two together to make the third and last payment; that, relying upon these assurances, defendant entered into the contract for the purchase of the lots, and executed the notes filed with the declaration; that all of said representations were untrue, and that by reason of the matters in the plea contained the defendant has sustained damages to the amount of \$1,500, which he is entitled to have set off against the demand of the plaintiff.

This plea was objected to by the plaintiff as being in violation of the rule which requires singleness of issue, as it embraces in one plea several distinct false representations, each of which the plaintiff claims should have been pleaded separately, if at all.

The court overruled this objection, and permitted the plea to be filed, and thereupon the defendant filed pleas setting out separately the several representations embraced in the first plea. To these pleas the plaintiff objected upon the ground that the representations, whether pleaded in one or several pleas, constituted no defense to the action. This objection the court overruled and permitted the pleas to be filed; and thereupon the plaintiff joined issue upon them, the jury was sworn, the evidence for plaintiff and defendant introduced, the plaintiff demurred to the defendant's evidence, and the jury rendered the following verdict:

"We, the jury, upon the issues joined, find for the plaintiff the sum of \$1,066.64, with interest from July 18, 1892, until paid, subject to the opinion of the court upon the plaintiff's demurrer to the evidence."

Upon this verdict the court entered a judgment for the defendant, and the case is before us upon a writ of error.

The five special pleas upon which the case was tried were filed under section 3290 of the Code. The plaintiff had made out its case by the introduction of the notes of the defendant duly executed and delivered. To avoid his liability upon them, the defendant pleaded that he was induced to execute them by the false and fraudulent representations of the plaintiff, which induced him to purchase the lots for the price of which the notes were executed. The circuit court held the pleas to be sufficient, and it then devolved upon the defendant to make good by proof what he had averred in his pleas. It was for him to show, not the value of the lots at the time of the trial, but their value at the date when he became the purchaser. There is no evidence whatever upon this subject. Indeed, a fair inference from the evidence is that at the date of the purchase the lots were reasonably worth the price which the defendant undertook to pay. There is certainly no proof and no fact from which the jury were authorized to infer that such was not the case.

As was said by Buchanan, J., in *Tyson v. Williamson*, 98 Va. 639, 32 S. E. 42: "If the defense is based upon equitable grounds which require a rescission of the contract, and a reinvestment of the vendor with the title, the plea provided for by that statute is not available, because the court of law is incompetent to do complete justice between the parties. *Mangus v. McClelland*, 93 Va. 788, 22 S. E. 364; 4 Minor, Inst., 796.

"There can be no rescission in this action; neither can there be a plea in bar based upon the right and offer to rescind. If the fraud or misrepresentation relied on is such as to justify a rescission of the contract,—as to which we express no opinion,—that relief can only be had in a court of equity.

"The pleas were bad both at common law and under the statute, and were properly rejected by the circuit court.

"Plea No. 4 was evidently framed with reference to the provisions of section 3299 of the Code, but it does not aver that the lot which the defendant was induced to purchase by the alleged misrepresentations of the plaintiff's agent, was not worth, at the date of his contract, what he agreed to give for it, but avers that it was worthless at the time the plea was filed. That averment is not sufficient. His damages, if any, are to be ascertained and fixed as of the date of the contract, the time the fraud is alleged to have been committed, and not as of the date his plea was filed."

The case stated is directly in point, and is conclusive of that under consideration.

There is one objection, however, urged by the plaintiff in error, which should not be passed over without some comment. The plaintiff demurred to the defendant's evidence. The jury found a verdict upon the issues joined in favor of the plaintiff for the entire sum demanded by him. The pleas filed by the defendant aver that he had suffered damage by reason of certain representations which had induced him to enter into the contract, but the jury assesses by its verdict no damages against the plaintiff, nor is there any alternative finding, in whole or in part, in favor of the defendant. It would seem that in such a case the proper verdict upon a demurrer to the evidence would have been: "We, the jury, upon the issues joined, find for the defendant, and assess his damages" at a stated sum, "subject to the opinion of the court upon the plaintiff's demurrer to the evidence; and if, upon the demurrer to the evidence, the law be with the plaintiff, then we find for the plaintiff the issues joined, and assess his damages at" whatever sum the jury ascertain to be due. We mention this, however, merely by way of precaution, lest our silence might have been construed into an approval of the mode of proceedings here adopted.

We are of opinion that the judgment of the circuit court should be reversed, and

this court will proceed to enter such judgment as the circuit court should have rendered.

Reversed.

(98 Va. 430)

HOFFMAN v. PLANTERS' NAT. BANK.
(Supreme Court of Appeals of Virginia. June 20, 1901.)

NEGOTIABLE INSTRUMENTS—ALTERATION.

Act March 3, 1898, § 124, declares that, where a negotiable instrument is materially altered without the assent of all parties liable, it is avoided, except as against a party who has himself made or authorized or assented to the alteration and subsequent indorsers. Section 125 declares an alteration which changes the relation of the parties or alters the effect of the instrument to be a material alteration. Section 184 declares that, where a note is drawn to the maker's own order, it is not complete till indorsed by him. H. signed a note payable to herself, and, without indorsing it, gave it to W. to take up a note held by a bank, signed by W., and indorsed by H. Held, that the alteration of the note by the bank, without knowledge or consent of H., by striking off the name of H. as payee, and inserting that of W., and having W. indorse it, was a material alteration, avoiding the note as to H.

Error to circuit court of city of Richmond.

Action by the Planters' National Bank against Nellie L. Hoffman. Judgment for plaintiff. Defendant brings error. Reversed.

L. O. Wendenburg, for plaintiff in error.
Smith, Moncure & Gordon, for defendant in error.

CARDWELL, J. Some time prior to May 9, 1898, Mrs. M. F. Woodruff applied to defendant in error, the Planters' National Bank of Richmond, Va., for a loan of \$600, and the bank refused to make it without a surety or indorser on the note to be given. Thereupon Mrs. Woodruff offered to give her sister-in-law, plaintiff in error, as surety or indorser, leaving with the bank the name of certain parties in Baltimore to be inquired of as to her financial standing. After inquiring of these parties, the bank agreed to accept plaintiff in error as indorser, and thereupon, on May 9, 1898, it loaned to Mrs. Woodruff the sum of \$600, less the discount thereon, and took from her a note for that amount, dated May 9, 1898, payable 60 days after its date, with plaintiff in error as indorser. When this note became due, July 8, 1898, Mrs. Woodruff went to the bank, and offered to pay \$50 as a curtail of the original note, and to give a renewal note for the balance, \$550. The renewal note was drawn up by one of the clerks of the bank for \$550, dated July 8, 1898, and payable 60 days after its date to the order of Mrs. Nellie L. Hoffman (plaintiff in error), and the place for the maker, Mrs. Woodruff, to sign was left blank. This blank note was given to Mrs. Woodruff to be signed by her as drawer, and carried to plaintiff in error to be indorsed by her, the latter then being at Lakeside, about seven miles

from Richmond; and the cashier of the bank agreed to wait on Mrs. Woodruff until she returned with the note indorsed by plaintiff in error. Mrs. Woodruff went to Lakeside, and told plaintiff in error to sign the note, and this she did without reading it, but signed it in the place left blank for the drawer's signature, and did not indorse her name on it, so that, when the note left plaintiff in error's hands, and was delivered by Mrs. Woodruff to the bank that same afternoon, it was an incomplete note, drawn by plaintiff in error to her own order, but not indorsed by her. When the note was delivered to the bank in this incomplete condition, instead of sending it back to have plaintiff in error correct the mistake made in signing the note as drawn instead of as indorser, or to complete the contract evidenced by the note by indorsing her name on it, a clerk in the bank altered the note by striking out plaintiff in error's name as payee and interlining the name of M. S. Woodruff as payee, and thereupon Mrs. Woodruff indorsed the note, and the bank accepted it in renewal, in part, of the original note, and delivered the original note to Mrs. Woodruff. When this note of \$550 became due, it was not paid, and on March 13, 1899, the bank served notice on plaintiff in error of a motion to be made by it in the circuit court of the city of Richmond on the 1st day of April, 1899, for a judgment against her as drawer of the note, with interest thereon from the 6th day of September, 1890, till paid.

Upon a trial of the cause on the general issue pleaded by plaintiff in error, it was disclosed to her for the first time, by the introduction of the note sued on, the changes that had been made therein after it left her hands, and thereupon the court was asked to instruct the jury as follows:

"The court instructs the jury that, if they believe from the evidence that the note sued on was signed by the defendant payable to the order of herself, but was not indorsed by her, and that when Mrs. M. F. Woodruff carried the note to the bank, the plaintiff in this case, the plaintiff, through one of its agents and clerks, altered said note, without the knowledge or consent of the defendant, by striking out the name of the payee, the said defendant, and interlining or inserting the name of M. S. Woodruff, as payee, and that no one had the authority to make this change or alteration, then they must find for the defendant."

This instruction was refused, and in lieu thereof the jury were told, in effect, that there was no evidence in the case to show a material alteration of the note, and therefore they should find for the plaintiff. A verdict and a judgment in favor of the bank against plaintiff in error for the amount of the note, with interest, followed.

The circuit court erred in refusing the instruction asked, and in instructing the jury that there was no evidence in the case to

show a material alteration of the note sued on.

There was no evidence whatever tending to show that the alteration made in the note was with the knowledge or consent of the plaintiff in error, or that she in any way ratified the alteration after knowledge of it was brought home to her. That it was a material alteration, and avoided the note as to plaintiff in error, is clearly settled, we think, by statute.

Section 124 of the act to revise, arrange, and consolidate into one act the laws relating to negotiable instruments, approved March 3, 1898 (Acts 1897-98, p. 910; Pollard's Supp. 302), provides:

"Where a negotiable instrument is materially altered without the assent of all parties liable therein, it is avoided except as against a party who has himself made or authorized, or assented to the alteration and subsequent endorser."

"But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor."

The first paragraph of the section applies with all its force to this case, while the last has no application to it.

Section 125 of the act defines what constitutes a material alteration of a negotiable instrument thus: "Any alteration which changes (1) the date, (2) the sum payable either for principal or interest, (3) the time or place of payment, (4) the number or the relations of the parties, (5) the medium or currency in which it is to be paid—or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

Section 184, p. 917, of the act (Pollard's Supp. 309), defines a negotiable promissory note within the meaning of the act, and declares that, "Where a note is drawn to the maker's own order it is not complete until endorsed by him."

These provisions of the statute are but declaratory of the principle, of universal application, that a material alteration of a written instrument renders it void as to a party who has himself not made or authorized or assented to the alteration, and applies, a fortiori, in favor of indorser. *Dobyns v. Rawley*, 76 Va. 544; *Batchelder v. White*, 80 Va. 103; *Pars. Bills & N.* 561, 562; *Daniel, Neg. Inst.* § 1387.

In *Robinson v. Berryman*, 22 Mo. App. 512, the opinion says: "Changing the note by erasing the original and inserting a different payee is a material alteration. This is so manifestly true that it needs no argument to sustain the assertion."

It is true, in the case at bar, plaintiff in error says that she signed the note and handed it back to Mrs. Woodruff "to take

up the other note," but, as to the other note she was only an indorser, as the bank well knew, and does not deny. Whether plaintiff in error's signing the note as drawer and omitting to put her name on the back thereof as indorser was accidental or not does not appear, and is immaterial. When the note was offered at the bank that afternoon, it was an incomplete instrument, its defects not being such that authority to complete the instrument was to be implied from the nature of the contract or from custom, and a clerk and agent of the bank made the alterations needed to make it a complete instrument, in form binding plaintiff in error as principal, instead of indorser or surety; and the cashier at once discounted it, and delivered the original note to Mrs. Woodruff.

When a party puts his paper in circulation, he invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none. It is the duty of the maker of a negotiable note to guard not only himself, but the public, against frauds and alterations by refusing to sign negotiable paper made on such a form as to admit of fraudulent practices upon them with ease, and without ready detection. The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character; and, when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration. Daniel, Neg. Inst. § 1405.

There are many instances in which a note signed by a party and delivered to another may be materially altered, and still be binding on the party signing it in the hands of an innocent holder for value. This is upon the well-settled principles already stated, but they have no application whatever in this case.

Plaintiff in error did not, by careless execution of the instrument in question, leave room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicions of a prudent, careful man. Even if the cashier of the bank had no knowledge as to when and by whom the alterations in the note were made, they were of such a character that they could not have escaped his attention. He well knew that to take the note, in the state presented, in renewal of the original note upon which plaintiff in error was surety, changed her relation to the original contract from that of surety to that of principal debtor, and it behooved him to inquire by what authority from plaintiff in error this was done. No such inquiry was made, but the altered note was discounted, and plaintiff in error had no knowledge that she had thereby been made principal debtor to the bank until Mrs. Woodruff had disposed of all of her property here and left the state.

The contention of counsel that the delivery of the incomplete note by plaintiff in error to Mrs. Woodruff constituted her the agent of plaintiff in error to make the alterations necessary to give effect to the note for the purposes for which it was intended is without merit. If it had been the purpose of plaintiff in error to become the principal debtor to the bank, instead of indorser for Mrs. Woodruff, no reason appears why she did not indorse her name on the note. As indorser she was entitled to notice of the nonpayment of the note by the principal debtor, and might have protected herself against loss. But as she was, without her knowledge or assent, in the position of principal debtor to the bank, she was not given, and was not entitled in law to, notice of the nonpayment of the debt, and, having no knowledge of the failure of Mrs. Woodruff to pay it when due, an opportunity to protect herself may have been lost to her. What more material alteration as to plaintiff in error's relation to the transactions between Mrs. Woodruff and the bank could have been made in this note than was made? The statute wisely declares that a negotiable note so altered is void as to all parties liable therein, "except as against a party who has himself made or authorized or assented to the alteration and subsequent indorsers."

This case does not come within the exception; nor is the position of counsel for the bank that, because the note was incomplete when the alterations in it were made the rule prescribed by the statute does not apply, tenable.

There are other questions argued by counsel, but, in the view we take of the case, it is unnecessary to consider them.

The judgment of the circuit court will be reversed and annulled, and the case remanded for a new trial in accordance with this opinion.

Reversed.

KEITH, P., absent.

(99 Va. 460)

VIRGINIA BUILDING & LOAN ASS'N v. GLENN.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

TAXATION—PURCHASE FROM COMMONWEALTH—NOTICE—RECORDS.

1. Code, § 668, as amended by Act Feb. 11, 1898 (Sess. Acts 1897-98, p. 343), provides that applications to purchase real estate bought in for the commonwealth for taxes shall be served on the previous owner, and also on trustees, mortgagees, and beneficiaries, as shown by the record in a deed of trust or mortgage, and the terms of section 661, as to the deed to the applicant, shall apply "to deeds made under authority of this section." *Held*, that section 661, applying to deeds acquired by parties purchasing directly at the original tax sale, and providing that such deeds may be defeated only by proof that the taxes were not properly chargeable on the land or had been paid, does not ap-

ply to a deed obtained under section 666, where notice was not given the trustee or beneficiary in a recorded deed of trust.

2. An applicant to purchase real estate bought in by the commonwealth for taxes is not freed from the duty imposed by Code, § 666, to give notice to a trustee and beneficiary as shown by the record of a deed of trust, though the deed of trust is not properly indexed.

Appeal from law and equity court of City of Richmond.

Suit by the Virginia Building & Loan Association against Joseph E. Glenn. Bill dismissed and rehearing denied, and plaintiff appeals. Reversed.

B. T. Crump, for appellant. W. H. Werth, for appellee.

CARDWELL, J. Mary E. Buffin, wife of A. R. Buffin, was the owner of a certain parcel of real estate in the city of Richmond, conveyed to her from T. W. Staggs and wife by deed of August 1, 1894, duly recorded. In December, 1895, A. R. Buffin and Mary E. Buffin, his wife, conveyed the said real estate to H. A. McCurdy, in trust to secure compliance with the conditions of a bond made by A. R. Buffin for a loan to him from the Virginia Building & Loan Association, which deed was also admitted to record in the clerk's office of the chancery court of the city of Richmond on the 13th day of December, 1895. The property had been for several years assessed for taxation in the name of Mary E. Buffin, and she failed to pay the taxes thereon for the year 1895, and, being returned delinquent, it was in due course sold for the taxes of that year, and bought in by the auditor of public accounts. On the 29th day of May, 1899, there was filed in the clerk's office of the hustings court for the city of Richmond, by Joseph E. Glenn, an application to purchase this property from the commonwealth under section 666 of the Code, as amended by an act approved February 11, 1896 (Sess. Acts 1897-98, p. 343). The application named no other parties upon whom copies of it should be served except the said Mary E. Buffin. Neither McCurdy, trustee, nor the Virginia Building & Loan Association was notified, or had any knowledge, that the taxes on the property were unpaid, and knew nothing of the proceedings to acquire title thereto under section 666, until a statement appeared in one of the newspapers published in the city of Richmond that a deed had been recorded from the clerk of the hustings court conveying the property to Glenn.

In December, 1899, the Virginia Building & Loan Association filed its bill in the law and equity court against A. R. Buffin and Mary E., his wife, for the purpose of enforcing the deed of trust given by them to McCurdy, and for the appointment of a receiver to rent out the property during the pendency of the proceedings. After the ap-

pointment of the receiver, Glenn filed his petition in the suit, and was made a party defendant thereto, and given leave to make defense to the bill; whereupon the plaintiff filed an amended bill, making its case on the new matter set out in the petition of Glenn, and praying that the deed for the property in question from Christian, clerk, to Glenn be declared of no effect, as to the plaintiff, upon several grounds, but more especially because the plaintiff had no notice of the proceedings by which the deed was obtained by Glenn. Glenn answered the amended bill, and the cause having been heard upon the pleadings, exhibits with them, the admissions in the pleadings, and a written and agreed state of facts, a decree was entered on the 5th of April, 1900, dismissing the plaintiff's bill; whereupon, at the same term of the court, the plaintiff filed a petition for a rehearing, which was denied by decree of May 11, 1900, and from these two decrees an appeal was allowed to this court.

Section 666 of the Code, as amended, requires that the application to purchase real estate bought by the auditor for delinquent taxes due the commonwealth shall be served, not only upon the previous owner of the real estate, but upon the trustees, mortgagees, and beneficiaries as shown by the record in any deed of trust or mortgage on said real estate or their personal representative, provided the names of any persons may be omitted which do not appear of record in the clerk's office of the county or corporation in which the land is situated, and, if it be situated in the city of Richmond, which do not appear of record in the clerk's office of the chancery court of said city, etc. Section 666 further provides that the terms of section 661, as to the deed from the clerk to the applicant, shall apply "to deeds made under authority of this section."

Section 661, as it stood when the deed in this case was made to appellee, provided that when the purchaser of any real estate sold under the preceding sections of chapter 28, his heirs or assigns, had obtained a deed therefor, and the same had been duly admitted to record, etc., the right or title to such real estate should stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made, etc., subject to be defeated only by proof that the taxes or levies for which said real estate was sold were not properly chargeable thereon, or that the taxes and levies properly chargeable thereon had been paid, etc.

As amended by act of March 7, 1900 [Acts 1899-1900, p. 1234], in force when the decrees complained of in this cause were made, section 661 provides that when a purchaser of any real estate sold as aforesaid (i. e., under the preceding sections of chapter 28 of the Code), "or sold in pursuance of section 666," has obtained a deed therefor, etc., the right or title to such estate shall stand vest-

ed in the grantee, etc., subject to be defeated only by proof (1) that the taxes for which said real estate was sold were not properly chargeable thereon; or (2) that the taxes, etc., properly chargeable on such real estate have been paid; or (3) that the notice of the tax sale, where made to a person other than the commonwealth, or notice of the application to purchase in case the sale was made under section 666, has not been duly given; or (4) that the payment or redemption of the real estate has been prevented by fraud, etc.

Appellee has made no claim whatever that he gave to appellant, or to McCurdy, trustee, any sort of notice of his application under which the deed from Christian, clerk, conveying to him the property which is the subject of litigation in this suit, was made, and there is no sort of question raised that the deed from A. R. Buffin and Mary E., his wife, to McCurdy, trustee, of December 10, 1895, was admitted to record in the clerk's office of the chancery court of the city of Richmond, December 13, 1895, and that it shows upon its face that A. R. Buffin and Mary E. Buffin were husband and wife, and in the description of the property conveyed recites that it is the property of Mary E. Buffin, conveyed to her by T. W. Stagg and wife by their deed of August 1, 1894, recorded in the clerk's office of the chancery court of the city of Richmond, D. B. 152A, page 263. But appellee strenuously insists that he is entitled to hold the property under his deed from Christian, clerk, because he was prevented from giving the required notice (1) by reason of the negligence and carelessness of appellant in preparing its trust deed; and (2) the deed of trust was only indexed in the general index of the clerk's office of the chancery court in the name of A. R. Buffin as grantor, and not in the name of Mary E. Buffin, his wife, the real owner of the property conveyed.

The negligence imputed to appellant in the preparation of its deeds of trust consists only in stating the conveyance as from "A. R. Buffin and Mary E. Buffin, his wife," instead of from "Mary E. Buffin and A. R. Buffin, her husband."

Appellee further contends that if appellant is not estopped from setting up the want of notice of the application to purchase the property in question, under section 666 of the Code, he is fully protected in his right to hold the property under his deed from Christian, clerk, by virtue of section 661 of the Code, as it stood when the deed was made and recorded. In other words, although section 666 expressly required appellee, before obtaining his deed to the property, to serve a copy of his application to purchase the same from the commonwealth upon appellant and its trustee, either by actual service of a copy of the application or by publication in a newspaper under certain conditions, and furthermore provided that section 661 should only apply to deeds made under

authority of section 666, i. e. where the provisions of that section had been complied with, still appellee is secure in his right to hold the property under his deed from Christian, clerk. To support the last proposition, appellee invokes the decision of this court in *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813, and *Coal Co. v. Thomas*, 97 Va. 527, 34 S. E. 486.

We deem it wholly unnecessary to consider the question whether or not section 661, as amended by the act of March 7, 1900, applies to deeds made before the amendment was adopted. The object of the law before and since that amendment was to give to the original owner an opportunity to redeem his property, and to protect innocent parties who had property rights therein. The legislature recognized that a creditor had a right in the property on which his debt is secured, and in order to protect that right it was enacted that the creditor should have notice of any proceedings to take away the property which he held as security. Section 661 of the Code applies only to deeds acquired by parties who purchase directly at the original tax sale, and section 666 is the section under which the title to property bought in for the commonwealth may be acquired by an applicant to purchase the same, and which provides that the terms of section 661 shall apply "to deeds made under authority of this section." Clearly, a deed cannot be made under authority of section 666 unless its provisions are complied with. The effect of a deed under section 661 is to cut off inquiry as to the matters preceding the time at which the commonwealth acquired her rights to subject the property to sale for taxes due thereon, but, before the purchaser under section 666 can claim the benefit of the terms of section 661, he must show that he has fulfilled the provisions of section 666, and, until he is in a position to do this, there is no authority for making him a deed for the property. The legislature would not have done so useless a thing as to require certain steps to be taken by the purchaser entirely independent of the steps by which the commonwealth acquired her title to property bought for the delinquent taxes due thereon, and then to allow the purchaser, at his will, to refuse or fail to comply with the only terms upon which he has the right to purchase from the commonwealth. In no view of this statute providing how title to lands held by the commonwealth for delinquent taxes may be acquired by a purchaser does it appear that the legislature intended that the purchaser should be protected by the provisions of section 661, if he had not acquired his deed by compliance with the provisions of section 666. On the contrary, the legislature recognized that a deed of trust creditor or mortgagee has a right in the real estate upon which his debt is secured, which cannot be taken from him without notice of the proceedings by

which it is to be done, and giving him an opportunity to protect his interests.

It was never intended by the lawmaking power of the commonwealth to lay down a hard and fast rule that one who obtained a deed for lands owned by the commonwealth for delinquent taxes under section 666 of the Code should be secure in his title to the land, although he had obtained his deed without complying with the essential requirements of that section. If such an interpretation be given the statute, then a party having a right in the land could have it taken from him without notice of the proceedings by which it is done and without an opportunity to be heard. It is entirely reasonable for the legislature, in order to more effectually collect the revenues due the commonwealth for taxes, to make more stable titles acquired under tax sales by providing that a title acquired by compliance with the provisions of the statute under which the deed is made is "subject to be defeated only by proof that the taxes or levies for which said real estate was sold were not properly chargeable thereon, or that the taxes and levies properly chargeable thereon have been paid." So construed, that provision of the statute (section 661) has been upheld by this court as a constitutional and a valid exercise of legislative power. *Thomas v. Jones*, supra; *Coal Co. v. Thomas*, supra. But it has nowhere been held that this statute is to be so construed as to bring within its protection a deed obtained without compliance with all the provisions of section 666, under which the deed was made. In the case at bar the deed was made confessedly without compliance with the provisions of that statute, in that no sort of notice was given to appellant or its trustee of the proceedings upon the application to purchase the property resulting in the deed under which appellee claims. So to construe the statute as to bring appellee within the protection of section 661 would make it plainly a violation of both the spirit and the letter of the fourteenth amendment of the constitution of the United States, which provides that no person shall be deprived of his property without due process of law, i. e. without notice of the proceedings by which it is done and an opportunity to be heard. In this case, while appellant was given by the statute the right to redeem the property from the sale to the commonwealth, it imposed no duty upon it, as upon the owner of the property, of paying the tax, but expressly provided that it should have notice of the application to purchase the property under section 666 of the Code, and, had that notice been given, appellee would have been entitled to the benefit of section 661, and without it he is not.

In *Thomas v. Jones*, supra, the bill to set aside the deed was filed by the holder of a vendor's lien, the previous owner of the property not being a party to the suit, and as

the statute was when the deed in that case was made it was not required that notice of the application to purchase the land should be served on a creditor whose debt was secured thereon, and there was no allegation in the bill of entire lack of notice, but of a defective notice of the application. The deed in that case was held to be valid and within the protection of section 661, upon the ground that no valid objection had been shown to the deed or to the proceedings which led up to its execution.

In *Coal Co. v. Thomas*, supra, the constitutionality of section 661 of the Code was upheld, and Thomas' deed declared to be within the protection it afforded, but stress was laid upon the fact that Thomas had complied with all the provisions of section 666. The opinion by Keith, P., after a full discussion of the undisputed facts and the evidence in the case, says: "So that Thomas, having complied with all the requirements of section 666, comes within the protection of section 661."

In the more recent case, also, styled *Thomas v. Jones*, 98 Va. 323, 36 S. E. 382, Thomas had procured from the clerk of the county court of Culpeper and had recorded a deed for Jones' land, which had been bought by the commonwealth for delinquent taxes, and Jones filed his bill to have the deed annulled on the ground that Thomas had not complied with the provisions of section 666 of the Code, etc. Thomas answered the bill, denying all of its material averments, and invoked the protection of section 661 of the Code. This court affirmed the decree of the circuit court annulling the deed as having been procured by Thomas under such circumstances as rendered it inequitable for him to avail himself of it. The opinion says that Thomas could not be permitted to rely upon the deed executed to him by the clerk to cure any defects which existed in the course of the proceeding under which he claimed; that the burden was upon him to show a compliance with the law, and the undisputed facts in the record are conclusive against him, whereby he is deprived of the advantage enjoyed by virtue of the deed.

It is true that in that case Thomas obtained his deed under circumstances which amounted to a fraud upon the rights of Jones, though the fraud was not intended, whereby a case was made for equitable relief, independent of the statute; but the opinion clearly upholds the principle that, notwithstanding the provisions of section 661 of the Code, the holder of a deed made under authority of section 666 is not entitled to the benefits of section 661, unless all the provisions of section 666 have been complied with. These provisions relate to the steps that an applicant to purchase under that section must take in order to acquire the commonwealth's title to the land. After he has taken these steps, and not until then, is he entitled to a deed to the land. When he has in fact

complied with all the provisions of the statute, and gotten rightly his deed, he comes within the protection of section 681, and no question can be raised as to the regularity of the proceedings by which the commonwealth acquired title to the land conveyed to him by his deed, except as therein provided. But, until he is in this position, neither in morals nor under the law is he entitled to hold the property, and the deed he holds cannot be said to have been obtained under the authority of section 686, as to parties having an interest in the land conveyed who have not had the notice of the proceedings in which the deed was obtained that the statute requires.

That the deed of trust of appellant in this case was delivered to the clerk and duly admitted to record cannot be controverted, and the failure of the clerk to properly index it does not affect its validity as notice to subsequent purchasers of the property. As was said by Staples, J., in *Granite Co. v. Clark*, 28 Grat. 617: "If the clerk fails to make the index, he injures those who desire to make the search. The clerk's duty, therefore, is to the searcher and to the public, and not to the holder of the deed. When the latter has placed his deed upon the record book, he has done all the law requires him to do. Any one who will take the trouble can examine this record. The time and labor expended in making this examination is merely a question of degree. If the party making the search is content with looking at the index, without examining the record, and he is thereby misled, his remedy is against the clerk, whose duty it is to prepare the index for the benefit of the searcher, and not the holder of the deed. These views are not only in conformity with our statute, upon a fair and reasonable interpretation, but they are intrinsically just and sensible in themselves."

In that case the question was whether or not the indexing of a judgment was necessary to give it effect as notice to purchasers of property upon which it became a lien when docketed, but the opinion says that the reasoning applies to the indexing of deeds and judgments alike. When that case arose there was no statute providing that a judgment should not be regarded as docketed as to any defendant in whose name it was not indexed, but subsequently such a statute was enacted, and is now section 3561 of the Code. No such provision is found in the statute relating to the recordation of deeds.

In *Beverley v. Ellis*, 1 Rand. 102, it was held that where a deed is duly proved or acknowledged, and ordered to be recorded, and left with the clerk for that purpose, it is considered as recorded from that time, although it may never, in fact, be recorded, but is lost by the negligence of the clerk or other accident; that a deed, under such circumstances, will be preferred to a subsequent

deed, which has been duly recorded, although the party to such subsequent deed may not have notice of the prior deed.

The decision in that case has been often cited by this court, and is quoted from by Burks, J., in *Davis v. Beazley*, 75 Va. 491, who adds that, if the deed is duly admitted to record, notice, in contemplation of law, is thereby given as effectually as if it had been spread on the deed book, and the certificate of the clerk, written on the deed, that it has been so admitted to record, is evidence of the fact. The admission to record is in law notice of the deed to the world. For this purpose the admission to record is effectual, though the clerical act of spreading the instrument in extenso on the deed book be never performed.

A recorded instrument is sufficient to operate as constructive notice under the registry laws if the property be so described or identified that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what and where it was, and the language used be such that, if he should examine the instrument itself, he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it. *Flourance v. Morien*, 98 Va. 26, 34 S. E. 890, and authorities cited.

The statute as to indexing deeds, now section 3505 of the Code, is substantially the same as it has always been. While the index is in fact the key to the deed books, and is depended upon by all examiners of title, it is not essential in Virginia to due registry. 2 Va. Law Reg. 620.

The evidence adduced by appellee as to the reasons why the trust deed in this case was not indexed in the name of Mary E. Buffin, as the grantor, is wholly irrelevant. If appellee contented himself with only looking to the general index to deeds in the clerk's office of the chancery court, and not to the deed itself, for information as to who was entitled to notice of his application to purchase the property upon which appellant's debt is secured, and was misled, it is his own fault and negligence, and not that of appellant. It had done all the law required when its deed was left with the clerk for recordation and in a condition to be recorded.

We are therefore of opinion that the decrees appealed from are erroneous, and they will be set aside and annulled, and this court will enter such decree as the lower court should have entered, setting aside the deed from Christian, clerk, to appellee, as null and void as to the appellant, upon condition that the appellant refund to appellee all taxes paid by the latter on the property, with interest thereon from the date or dates the same were paid, and the cause will be remanded for such further proceedings as may be necessary to carry into effect the decree of this court. Reversed.

(99 Va. 411)

STATE BANK OF VIRGINIA v. DOMESTIC SEWING-MACH. CO.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

CORPORATIONS—ASSIGNMENT FOR CREDITORS—PRIORITY OF CLAIMS—NOVATION.

1. The receiver of an insolvent corporation agreed with a bank to take certain notes which the bank had discounted for the receiver, and collected them himself, replacing such notes with receiver's certificates, and stipulating that the money collected on the notes should be applied to the payment of the receiver's certificates. *Held*, that the acceptance by the bank of the receiver's certificates was not a novation, the parties not intending the same.

2. A receiver of an insolvent corporation, empowered by orders of the court to continue the business, and to discount and protect such commercial paper as might come into his hands, and to issue receiver's certificates to a certain amount, agreed with a bank to take in trust for collection notes to the amount of \$6,614.34, which the bank had discounted for the receiver, and to replace the same with receiver's certificates to the amount of \$8,500. All money collected on the notes was to be deposited in the bank as a trust fund to be applied on the payment of the receiver's certificates so deposited. *Held* that, the receiver having power to discount notes, the receiver's certificates, deposited as collateral to protect the discounts made by the bank, to the extent required for the protection of such discounts, became the absolute property of the bank, and, to the amount of the discounts, were entitled to priority over open accounts for goods purchased by the corporation.

3. The certificates to the amount in excess of the amount necessary to protect the discounts, were not entitled to precedence over claims of other creditors of the same class.

Appeal from chancery court of Richmond.

Proceedings by the State Bank of Virginia against the Domestic Sewing-Machine Company to determine the priority of the claims against the defendant, an insolvent corporation. From a decree sustaining exceptions to the commissioner's report, the complainant appeals. Reversed.

Coke & Pickrell, for appellant. B. T. Crump, for appellee.

WHITTLE, J. This is an appeal from a decree of the chancery court of the city of Richmond. The controversy is one for priority of claim between the State Bank of Virginia and the receiver of the Domestic Manufacturing Company, creditors of the Domestic Sewing-Machine Company.

In 1893 the Domestic Sewing-Machine Company became insolvent, and executed a deed of trust or assignment conveying all its property in its agency and place of business in the city of Richmond to Henry O. Jones, trustee, for the benefit of its creditors.

Thereupon the trustee filed a bill in the chancery court to administer the trust, and in that cause was appointed receiver, and authorized to continue the business, so far as, in his judgment, it might be necessary to speedily dispose of the assets and wind up the trust.

Subsequently he submitted an exhaustive

report of his transactions to the court, from which it appeared that it was the opinion of the creditors that great loss and damage would result if the affairs of the company were closed at once, and recommending that the business be temporarily conducted by the receiver until a permanent organization or other final settlement could be effected.

The receiver, conforming to this policy, and with the consent of the creditors, adopted the necessary measures to continue the business. He suggested, among other things, that authority be conferred upon him to have discounted from time to time, as the necessities of the receivership required, such negotiable paper then in his hands, or which might come into his hands, as he should consider it expedient to discount, and to arrange for its proper protection. The report and all acts of the receiver were approved and confirmed by the court, especially his action in changing the management from a passive to an active receivership, and looking to a temporary continuation of the business. To effectuate the new policy, the receiver was empowered to discount and protect such commercial paper as might come into his hands; and also to issue receiver's certificates, not to exceed \$40,000, payable at the State Bank of Virginia. These certificates were declared to be the first lien upon all the sewing machines and upon all other property in the store or warehouse of the company, or which the receiver might have in the conduct of his office, wheresoever the same might be, together with all notes, leases, open accounts, and other bills receivable for or on account of sewing machines theretofore sold by him, or which he might thereafter sell. The lien, however, was to be subject and subordinate to the payment of rent, taxes, and the expenses of conducting the business, including salaries, wages, costs, fees, and charges, together with the cost price of any machines or other goods or merchandise which the receiver might purchase.

By a subsequent decree, Henry C. Jones was discharged from the receivership, and J. H. Derbyshire appointed receiver in his place and stead, who was clothed with all the rights and privileges and subject to all the liabilities and duties conferred or imposed upon the former by previous decrees in the cause.

Afterwards, the business having been attended with considerable loss, the cause was referred to a commissioner in chancery to take certain accounts, looking to a final settlement of the affairs of the company. The commissioner reported a large claim in favor of the receiver of the Domestic Manufacturing Company, composed of open accounts and receiver's certificates. He also reported the demand of the State Bank of Virginia, represented by notes discounted by it for Receiver Derbyshire and receiver's certificates. The commissioner says of this latter claim: "The business was continued by

Receiver Derbyshire under these decrees, and on the 10th of December, 1896, the State Bank of Virginia held certain notes which had been discounted for Receiver Derbyshire of the face value of \$6,614.34. * * * The receiver believed that he could collect these notes to better advantage than the bank, and wished to get possession of them for that purpose. With this object in view, the evidence shows that he made the following agreement with the bank: 'On December 16, 1896, said bank discounted 17 receiver's certificates, to wit, Nos. 1 to 16, inclusive, and No. 41, dated December 15, 1896, of the face value of \$8,500, and payable to the State Bank of Virginia, on April 26, 1897, with interest from date. Said bank thereupon credited the account of said receiver by \$8,500, whereupon the receiver on the same day checked on said account for the sum of \$6,615.34, and received the discounted notes mentioned above, amounting to that sum, upon the understanding and parol agreement that he was to hold said notes as a special trust fund, and deposit all collections made on account thereof to the credit of J. H. Derbyshire, trustee, in said bank, to be applied to the payment of said receiver's certificates. Thereupon the notes were marked "Paid" in the home discount book and discount ledger of said bank.'

It appears that the account of J. H. Derbyshire, trustee, was opened with the bank December 19, 1896, and continued throughout his receivership. From the trustee's account, the receiver's certificates held by the bank were reduced from \$8,500 to \$6,000, and on July 23, 1897, there was a balance to the trustee's account of \$1,217.41. It further appears that while Derbyshire was holding withdrawn notes amounting to \$6,615.34, and making deposits in the bank to the trustee's account, he collected five notes made by A. Kent, belonging to the trust fund, amounting in the aggregate to \$2,531.64; that he did not deposit these collections to the credit of the trustee's account, but applied them to current expenses of the receivership. He, however, substituted \$4,396.28 of other notes and accounts held by him as receiver in the place of the Kent notes, as collateral security for discounts of negotiable notes and receiver's certificates discounted at the bank.

It must be observed that to the extent of \$6,615.34 the \$8,500 of receiver's certificates held by the bank were composed of notes previously discounted by the bank for the receiver.

In reporting demands against the assets of the company, the commissioner allowed precedence to the amount due the bank from the receivership for discounts of notes over the open accounts due the receiver of the Domestic Manufacturing Company for the purchase price of sewing machines, but gave preference to the latter over the residue of receiver's certificates held by the former. To this finding of the commissioner, the receiver

of the Domestic Manufacturing Company excepted, and insisted:

(1) That the commissioner should have found and reported that Receiver Derbyshire had no authority to enter into the agreement of December 16, 1897, with the bank.

(2) That the receiver had no authority to withdraw any funds in his possession, as receiver, from the disposition directed to be made by the court, and to deposit them to his credit as trustee in the bank.

(3) That the sum of \$1,217.41, so deposited, belonged to the general funds of the receivership, and should not have been applied to the payment of receiver's certificates owned by the bank.

(4) That the commissioner ought not to have reported that the bank was entitled to have the proceeds of the notes and accounts pledged by the receiver applied to receiver's certificates held by it.

(5) That all receiver's certificates stood upon an equal footing, and the bank, having held originally \$8,500 of these certificates, and having received \$2,500 out of the funds of the receivership, should refund and pay back to the receivership that amount, and make claim for its \$8,500 of receiver's certificates, subject to all prior claims.

(6) That the commissioner ought not to have reported that the bank was entitled to be paid \$2,797.82 for notes discounted by it, before anything should be paid exceptant on his open account, but should have given preference to the entire open account of exceptant, or, at most, have placed their demands on the same footing.

The bank excepted, because the commissioner reported the balance due it on receiver's certificates, not based on discounted notes, as a debt of the fourth class, thereby postponing it to the open accounts of the receiver of the Domestic Manufacturing Company; its contention being that, as to said balance, the bank was entitled to priority over the other debts of the fourth class and of said open accounts.

The decree appealed from sustained exceptions 1 to 5, inclusive, and overruled exception 6, and also the exception of the bank; and this ruling gives rise to the case presented on appeal.

In his memorandum for decree, the chancellor concedes Receiver Derbyshire's authority to discount notes which came into his hands in the course of business, and to protect them at maturity, either by payment with money or other notes, upon default of the makers; and also his authority to pledge other notes as collateral security for such discounted notes. He declares that "all such discounted notes constitute a claim of the first dignity against the assets of the receivership," but that "the receiver had no authority to pledge the notes, nor any other part of the assets of the receivership in his hands, as collateral security for the payment of receiver's certificates; nor had he author-

ty to pay off any of these certificates with the proceeds of notes which he had undertaken to pledge as security therefor, nor in any other manner. So far as the bank's claim is based on notes discounted for the receiver, it has precedence over the open accounts of the receiver of the Domestic Manufacturing Company, of course, over all the receiver's certificates, and the bank has the right to hold the collaterals as security for the payment of its claim.

"In settling the account between the bank and the receiver, credit the bank by all the sums advanced to the receiver in the way of discounts, and with interest thereon, and charge it with all the money it has received from the receiver, or from the collaterals, in repayment of such advances. All the receiver's certificates must stand on the same footing. All persons dealing with the receiver must be charged with full knowledge of the proceedings and the decrees in this cause, so far as they confer and limit his authority and powers.

"Sustain the first five exceptions to the commissioner's report, and overrule the sixth, and overrule the exception of the bank."

This ruling is, in effect, a recognition of the authority of Receiver Derbyshire to enter into the arrangement made between him and the bank in relation to discounting notes, "and his right to pledge other notes as collateral security for such discounted notes," which is precisely the view taken of the transaction by the commissioner. Nevertheless, the practical result from the conclusion reached, and the decree sustaining the five exceptions of the receiver of the Domestic Manufacturing Company to the report, was to deprive the bank of the very preference to which it had been declared entitled.

"The contracts of a receiver, made with express or implied authority, cannot be annulled at the pleasure of the court." Beach, Rec. § 329; *Vanderbilt v. Railroad Co.*, 43 N. J. Eq. 669, 12 Atl. 188.

There is a well-recognized distinction by the authorities between passive receivers, who merely preserve the property, collect the assets, and report the fund to the court for distribution, and active receivers, to whom are confided the management of going concerns. The powers of the latter are necessarily very much broader than those of the former.

It is contended for the appellee that the acceptance by the bank of receiver's certificates for the amount of its demand for discounts was a novation of its original claim, and an extinguishment of any priority that may have attached to it. Whether a new security shall be taken to be a novation or substitution for, and an extinguishment of, a prior indebtedness, is a matter of intention; and the burden rests upon him who asserts that there has been such novation to establish it. The rule is stated thus by this court in the recent case of *Trust Co. v. Engle-*

by, 37 S. E. 957: "Whether or not a debt has been novated is a question of fact, and depends entirely upon the intention of the parties to the particular transaction claimed to be a novation. In the absence of satisfactory proof to the contrary, the presumption is that the debt has not been extinguished by taking the new evidence of indebtedness. The fact that the word 'Paid' was stamped on evidences of debt surrendered to the debtor is not, standing alone, a controlling circumstance to show satisfaction." It is apparent that neither the receiver nor the bank, in this instance, intended a novation, for, after delivery of the receiver's certificates, the parties continued to act on the basis of the original agreement, using the receiver's certificates merely for the purpose of evidencing the true amount due from the receiver to the bank.

Under the decrees of the court, the receiver plainly had authority to discount notes which came into his hands in the course of business with the bank, and to protect them by the hypothecation of other notes and securities as collateral; and, when he did so, such collaterals, to the extent to which it became necessary to apply them to the protection of discounts, ceased to be assets of the receivership, and became the absolute property of the bank. Nor was their true status altered or affected by the circumstance that an agreement was made by which, for convenience, the collaterals were delivered to Derbyshire to be collected by him, and the avails deposited in the bank to his credit as trustee. In that respect he was not acting in the capacity of receiver, but the effect of the arrangement was to constitute him trustee or agent for the real owner of the collaterals, the bank. And if, as in the case of the Kent notes, he applied his collections to current expenses of the receivership, good faith required that he should make restitution to the bank to that extent out of other funds, and the assets of the receivership could in no wise be diminished or affected by the transaction.

The collaterals belonged to the bank, not to the receivership, and were delivered to Derbyshire, as the agent of the bank, merely to facilitate their collection, stamped and impressed with a conceded trust.

The bank never parted with its equitable ownership or possession of the notes or their proceeds. The possession of Derbyshire, in legal contemplation, was its possession; and the receiver, having, by misappropriation of the proceeds, gotten the benefit of the money that belonged to the bank, should, in equity and good conscience, be required to reinstate the trust fund owned by the bank; and this may be done without the slightest prejudice to any other interest.

"A court of equity will follow a fund diverted from the owner or charged with a lien as far as it can be traced, and will enforce the true owner's rights against any

property in which it may have been invested." *Fitzgerald's Ex'r v. Irby* (Va.) 87 S. E. 777.

It is not perceived that the bank's demand, in excess of discounted notes protected by collaterals, evidenced by receiver's certificates, stands on a different footing from, or is entitled to precedence over, claims of other creditors of the same class. The exception of the bank to the commissioner's report, denying such preference, was therefore properly overruled.

The findings of the commissioner upon the questions involved in this appeal were, in all respects, correct, and his report ought to have been confirmed.

The chancery court erred in sustaining the exceptions of the receiver of the Domestic Manufacturing Company to the report, and for that error the decree complained of must be reversed, and the cause remanded for further proceedings to be had therein in conformity with this opinion.

Reversed.

GARDWELL, J., absent.

(99 Va. 394)

SOUTHERN RY. CO. v. WILCOX et al.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

CARRIERS—CONTRACT OF CARRIAGE—CONSTRUCTION—VALIDITY—INTERSTATE COMMERCE—ACTION FOR BREACH—PLEADING—REJECTING OF PLEA—EVIDENCE—RES GESTÆ—RES INTER ALIOS ACTA—INSTRUCTIONS—EVIDENCE IN SUPPORT OF—APPEAL—HARMLESS ERROR.

1. Where a contract of shipment does not specify the time the goods are to be delivered to the carrier for shipment, the shipper has a reasonable time.

2. An allegation in the declaration that the goods were delivered according to the agreement is to be construed as alleging a delivery within a reasonable time.

3. An allegation in the declaration in an action by a shipper against a carrier for breach of a contract of shipment, which alleges an offer on the part of the carrier and an acceptance by the shipper, is an allegation of an acceptance before the offer was withdrawn.

4. When an interstate railroad is sued for the breach of a contract to carry goods at a reduced rate, evidence that the contract is illegal as a violation of the interstate commerce law is admissible under the general issue.

5. Error in rejecting a plea tendered by defendant is harmless where the evidence in support thereof is admitted under the general issue.

6. Correspondence between the parties to a contract after its execution is not admissible in an action thereon as a part of the res gestæ.

7. Evidence of contracts by a shipper for the sale of goods to be shipped over a certain railroad, the railroad not being a party thereto, is inadmissible in action by the shipper against the railroad for the breach of a contract to carry the goods at a certain rate, though such contracts of sale are based on the reduced freight rate.

8. Where there is evidence of certain facts, an instruction is properly based thereon, though such evidence is insufficient to support a verdict.

9. Where a contract for the shipment of goods at a reduced rate requires delivery to the shipper within a reasonable time, and there is considerable delay on the part of the shipper, but it is partially caused by the carrier making overcharges, and by an increase in the rate, it is not error, in an action against the carrier for a breach of the contract, to submit the issue whether the goods were delivered to the carrier within a reasonable time.

10. The mere promise by a carrier to ship certain freight at a certain rate does not constitute a contract on which an action can be based, unless the shipper accepts the offer by agreeing to ship the goods at such rate.

11. Code, § 3343, authorizing the proof of records kept in public offices by certified copy, does not prohibit the proof of the schedule of rules on file with the interstate commerce commission by other evidence.

12. The illegality of a contract for the interstate shipment of freight at a less rate than specified in the printed schedules of rates, which is prohibited by the interstate commerce act, prevents the recovery by the shipper for a breach thereof.

13. Where a contract for the interstate shipment of freight is illegal in being lower than the established schedules, as prohibited by the interstate commerce act, a subsequent lowering of the rate to that specified in the contract does not validate the contract, and render the carrier liable for a breach thereof, on a future increase in the rate, and its refusal to carry the goods for the agreed rate.

Error to law and chancery court of city of Norfolk.

Action in assumpsit by Frank E. Wilcox and another against the Southern Railway Company. From a judgment in favor of plaintiffs, defendant brings error. Reversed.

W. L. Williams, for plaintiff in error.
Walke & Old, for defendants in error.

BUCHANAN, J. Wilcox and De Jarnette, the defendants in error, brought an action of assumpsit to recover from the Southern Railway Company, the plaintiff in error, the difference between an alleged agreed rate of freight and that actually charged and collected by the railway company for the transportation of certain phosphate rock from Mt. Pleasant, in the state of Tennessee, to Raleigh, in the state of North Carolina. The case has been twice tried. The judgment entered upon the first trial was reversed by this court upon a former writ of error upon the ground that the declaration did not aver any consideration for the alleged promise of the railway company upon which the action was based, and the cause remanded, with leave to the plaintiffs to amend their declaration. *Railway Co. v. Wilcox*, 98 Va. 222, 35 S. E. 355.

The demurrer to the declaration as amended, and to each count thereof, was overruled. This action of the court is assigned as error.

The objection made to the first, second, and fourth counts is that neither avers that the phosphate rock was furnished by the plaintiffs for transportation within a reasonable time after the alleged contract for shipment was made.

The first and fourth counts aver, in substance, that the railway company offered to

carry the rock upon certain terms, and that the plaintiffs accepted the offer. The second count avers that the railway company agreed to carry the rock at a named price, and that in consideration thereof the plaintiffs bound themselves to deliver it for transportation. Each of the three counts aver that the plaintiffs did furnish the rock as they had agreed to do, but the railway company charged and collected a greater freight per ton for carrying it than the contract price. No time was fixed by the alleged contract in which the rock was to be delivered for shipment. The plaintiffs had, therefore, a reasonable time within which to deliver it, and the averments in each of the counts that it was delivered for shipment as they had agreed to furnish it must be construed as averring that it was furnished within a reasonable time after making the contract. The trial court so construed the counts, as is clear from the instructions given for the plaintiffs, and properly held them sufficient.

The objection made to the third count is that, while it avers an offer on the part of the railway company to transport the rock upon the terms named, and an acceptance of the offer on the part of the plaintiffs, it fails to aver that it was accepted before it was withdrawn. The averment that the offer was accepted necessarily implies that it had not been withdrawn, for there could be no acceptance of an offer that had been withdrawn.

The demurrer to the declaration, and to each count thereof, was properly overruled.

The rejection of two special pleas offered by the railway company, in which it was averred that the agreement sued on was in violation of the act of congress commonly known as the "Interstate Commerce Act," and was, therefore, illegal and void, is assigned as error.

The defense that the contract was illegal was clearly admissible under the general issue which had been pleaded. 4 Minor, Inst. 773; 5 Rob. Prac. 255; Insurance Co. v. Buck, 88 Va. 517, 13 S. E. 973.

But, if it had not been, the railway company was not injured by the rejection of the special pleas, as it was permitted to introduce its evidence upon that question under the general issue.

The admission in evidence of certain letters written by the plaintiffs to the defendant's general agent at Norfolk, Va., dated, respectively, January 29, February 23, and April 25, 1898, is assigned as error.

The letter of January 29th states that from the tenor of the letters the plaintiffs were receiving from Raleigh they were very much afraid that, unless the freight matter from Mt. Pleasant to Raleigh was adjusted satisfactorily very soon, much trouble would result; that they did not like the tone of the last two communications they had received from the people to whom they had sold the

phosphate rock on that subject, and urged the railway company to settle the question without further delay. It further states that they inclosed a letter which showed that the rate of freight from Mt. Pleasant to Norfolk was still \$3.30 per gross ton; that being the figure named therein about the time freight to Raleigh was given them. The letter of February 23d noted the reception of the agent's letters of the 2d and 5th of that month, expressed surprise at the conclusion of the general freight agent of the railway company as stated in those letters, and the hope that upon a reconsideration of the matter he would take a different view of the question. The letter then gives a history of the matter in controversy from the plaintiffs' standpoint from the time of their application for special rates in the winter of 1897 down to the date of the letter, and insisted that the railway company ought to transport the whole 3,000 tons of phosphate rock at the alleged contract price. The letter of April 23d states that there are inclosed certain letters, as requested by the defendant's agent, mentioning briefly the contents of each, all of which refer to the freight rate to Norfolk. The letter discusses the justice and propriety of giving a lower rate to Norfolk than to Raleigh when shipments made over the railway company's road must pass the last-named point to reach Norfolk.

These letters were all written long after the contract in question is alleged to have been made and broken. They are no part of the *res gestæ*. They are, for the most part, mere statements of the plaintiffs' view of the differences between the parties and the expression of plaintiffs' desire to have them adjusted. The fact that a lower rate may have been charged by the railway company upon shipments of phosphate rock to Norfolk than was charged to Raleigh could not have any bearing upon the issues in this case, as the plaintiffs' demand was based not upon an unreasonable or excessive charge, but upon a violation of their contract rights.

These letters ought not to have been admitted in evidence.

Neither were the contracts referred to in bills of exceptions numbered 12, 13, and 17 proper testimony. They were contracts to which the railway company was not a party, and of which it had no knowledge until after they were made. It may be that the plaintiffs, in making their contracts for the sale of phosphate rock, fixed their prices with reference to the rate of freight quoted to them by the railway company; but that fact does not tend to show that they had accepted the railway company's offer, and bound themselves to furnish the rock for shipment. If they accepted the railway company's offer, and bound themselves to furnish the rock for shipment, it is wholly immaterial to whom they sold the rock, or whether they sold it at all. Their making

contracts for the sale of the rock, to which the railway company was not a party, and of which it had no knowledge until after the contracts were made, would no more tend to show that they had accepted the offer than their not making contracts for its sale would tend to show that they had not accepted it.

Instructions numbered 1 and 2 are objected to upon the ground that there was no sufficient evidence upon which to base them.

These instructions in effect told the jury that, if they believed that the railway company had offered to transport the phosphate rock at the price named, and that the plaintiffs had accepted the offer before a withdrawal of the same, then such acceptance constituted a contract; and, if they further believed from the evidence that the plaintiffs furnished the rock for shipment within a reasonable time under all the facts and circumstances of the case, then the defendant was bound to transport the rock at the agreed rate. There was evidence tending to prove the facts upon which these instructions were based. Whether it was sufficient or not to support a verdict could not, under our practice, be passed upon by the court when instructing the jury. Where a defendant is of opinion that the plaintiff has failed to prove his case, he can demur to the evidence, and generally have the court pass upon its sufficiency; or he can wait until the jury have found their verdict, and, if it be against him, have the court pass upon its sufficiency upon a motion to set it aside. But, if the case goes to the jury, and there is any evidence tending to prove a fact, it is proper for the court to give an instruction applicable to it if requested to do so, even though it is so slight as to be insufficient to support a verdict founded upon it. *Jones v. Morris*, 97 Va. 43, 49, 33 S. E. 377, and cases cited.

The objection to the other instruction, numbered 3, given for the plaintiffs, is that the question of whether the phosphate rock had been delivered for shipment within a reasonable time after the making of the alleged contract was a question for the court, and ought not to have been submitted to the jury, as was done by the instruction. There was considerable delay on the part of the plaintiffs in delivering the rock for transportation; but for this delay, if there was a valid contract for its shipment, the defendant was, to some extent, responsible. It made overcharges on the earlier shipments, in adjusting which there was delay. Soon afterwards the connecting carrier objecting to a continuation of the contract rate of freight, the rate was changed. All these things had more or less effect upon the delivery of the rock for shipment, and the question whether it was delivered within a reasonable time was properly left to the jury to be determined by them under the facts and circumstances in evidence.

From what has been said in reference to the last-named instruction, it follows that the court rightly refused to give the railway company's instruction numbered 1, which was in conflict with it.

The railway company's instructions numbered 2 and 3, which the court refused to give, told the jury, in effect, that, unless they believed from the evidence that the plaintiffs had promised or agreed to furnish about 3,000 tons of phosphate rock to be carried by the railway company at the freight rate named in its offer, the plaintiffs were not entitled to recover, and they must find for the defendant.

There was no consideration for the promise of the railway company to transport the rock unless there was a promise on the part of the plaintiffs which bound them to furnish the rock for shipment. The fact that the plaintiffs made a contract with a third party for the sale and delivery of the rock based upon the rate of freight named by the defendant, cannot affect the question. If the plaintiffs accepted and bound themselves to furnish the rock for shipment, they were entitled to have it shipped at that rate, if the contract was in other respects valid. If they did not accept the offer, and were not bound to furnish it for shipment, they had no right to have it shipped at the rate named, if the regular rate was different, although they may have made contracts with third parties upon the basis of the named rate. The mutual obligations of the parties, the one to transport and the other to furnish for transportation, would have been a sufficient consideration for the promise of each; but, if the plaintiffs did not accept the offer of the railway company, and were not bound to furnish the rock for shipment, the railway company's offer or promise was a mere nude pact, the breach of which would furnish no ground of action (*Railway Co. v. Willcox*, supra; *Railway Co. v. Dane*, 43 N. Y. 240), and the jury should have been so instructed.

The refusal of the court to give instructions numbered 4 and 5 asked for by the railway company is also assigned as error.

These instructions were intended to raise the question of the legality of the contract sued on. One of the objections made to them is that there was no proper evidence before the jury upon which to base them. In this contention the plaintiffs are clearly in error. Witnesses testified as to the established freight rate in force at the time the contract was alleged to have been made, and copies of the freight schedules on file in the office of the interstate commerce commission were introduced, all of which tended to prove that the established rate was higher than the alleged contract rate. It is true that these copies were not attested in the manner provided by section 3343 of the Code, but a witness was introduced who testified that he had compared them with, and that they were exact copies of, the originals on file in the

office of the interstate commerce commission. The railway company had the right to prove the freight rate on file in the office of the interstate commerce commission by introducing in evidence examined copies. That is one of the usual methods of proving records. The method provided by section 3343 of the Code is merely cumulative. The enactment of such statutes rendering admissible a convenient species of evidence does not thereby deprive parties of the right to resort to any other mode of proof allowable at common law, unless in the enactment of the statute it is clearly indicated (as it is not in this case) that it was the intention of the legislature to abrogate the old rule. 2 Tayl. Ev. §§ 1546, 1547; 1 Greenl. Ev. §§ 505-508.

The plaintiffs' shipments were interstate freight, and must be governed by the interstate commerce act. That statute prohibits an interstate carrier from contracting for or collecting a less rate of freight on interstate shipments than that specified in the schedules of rates in force at the time, and which are required to be printed, and kept at all stations for the inspection and use of the public. The evidence, as before stated, tended to show that the alleged contract was in violation of that act. If it was, there could be no recovery upon it. The general rule of law being that a contract made in violation of law is void, and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract he cannot recover. *Camp v. Bruce*, 98 Va. 521, 31 S. E. 901, 43 L. R. A. 146; *Hancock v. Railroad Co.*, 145 U. S. 416, 12 Sup. Ct. 969, 36 L. Ed. 755; 5 Rob. Prac. 409, etc. There is no reason why contracts in violation of the interstate commerce act should not be governed by the general rule, and the courts which have passed upon this question have generally so held. See *Railway Co. v. Bundick* (Ga.) 21 S. E. 995; *Railway Co. v. Harrison* (Ala.) 24 South. 552; *Railway Co. v. Hubbell* (Kan.) 38 Pac. 266; *Railway Co. v. Clements* (Tex. Civ. App.) 49 S. W. 913; *Wight v. U. S.*, 167 U. S. 513, 17 Sup. Ct. 822, 42 L. Ed. 258.

It is insisted that, although the contract in question may have been, at the time it was made, in violation of the interstate commerce act, yet that the railway company and connecting carriers subsequently lowered their rate in the manner provided by the interstate commerce act so as to conform to the contract rate, and carried a portion of the phosphate rock at the lower rate, thus making valid the contract rate; but afterwards restored the rate to what it was when the contract was made, and charged and collected the restored rate on all subsequent shipments, in violation of the plaintiffs' rights. The evidence tends to show that the railway company, after it learned that the plaintiffs had made a contract for the sale of the phosphate rock upon the faith of the rate quoted to them by mistake, did induce the connect-

ing carriers to lower the rate so as to conform to the contract rate, and kept that rate in force from July 22, 1897, until the 16th of the following November, when the rate was advanced or restored to what it was when the alleged contract was made. The fact that the railway company and connecting carriers lowered their rate after the alleged contract was made, and transported a part of the phosphate rock at the lowered rate, did not make the contract sued on valid and binding on the railway company if it was invalid in its inception. The railway company was under no legal obligation to lower the rate, and, if it and the connecting carriers lowered it when they were under no legal obligation to do so, they clearly had the right to advance it to the old rate (if that rate was reasonable, and that is not questioned in this case) in accordance with the provisions of the interstate commerce act. There being no legal duty upon them to lower the rate, they violated no right of the plaintiffs in restoring it.

The plaintiffs' right to recover depends upon the validity of their alleged contract. If that was made in violation of the interstate commerce act, they cannot recover, and the jury ought to have been so instructed.

It will be unnecessary, if not improper, to consider the remaining assignment of error, viz. that the verdict was contrary to the evidence, as the judgment of the court will have to be reversed for the errors above mentioned, and the cause remanded for a new trial, in which the evidence may be different.

The judgment of the court of law and chancery must be reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

(99 Va. 440)

WATKINS v. VENABLE.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

QUO WARRANTO—JURISDICTION—WRIT OF ERROR—CLERKS OF COURT.

1. The supreme court having, under Const. art. 6, § 2, no original jurisdiction in quo warranto cases, and under Code, § 3024, the writ being the first notice the defendant has of the proceeding, without award of which he does not become a party, the writ having been refused, the defendant cannot be made a party to the writ of error, but all the supreme court can do is to review the action of the circuit judge in refusing the writ, and, if of the opinion it ought to have been awarded, reverse his action, and award it.

2. Where relator claims title to an office for the full term, which will not expire for more than four years, and is prompt in asserting his claim, and no inconvenience can result to the public from issuing the writ, quo warranto should be granted.

3. Code, c. 146, regulating the procedure in quo warranto, and defining the cases in which

the writ will lie, does not narrow the common-law proceedings so as to make it applicable only where the incumbent is a mere intruder or usurper, without color or pretense of title.

4. The matter in controversy being title to an office, a matter not merely pecuniary, and the order being final, writ of error will, under Code, §§ 3454, 3455, lie from the supreme court.

5. Under Code, § 93, providing that in every county containing less than 15,000 population there shall be ex officio clerk of the circuit court, and that in every county having a greater population there shall be a separate clerk of the circuit court; that the clerks shall be elected at a certain time, and every six years thereafter, and shall hold their offices for the term of six years; and that the population as at any such general election shall be determined according to the last preceding census,—the rights and duties of a clerk are not affected for the balance of his term by reason of a census being taken during the term, whereby the population is raised above 15,000.

Appeal from circuit court, Prince Edward county.

Quo warranto by Watkins, commonwealth's attorney, on relation of E. J. Whitehead, against Woodson Venable. Writ refused, and petitioner appeals. Refused.

W. H. Mann, for petitioner. Caskie & Coleman, for defendant.

BUCHANAN, J. The commonwealth's attorney for Prince Edward county, at the relation of E. J. Whitehead, applied to the judge of the circuit court of that county for a writ of quo warranto. In his petition he alleged that, according to the census of the United States immediately preceding the election for clerk in May, 1899, that county had a population of less than 15,000 inhabitants, and in accordance with the constitution and laws of the commonwealth W. H. Thaxton was elected clerk of the county court, and as such was ex officio clerk of the circuit court; that in July of that year Thaxton departed this life, and in August following the relator was appointed clerk of the county court, and, having qualified as required by law, became clerk of that court, and also clerk of the circuit court, until the 30th day of June following the next regular election for clerk, which will not occur until May, 1905; that as such clerk he was in charge of, and was faithfully discharging the duties of, the office of clerk of the circuit court; that, notwithstanding these facts, the judge of the circuit court, under a mistaken view of his powers and duties, as the petitioner believed, appointed one Woodson Venable clerk of the circuit court, who thereupon gave the bonds required, and immediately demanded that the relator should turn over to him all the records, books, and papers of the circuit court clerk's office, which the relator did under protest, then and still asserting his right to the office, and prayed for a writ of quo warranto against the said Venable to show by what authority he was holding the office of clerk of the circuit court.

The judge of the circuit court was of opinion, the general census of the United States

for 1900 showing that the county had a population of more than 15,000 inhabitants, that the petition did not make a case for awarding the writ, and refused to issue it. Thereupon the petitioner applied to this court by petition, filing therewith his petition to the judge of the circuit court and his order refusing the writ, in which the petitioner prayed that this court would award the writ, or that the order of the judge of the circuit court refusing it be reversed, and the writ directed to issue.

This court has no original jurisdiction in cases of quo warranto. Const. art. 6, § 2.

Neither has a single judge of this court, as in cases of injunctions refused by the circuit or corporation court or judge, jurisdiction to issue the writ, and send the case to the circuit court to be proceeded with. That power is conferred by section 3438 of the Code, and only authorizes its exercise in cases where an injunction has been refused by the circuit or corporation court or judge having original jurisdiction to grant the injunction prayed for. If this court has jurisdiction, it is as an appellate court.

A writ of error was granted, and the clerk of this court issued process against Mr. Venable, against whom the writ of quo warranto was sought.

By the terms of our statute regulating a quo warranto proceeding the writ is the first notice the defendant has of the proceeding, and he does not become a party to it until the writ has been awarded. Section 3024 of the Code. As the circuit judge refused to issue the writ, Mr. Venable never became a party to the original proceeding, and cannot be made a party here. The process against him must, therefore, be quashed.

If this court has jurisdiction, all that it can do will be to review the action of the circuit judge in refusing the writ, and, if it be of opinion that the writ ought to have been awarded, reverse his action and award the writ.

Neither at common law under the modern practice, nor under the provisions of our statute in a case like this, is an applicant for the writ entitled, as a matter of absolute right, to have it issued, but whether it shall be awarded or not is subject, in a considerable degree, to the exercise of a wise judicial discretion. Smart, Mand. & Quo War. (Am. Ed. 1888) pp. 121, 123; High, Extr. Rem. §§ 605, 628; Code, c. 145, § 3024. In the exercise of this discretion, upon the application of a private relator, says Mr. High, "It is proper for the court to take into consideration the necessity and policy of allowing the proceedings, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed merely to gratify a relator who has no interest in the subject of inquiry. The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determin-

ing whether to grant or refuse the application. And whenever it is apparent that the filing of the application would result in no practical benefit,—as where there is no one claiming the office in opposition to the respondent, and the time will expire before a trial of the right can be had, or where a new election for the office is about to occur, which will afford full redress to the relators,—the court may properly refuse the application for leave to file the information." See, also, *Smart, Mand. & Quo War.* pp. 147-157. None of the circumstances which should control a court in refusing to award the writ existed in this case. The relator himself claimed title to the office for the full term, which would not expire for more than four years. He was prompt in asserting his claim to it, and no inconvenience could have resulted to the public from issuing the writ. As the judge who refused to issue the writ was the same judge who appointed Mr. Venable to the position of clerk of the circuit court, it is apparent that his refusal to issue the writ was not based upon any of the grounds upon which the court, in the exercise of its discretion, may properly refuse to award the same, but because he was of the opinion that under article 7, § 1, of the constitution, and the provisions of sections 93 and 106 of the Code as amended, there was a vacancy in the office of the clerk of the circuit court, which he was authorized to fill.

It was suggested in argument that the provisions of chapter 145 of the Code, regulating the procedure in cases of quo warranto, and defining the cases in which the writ will lie, does not apply to a case where the incumbent in office is an officer executing his duties under some color of right and some pretense of title, either by election or by appointment, but is applicable only to cases in which the incumbent is a mere intruder or usurper, without color or pretense of title.

The object of the provisions of chapter 145 of the Code, introduced into our statute law for the first time by the Code of 1887, was to simplify the procedure in quo warranto cases, and to define the cases in which it might be used. It was not intended, we think, to narrow the use of the writ, and make it less comprehensive in trying the title to an office than the common-law proceeding of quo warranto or of an information in the nature of the writ of quo warranto, in which the title to the office could be tested if the incumbent was not in possession de jure, although he might be a full de facto officer. *Smart, Mand. & Quo War.* side pp. 121-124; *High, Extr. Rem.* § 614. With us, persons very seldom intrude into or usurp a public office without some color or pretense of title either by election or appointment. To construe that the provisions of chapter 145 to try the title to an office only applied to such cases would so narrow the common-law use of the writ as to render the proceeding practically of little value.

In some jurisdictions judgments or orders made in the exercise of a judicial discretion are never subject to review by an appellate court. With us, however, such is not the rule, and in many cases such judgments and orders are reviewable; yet the action of a trial court, in the exercise of its judicial discretion, will not be reversed unless it is plainly erroneous. *Fant v. Miller*, 17 Grat. 187; *Reynolds v. Zink*, 27 Grat. 29; *Miller v. Wills*, 95 Va. 337, 351, 28 S. E. 337; *Hite v. Com.*, 96 Va. 489, 31 S. E. 895, and cases cited. No stronger case could be presented for review by an appellate court than the refusal of a trial court to permit a citizen claiming title to a valuable office to test his title to it in the manner specially provided by law for that purpose.

The order of the judge in this case was final. The matter in controversy was title to an office, a matter not merely pecuniary, and was, therefore, under the provisions of sections 3454 and 3455 of the Code, one to which a writ of error from this court will lie.

That the circuit judge erred in refusing to award the writ we have no doubt. By section 1, art. 7, of the constitution it is provided, among other things, that there may be elected by the qualified voters of the county one county clerk, who shall also be clerk of the circuit court, except that in counties containing 15,000 inhabitants there may be a separate clerk of the circuit court. This provision is not self-executing, and to give it effect legislation was necessary. *Cooley, Const. Law*, p. 100; *Association v. Ashby*, 93 Va. 667, 26 S. E. 893, and cases cited.

In giving effect to this provision of the constitution, the legislature enacted section 93 of the Code. By that section it is provided that: "In every county containing a population of less than fifteen thousand there shall be a clerk of the county court of said county, who shall ex officio be also clerk of the circuit court of said county, and in every county containing a population of fifteen thousand or more there shall be a separate clerk of the circuit court of the said county. The said clerks shall be elected by the qualified voters of the respective counties at the general election in May of the year eighteen hundred and ninety-three and every sixth year thereafter, and shall hold their offices for the term of six years. The population in the counties, as at any such general election, shall be determined according to the last general census preceding such election."

The proper construction of this section as to the question involved in this case is that where, by the last general census preceding the election for clerks, any county contains a less population than 15,000, a clerk of the county court only shall be elected. He is ex officio clerk of the circuit court during his term of office. If before the next general election for clerks another general census has been taken, by which it appears that the population of the county is 15,000 or more,

then at such succeeding general election a separate clerk for the circuit court shall be elected; but until that election the rights and duties of the clerks elected at the preceding general election are unaffected by the new census. If the population of a county is 15,000 or more by the last general census preceding a general election for clerks, two clerks are to be elected,—one for the county court, and the other for the circuit court,—who hold for the term of six years, although during their term of office another general census may be taken, which shows that the county has less than 15,000 population. Whether there shall be one or two clerks elected in a county at a general election is determined by the last general census preceding the election, and, when elected, they hold their offices until the end of the term (six years), without regard to any changes that may take place in the population of the county during their term of office.

We are of opinion that the petition presented to the circuit judge made a clear, prima facie case for the writ, and that it should have been awarded. This court will, therefore, reverse the order of the circuit judge refusing it, and remand the cause, with direction that the writ be awarded in accordance with the provisions of section 3024 of the Code.

Reversed.

(99 Va. 421)

NELSON v. TRIPLETT.

(Supreme Court of Appeals of Virginia. June 20, 1901.)

STALE CLAIM—LACHES.

A lien on land by virtue of a contract recorded is barred by laches, as against one who acquired title to the land without actual or constructive notice thereof, it being asserted more than 17 years after such acquisition of title and possession thereunder, and 25 years after its creation, and no reason being given for failure to assert it earlier.

Appeal from circuit court, Culpeper county.

Petition by Bushrod Triplett, trustee, against L. P. Nelson. From an adverse decree, defendant appeals. Reversed.

G. D. Gray and W. L. Jeffries, for appellant. Grimsley & Miller and Hay, Jeffries & Perry, for appellee.

CARDWELL, J. This cause is the sequel of the case of *Nelson v. Triplett* (decided by this court December 10, 1885), reported in 81 Va. 236. In that case Bushrod Triplett, trustee, and others, brought their action in ejectment in 1881 to recover of L. P. Nelson, appellant here, the tract of land which is the subject of litigation in this suit. They obtained a judgment in the circuit court, but it was reversed and annulled by this court, and judgment given for the defendant, without prejudice to the plaintiffs to resort to a court of chancery if they should be advised to do so.

In November, 1894, Bushrod Triplett, trustee, for his wife, Frances A. Triplett, and their children, filed his petition in the chancery suits of Hopper, guardian, against Bowen, and Triplett, trustee, against Bruce, pending in the circuit court of Culpeper county, and heard together, in which he sought to set up a lien for \$1,425, with interest from January 1, 1874, on the land in controversy in the possession of appellant, who, together with Thomas R. Rixey's administrator, were made parties defendant to the petition.

It appears that on the 18th day of April, 1862, one Paul L. Bowen purchased of Thomas R. Rixey the said tract of land, which contains 242¼ acres, and executed in payment therefor five bonds, of \$1,000 each, payable in one, two, three, four, and five years, respectively, from their date, and five other bonds, for different amounts, for the interest thereon. At the same time that the property was conveyed to Bowen he reconveyed it to Henry Shackelford, in trust to secure the payment of all of said bonds. Bowen in his lifetime having paid but a small portion of the purchase money for the land, after his death the suit of Hopper, guardian, against Bowen was brought in the circuit court of Culpeper county against Bowen's representatives to enforce the payment of the unpaid purchase money due to Thomas R. Rixey, with the view of satisfying the balance of the debt due to Rixey, and thereby save to Bowen's heirs another small parcel of land as a home for his family.

A number of ineffectual efforts were made under the decrees of the court in that case to sell the land, and finally, on October 22, 1867, Thomas R. Rixey entered into an agreement with Bushrod Triplett, trustee for his wife and children, to sell Triplett, trustee, etc., the land at the price of \$4,147 in full of Rixey's lien thereon due from Bowen's estate, and this sale, upon being reported to the court in Hopper, guardian, against Bowen, was confirmed, and a commissioner directed to convey the land to Rixey upon his delivering up to the commissioner the bonds of Bowen secured on the land, to be filed with the papers in the cause. These bonds were filed with the papers in the cause, but it does not appear that a deed reconveying the land to Rixey was ever made.

By another contract entered into between Thomas R. Rixey and Triplett, trustee, etc., June 23, 1869, it was agreed that a certain trust fund held by Triplett, trustee, etc., under the control of the circuit court of Rapahannock county, in the suit of Triplett and wife against Bruce, was to be used in part payment of the purchase money for the land Rixey agreed to sell Triplett, trustee, etc., as per the contract of October 22, 1867; Rixey agreeing that if Triplett failed to pay the residue of the purchase money, or failed to get a title to the land, the amount of the purchase money paid out of the trust fund

under the control of the court in the suit of Triplett and wife against Bruce should constitute a first lien on the land for the benefit of Triplett's wife and his children, according to the terms upon which said trust fund was held under the control of the circuit court of Rappahannock county. A decree was entered in the action of Triplett and wife against Bruce authorizing the application of the trust fund under the control of the court to be used in payment of the purchase money for the Culpeper land, but it does not appear that Triplett, trustee, who, by the terms of his contract with Rixey, was to pay off the lien held by Rixey for unpaid purchase money due on the land before the lien was to be released, ever paid the amount due or more than a small portion of it; on the contrary, it is clear that he did not pay more than \$893.50.

It is this lien stipulated for in the contract of June 28, 1869, that Triplett, trustee, seeks to enforce in this suit, and it is from a decree of the circuit court of Culpeper in his favor, enforcing a lien on the land for the sum of \$893.14, with interest thereon from January 1, 1874, that Nelson appeals to this court.

The question presented is not whether appellant holds a good and valid title to the land in question, but whether, under all the circumstances of the case, a court of equity should afford appellee the relief he seeks.

In addition to the facts already stated, it appears from the records in this case and that of *Nelson v. Triplett* that Thomas R. Rixey on the 16th of September, 1872, conveyed this land to Thomas P. Rixey to secure the payment of \$500 to Mary F. Cole and her heirs, and that under that deed the land was sold to Bushrod Triplett, trustee, and others, for the sum of \$2,018, and deeded to the purchasers by F. M. Latham and J. L. Jeffries, subtrustees, on April 29, 1881, but not one dollar of the purchase money was paid, except by allowing the purchasers to retain it on account of their supposed prior liens upon the land, due from Thomas R. Rixey; Triplett, trustee, executing his obligation to the subtrustees, Latham and Jeffries, that "if at any time it should be decided by the proper legal authorities that Latham and Jeffries, trustees, * * * have improperly paid to us, or either of us, the sums aforesaid on our debts, we agree that the sale and the deed to us shall be null and void," etc.

These so-called purchasers were never in possession of the land, and the debt due from Paul L. Bowen to Thomas R. Rixey for the purchase money had not then, and has not since, been paid, and the legal title has never been reconveyed to Rixey from Bowen's heirs. In the meantime, Rixey, on the 21st day of January, 1874, by deed duly recorded, conveyed this same land, or all the right, title, or interest he had therein, and assigned the bonds of Bowen held by him, and secur-

ed by the deed to Shackelford, trustee, to James W. Green, in trust to secure L. P. Nelson (appellant here) a debt of \$1,237.74, with interest at 8 per cent., and to indemnify Nelson against loss as surety for Rixey on a bond of \$232 held by Elizabeth O'Bannon. On June 16, 1877, appellant obtained from the clerk of the county court of Culpeper a deed for this land for taxes assessed thereon in the name of Paul L. Bowen, and he took immediate possession of it, and has held the same openly, continuously, and adversely ever since, receiving the rents and profits therefrom, and paying the taxes thereon.

The contract by force of which appellee asserts a lien upon the land in question was never recorded in the county of Culpeper, and it is not pretended that appellant had any sort of notice of it until long after the conveyance of the land and the assignment of the Bowen bonds by Rixey to Green, trustee, to secure appellant, and after the deed from the clerk to him, were executed and recorded.

So that appellant's rights in this land and his possession thereof were acquired without notice, either actual or constructive, of any lien thereon in favor of appellee, and no effort has been made by the latter to enforce his alleged lien until the filing of his petition, in November, 1894, over 17 years after appellant had acquired possession, more than 10 years after the decision of this court in the ejectment suit, and 25 years after the alleged lien was created. Falling in his claim of title to the land, as to which he never had possession, or the right of possession, appellee falls back upon a lien by contract of over 25 years' standing, never recorded in the county in which the land is situated on which he claims the lien, and never brought to the knowledge of appellant until long after he had acquired title, by assignment, of the Bowen bonds secured on the land, and the possession of it under his deed made in 1877.

Appellee's unsuccessful action of ejectment led to no change in the possession of the land, and did not stop the running of the statute of limitations. *Workman v. Guthrie*, 29 Pa. 495, 72 Am. Dec. 654, and authorities cited. Leaving out of view the statute of limitations in such cases, a court of equity will refuse its aid to enforce stale demands, when the party asserting such a demand has slept upon his rights and acquiesced for an unreasonable length of time. While no fixed rule has been or can be laid down to govern in determining what lapse of time should be deemed sufficient to bar a recovery, as this must, of necessity, depend upon the particular circumstances of each case, it is well settled that when, from delay, any conclusion that the court may arrive at must at best be conjectural, and the original transactions have become so obscure by lapse of time, loss of evidence, and death of parties as to render it difficult, if not im-

possible, to do justice, the plaintiff will by his laches be precluded from relief, and it is not even necessary that the court should be satisfied that the original claim was unjust or has been satisfied.

If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim. *Tazewell's Ex'r v. Saunders' Ex'r*, 13 Grat. 854; *Harrison v. Gibson*, 23 Grat. 223; *Hatcher v. Hall*, 77 Va. 573; *Terry v. Fontaine's Adm'r*, 83 Va. 451, 2 S. E. 743; *Houck's Adm'r v. Dunham*, 92 Va. 215, 23 S. E. 238; *Covington v. Griffin's Adm'r*, 98 Va. 127, 34 S. E. 974; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504.

These equitable and salutary principles are peculiarly applicable to this case. Appellee does not pretend to set forth what were the impediments, if any, to an earlier prosecution of the claim he asserts. Thomas R. Rixey died in April, 1881, 13 years before appellee's petition was filed, and others who participated in the various beclouded and complicated transactions concerning the land in question have passed away, and, if it be not clear that appellee wholly abandoned his contract with Rixey soon after it was made, his subsequent course with reference to it and the land as to which he asserts the lien is wholly inconsistent with his having a right to enforce the lien. At all events, the facts and circumstances surrounding the case are such as to render it difficult, if not impossible, to do justice between the parties.

We are of opinion, therefore, that the decree appealed from is erroneous, and should be reversed and annulled, and this court will enter such decree as the circuit court should have entered, dismissing appellee's petition, with costs to appellant. Reversed.

(99 Va. 423)

DOYLE'S ADM'R et al. v. BEASLEY et al.
(Supreme Court of Appeals of Virginia. June 20, 1901.)

PAYMENT—PRESUMPTION.

1. Bonds given for payment of land, and secured thereon, will be presumed to have been paid, claim thereon not having been made until 22 years after they became due, and 2 years after death of obligor, the sale having been made for the express purpose of obtaining money to pay a debt on other lands, which was subsequently paid, and it being alleged in the petition for the sale and otherwise appearing that no other means were possessed for paying the debt.

2. Equitable relief will not be granted where any conclusion in favor thereof must be conjectural.

Appeal from circuit court, Culpeper county.

Suit by Beasley and others against Doyle's administrator and others. Decree for plaintiffs, and defendants appeal. Reversed.

Barbour & Rixey, for appellants. Grimsley & Miller and G. D. Gray, for appellees.

CARDWELL, J. Thomas Beasley died in the year 1853 possessed of several hundred acres of land situated in Culpeper county, and leaving a widow and seven children, among others Lemuel Beasley and Thomas W. Beasley. By his will, probated in March, 1853, Thomas Beasley left all of his property to his wife for life, with remainder to all of his children, but by a codicil thereto he provided: "I desire it to be understood that that portion of my estate which I have given in the will above to my son Thomas W. Beasley I now give to his wife, Anne Beasley, and children. Should he die without issue, I then desire his portion to be equally divided between the brothers and sisters of said Thomas W. Beasley who may be living at the time."

On the 1st day of September, 1859, Anne E. Beasley, the wife of Thomas W. Beasley, contracted with one W. M. Simms to purchase about six acres of land within a short distance of the Thomas Beasley estate, and for the purchase price executed to him her bond for \$250, with interest, payable April 1, 1860, with Lemuel Beasley as her surety. This bond was assigned by Simms to F. M. Latham, September 5, 1859, who in turn assigned it to John M. Herndon, November 3, 1860, and Anne E. Beasley and her husband took possession of the property, built a small house thereon, and continued to live there until the death of her husband, Thomas W. Beasley, in 1897, without ever having received a deed for the land.

At September rules, 1869, for the circuit court of Culpeper county, Lemuel Beasley filed his bill against the other devisees of Thomas Beasley for the sale or partition of the real estate left by Thomas Beasley. Commissioners appointed by the court to partition the land filed their report June 15, 1871, which was confirmed by decree at the November term, 1871, and in this partition 31½ acres of land was allotted to Thomas W. Beasley, which was the portion to which Anne E. Beasley, his wife, was in fact entitled to under the will of Thomas Beasley, and 26½ acres was allotted to Lemuel Beasley, but each of these lots was charged with \$37.50 for owelty of partition in favor of one Hill, who had purchased the interest of two of the devisees of Thomas Beasley.

In the meantime, at the October rules, 1870, of the county court of Culpeper, W. M. Simms, F. M. Latham, and John M. Herndon filed their bill against Thomas W. Beasley, Anne E. Beasley, his wife, and Lemuel Beasley, the object of which was to sell the six-acre lot of land purchased by Mrs. Beasley from Simms to pay off the balance of the purchase money due therefor to Herndon, and this bill was taken for confessed, and on September 19, 1871, a decree was entered appointing two commissioners, who were the plaintiffs' counsel, to sell the lot unless within 60 days the amount of the debt, with interest due to Herndon, should be paid. This

sale was never made, but on February 25, 1898, after the death of Anne E. Beasley, her children and William Simms conveyed the lot to one J. T. Jackson by deed duly recorded, which recited the sale by Simms in 1859 of the lot to Mrs. Beasley for \$250, which was not paid in cash, and therefore no deed executed at that time; that all the purchase money had been paid long since; that Simms was willing to convey the lot, etc.; and that, as Mrs. Beasley had died after contracting to sell the lot to Jackson, her children wished to carry out the mother's contract, and convey the lot to Jackson, etc.

At the September rules, 1872, Anne E. Beasley, by Thomas Beasley as next friend, filed her bill against her infant children, alleging the provisions of the will of Thomas Beasley, deceased; the partition of the land of which he died seised; the allotment of the 31½ acres, part thereof, to herself and children; and asking that this land be sold under the decree of the court to enable her to pay the purchase money for the six acres of land purchased by her of W. M. Simms, upon which she resided, so that it might be retained by her as a home for herself and children. The bill sets out that the 31½ acres of land had been devastated as the result of the Civil War; that all buildings, fences, and timbers thereon had been swept away; and that she (the plaintiff) was without means to improve the land; that she and her children were wholly destitute of means, and could with difficulty live; and that unless the 31½ acres of land was sold, and the proceeds applied to the satisfaction of the debt due to Herndon as assignee of Simms for the six-acre lot, the lot of six acres would be sold to satisfy the debt, and she and her children would thereby be deprived of their home, which was all they possessed, etc.

The infant children of Anne E. Beasley over the age of 14 years (two in number) answered her bill, admitting the allegations thereof, and uniting in the prayer for the sale of the 31½ acres of land, and the application of the proceeds to the payment of the purchase money due on the six-acre lot. The other infants, by their guardian ad litem, filed a formal answer. Depositions were taken in support of the bill, which show that Anne E. Beasley was without means; that her husband was a carpenter, in delicate health, dependent on his daily labor to support his family; and that a sale of the 31½ acres of land, and the application of the proceeds therefrom to the payment of the debt due on the six-acre lot, upon which the family resided, would be to the interest and advantage of all parties interested. On November 14, 1872, a decree was entered directing a sale of land, and appointing Lunsford L. Lewis a commissioner to make the sale, and on June 22, 1874, after due advertisement, Lewis, commissioner, sold the land at public auction to Patrick Doyle at \$15 per acre, who complied with the terms of sale by

paying \$40 cash, and executing his two bonds for \$260 each, at one and two years, with Simon Doyle as surety; the memorandum of sale and receipt for cash payment being signed, "L. L. Lewis, Com'r, per Hoxey," and Simon Doyle signing the bonds with his mark.

On April 3, 1875, Lewis, commissioner, filed a report of this sale to the court, and with it the purchase-money bonds given by Patrick Doyle, the report showing the disbursement of \$9 of the cash payment, and a decree was entered confirming the sale, and appointing Lewis to collect the purchase-money bonds as they became due, and requiring him to execute a proper receiver's bond, and to report his proceedings to the next term of the court, but no authority was given him to make a deed for the land to Doyle. No further proceedings were had in this suit until its dismissal, at the June term, 1885, under the seven-year rule, except that on June 5, 1878, Commissioner Lewis executed his bond as receiver in the cause.

After the decree of September 19, 1871, in the suit of Simms against Beasley, directing a sale by commissioners of the six-acre lot upon which Mrs. Beasley and her family resided to satisfy the debt due thereon to Herndon, no further proceedings were had therein until June 7, 1879, when it was also dismissed under the seven-year rule.

On December 15, 1878, the treasurer of Oulpeper county sold for delinquent taxes for the year 1872 the entire Thomas Beasley tract of land, and one O. A. Saunders became the purchaser thereof for \$33, which sale was regularly reported to, and confirmed by, the court, and ordered to be certified to the auditor.

On December 30, 1876, the clerk of the county court of Oulpeper made a deed to Saunders, reciting the said sale, etc., and that E. B. Hill and Henry Hill had redeemed their share of the land, leaving 149 acres unredeemed, and this 149 acres he conveyed to Saunders, pursuant to the order of the county court directing the same to be made in the mode required by law, and this deed was recorded January 23, 1880.

By deed dated July 27, 1878, Saunders and his wife made a deed to Patrick Doyle reciting the tax sale mentioned above, and the deed to Saunders from Payne, clerk; that Patrick Doyle had become the purchaser of the shares of Thomas Beasley and Lemuel Beasley in the land, and had, by the consent and agreement of Saunders, redeemed said two shares by paying to him the sum of \$22.39, the proper proportion of the taxes, etc., chargeable to said lot, and in consideration thereof conveyed these lots or parcels of land to Patrick Doyle. This deed was also admitted to record on January 23, 1880. Patrick Doyle died in 1896, Thomas W. Beasley in 1897, and Anne E. Beasley in 1898. There were no children born to Anne E. Beasley until after the death of Thomas

Beasley, and the probate of his will, the oldest of the children having been born in 1854.

In January, 1898, Anne E. Beasley and her children filed a memorandum in the clerk's office of the circuit court of Culpeper county for a chancery suit against Simon Doyle, administrator of Patrick Doyle, deceased, and John Doyle, the heir at law of Patrick Doyle, deceased, and sued out in the clerk's office an order of publication against John Doyle, who was a nonresident, in which order of publication it is stated that the object of the suit was to subject the tract of land in Culpeper county, containing 31½ acres, purchased by Patrick Doyle from L. L. Lewis, commissioner, in the chancery suit of Beasley against Beasley, to the payment of the balance due on said purchase, for which there was a lien on the land by reason of the retention of the legal title thereto, but before the bill was filed Anne E. Beasley died.

At the February rules, 1898, the bill was filed in the name of the surviving co-plaintiffs of Anne E. Beasley, and A. W. Pulliam, administrator of Anne E. Beasley, deceased, was made a co-defendant thereto, along with Patrick Doyle's administrator and John Doyle. The bill sets out the filing of the bill by Anne E. Beasley in 1872 in the suit of Beasley against Beasley, and the allegations therein made as hereinbefore stated, the death of Patrick Doyle, and avers that the purchase money for the 31½ acres of land had not been paid with the exception of the \$40, the cash payment made to Lewis, commissioner, at the time the sale was made, and prays a sale of the land to pay the balance of the purchase money. The bonds of Patrick Doyle were filed as exhibits with the bill, but just how, from the record in the suit of Beasley against Beasley, the plaintiffs obtained them, does not appear.

Simon Doyle, administrator of Patrick Doyle, deceased, and John Doyle demurred to and answered the bill, and in their answer deny that the purchase-money bonds of Patrick Doyle had not been paid, and claimed the benefit of laches and presumption of payment, and also relied, as a defense, upon the title to the land in question acquired by Patrick Doyle from C. A. Saunders, who had obtained a tax deed.

At the hearing of the cause the demurrer was not pressed, and upon the bill and answer and depositions taken for both plaintiffs and defendants the circuit court decreed that the purchase-money bonds given by Patrick Doyle to Lewis, commissioner, for the land in question, were still unpaid, and constituted an existing lien on the land in favor of the plaintiffs; that the plaintiffs had not lost their right to enforce the lien either by the statute of limitations or laches; and directed the land to be sold by commissioners appointed to satisfy the lien upon it. It is from this decree that the case is before us.

There is but a single question presented that requires our consideration, and that is whether or not the presumption of payment of the debt asserted, arising out of the lapse of time and the laches of the parties, has been overcome by the proof adduced by appellees.

Twenty-two years elapsed after the debt asserted became due and payable, and Patrick Doyle, the alleged debtor, had been dead two years or more, before any steps were taken to enforce the lien upon the land in question to satisfy the debt. That there has been the grossest laches on the part of appellees and their mother in asserting the alleged lien there can be no doubt. Mrs. Beasley and her family lived within one mile of Patrick Doyle from 1874, when he bought the land from Lewis, commissioner, till his death, in 1896. Neither she nor her family were ignorant of the sale of the land to Doyle, and that he owed originally a large part of the purchase money. She had caused the land to be sold to Doyle with the view of applying the proceeds to the payment of the debt due on her home, for which she was being pressed when she instituted her suit. From some source she obtained the means with which to pay the debt on her home, as the suit to enforce it was abandoned as soon as the sale of the 31½ acres of land to Patrick Doyle was consummated. That Mrs. Beasley had no other means with which to pay the debt on her home, except the proceeds of sale of the 31½ acres to Patrick Doyle, she declared in her bill, as we have seen, and in this she was corroborated by her children over 14 years of age in their answer to the bill.

To overcome the presumption that this debt has been paid, appellees rely on the deposition of Judge L. L. Lewis, who, as commissioner, made the sale to Patrick Doyle, and of Mrs. Yowell, one of the appellees, and a daughter of Anne E. Beasley, deceased.

Judge Lewis was made United States district attorney about the time the sale to Patrick Doyle was made in 1874, and practically became a resident of the city of Richmond. He was a member of this court from 1882 to 1895, and has been, as he states, but very little in the county of Culpeper since 1874. When he testified in this case in June, 1898, upon being asked if he had any recollection, one way or the other, as to the payment of these bonds (meaning the Patrick Doyle bonds), Judge Lewis frankly answered: "No; I have no recollection of ever having received a penny, as I have said, on account of them. The transactions are now so old that they have faded from my recollection. I do recollect the fact that there was a suit of the kind, and that I was appointed commissioner to collect the bonds. About that time, as I have said, I was practically living here in Richmond, and the whole thing has faded from my recollection."

As has been stated, the transaction in which Doyle gave the bonds was conducted by a Mr. Hoxey, a near relation of Judge Lewis, who attended to some business matters for him when he was away from the county, and who resided in Culpeper long after this transaction was had. Col. Cochran, the law partner of Judge Lewis when the suit of Beasley against Beasley was brought by them as counsel for Anne E. Beasley in 1872, continued to live and practice his profession in Culpeper county after Judge Lewis left, and until 1883, when he died. What transactions may have been had by Mrs. Beasley directly with Patrick Doyle, who lived but a mile from her, or through Col. Cochran or Mr. Hoxey after Judge Lewis left the county and ceased to attend to any business there, Judge Lewis could not know and does not pretend to say. He simply says that he knows nothing of the bonds in question having been paid, and no more.

Mrs. Yowell throws no light on the subject, but makes a number of statements as to declarations made by her mother to her, which, if made, are declarations in the interest of the declarant, and are not competent evidence, and they are wholly irreconcilable with the conduct of the parties with reference to this alleged indebtedness, in view of the facts as to the financial circumstances of Mrs. Beasley and her family through all the years that this indebtedness to her is alleged to have remained unpaid and not called for. That they were poor, and found it difficult to obtain a support, is not only stated in the bill filed by Mrs. Beasley, but is nowhere denied in this record, and no sort of explanation of the delay in asserting the claim they now make of over 22 years, and until after the death of Patrick Doyle, is attempted.

Mrs. Yowell lived with her mother till 1890, when she was 25 years of age, and went to reside in another county, and does not claim to have been in Culpeper more than once or twice a year on a visit since. She attempts to show that Mrs. Beasley paid Simms for the 6-acre lot bought of him with money she borrowed from Lemuel Beasley, and says that Lemuel Beasley got the money to lend her mother from the sale of his 26½ acres of land to Patrick Doyle; that she is just as sure of this as she is of everything else that she had testified to. Now, it appears that the money for the 6-acre lot was paid to Herndon, Simms' assignee, and not to Simms; that Lemuel Beasley sold his 26½ acres of land to Simon Doyle, and not Patrick Doyle, in April, 1872, for \$300 cash, \$100 in one year, and \$100 in two years; yet Mrs. Beasley filed her bill to sell the 31½-acre tract five months after, alleging that the debt on the 6-acre lot was then unpaid, and that she had no other source from which to derive the means with which to pay it except from a sale of the 31½-acre tract, and wit-

ness (Mrs. Yowell) filed her answer to the bill, under oath, stating that the allegations of the bill were true. The witness was wholly unable to say how much money her mother borrowed of Lemuel Beasley, and does not claim that he had any other source from which to get the money except from a sale of his 26½ acres of land. On the contrary, she admits that Lemuel Beasley was not only inclined to squander his money, but was at times an inmate of the poor house in Culpeper county. The witness carefully concealed all she knew about the transaction and the payment for the 6-acre lot by her mother with money borrowed of Lemuel Beasley, telling no one about it except her husband, until after Patrick Doyle was dead, her mother dead, and this suit had been pending for some time.

Patrick Doyle's bonds became due in 1876. It is nowhere claimed that he was unable to pay them, and they could have been collected, if not voluntarily paid, by enforcing the lien on the land reserved to secure their payment; yet it was 22 years after the bonds became due, and 26 years after the institution of the suit by Mrs. Beasley for the avowed purpose of selling the land for which the bonds were given, to obtain the means with which to prevent her home from being sold, before this suit was bought. The oldest of Mrs. Beasley's children was born in 1854, as we have seen, and the youngest became of age some years before Patrick Doyle died. Eighteen years before Mrs. Beasley died Patrick Doyle obtained the deed from Saunders for the 31½ acres of land, and recorded it. Still no steps were taken to subject this land to the payment of Patrick Doyle's bonds to Lewis, commissioner, until January, 1898, and it is neither averred nor proven that any of the Beasleys ever demanded of Doyle payment of the bonds, although, as fully appears in the record, they found it difficult to obtain a support.

Under the circumstances surrounding these people, it is inconceivable that they would have remained silent through all these years without taking steps to collect the bonds now sued on if they had not been paid. The only suggestion of an excuse for the long delay in bringing this suit is that during a part of the time after these bonds became due and payable some of the appellees were infants. Whether appellees, before the death of their mother, had an interest in the debt sought to be collected in this suit is immaterial. The question here is, has the alleged indebtedness been paid?

The presumption arising out of the lapse of time, the conduct of the parties interested, and the circumstances surrounding them, that the debt has been long since paid, is irresistible,—not paid to Lewis, commissioner, or as receiver, but directly or indirectly by Patrick Doyle, with the knowledge and approval of Mrs. Beasley, applying the money to the payment of the debt due to Herndon

secured on the six-acre lot, and the payment of the balance to Mrs. Beasley. J. T. Jackson, who is not impeached or contradicted as a witness, and who purchased the six-acre lot from Mrs. Beasley, states, substantially, that in his negotiations to purchase the six-acre lot Thomas Beasley told him, in the presence of Mrs. Beasley, who sanctioned the statement, that, while they had no deed for the lot, it had been paid for; that it had been paid for out of the proceeds from the sale of the 31½ acres of land, and that after paying for it there was \$40 coming to them, which they had gotten.

The case for appellees, at best, is clearly one in which any conclusion that a court of equity might arrive at in their favor would be purely conjectural; and for this, if for no other reason, the relief they seek should be denied. See *Nelson v. Triplett* (just decided by this court) 39 S. E. 150, and the authorities there cited.

We are of opinion that the decree appealed from is erroneous, and should be reversed, and this court will enter a decree dismissing appellees' bill.

Reversed.

KEITH, P., absent.

(99 Va. 528)

LAUREL CREEK COAL & COKE CO. v. BROWNING et al.

(Supreme Court of Appeals of Virginia. June 27, 1901.)

LANDLORD AND TENANT—LEASE—CONDITIONS—FORFEITURE—VENDEE OF LESSOR—ESTOPPEL—CANCELLATION.

1. Where a lease of lands to a coal company was conditioned that, unless a railroad company commenced condemnation of land for a line to the leased land by a certain date, the lease should be void, at the lessor's option, the owner of adjoining land, which was necessary to be crossed, who refused to sell a right of way to the company, and afterwards purchased the interest of some of the lessors, is not estopped from insisting on a forfeiture of the lease for failure to comply with the condition.

2. Land belonging to several persons was leased by their trustee to a coal company for mining purposes, conditioned that, if a railroad had not commenced condemnation of land for a line to the leased land by a certain time, the lease should be void, at the lessor's option. Such condition was not complied with, nor was the lessee able to comply, and assigned the lease to one incapable of complying with its stipulation. *Held*, that the lessors were entitled to cancel the lease.

Appeal from circuit court, Tazewell county.

Partition by James S. Browning and others against the Laurel Creek Coal & Coke Company. From a decree in favor of plaintiffs, defendant appeals. Affirmed.

A. J. & S. D. May, Douglas H. Smith, and Joseph S. Clark, for appellant. Henry & Graham, for appellees.

WHITTLE, J. The property involved in this litigation consists of three adjoining tracts of land situated on Laurel creek, Tazewell county, Va., embracing in the aggregate a surface area of 363½ acres. This land was, on June 17, 1895, held in fee simple as follows:

Hattie E. Stras and A. C. Spotts were the owners of 150 acres, and they, jointly with H. C. Alderson and T. H. Wickham, were the owners of 166½ acres, and W. L. Read was the owner of a moiety of 90 acres, the residue thereof.

The chief value of these lands consists of the coal deposits which they contain, being underlain with what is known as the "Pocahontas Seam of Coal."

On the date referred to, the constituent owners, with the view of having the coal mined and operated, determined to combine their interests, and for that purpose united in a deed by which they conveyed to B. W. Stras, in trust, their respective holdings in severalty, and took in lieu thereof certain specified undivided interests in the entire tract, the estimated coal-bearing area of which was fixed at 343 acres. Without giving in detail its stipulations, the deed provides that the trustee shall lease the entire property for coal-mining and coal-coking purposes, collect the royalties, and distribute the net proceeds among the owners in proportion to their respective interests.

On the same day, in accordance with the provisions of the trust deed, and in furtherance of the scheme adopted, the trustee leased the entire property to the Laurel Creek Coal & Coke Company, a private corporation, for a term of 30 years, which lease was ratified, approved, and confirmed by all the owners affixing their signatures and seals thereto, and duly acknowledging the same.

By the terms of the lease, the Laurel Creek Coal & Coke Company agreed to pay certain royalties on the coal which it should mine from the property, and further stipulated as follows:

"The carrying out of this contract by the lessee is conditioned upon its being able to secure the condemnation of right of way for a railroad by the Norfolk and Western Railroad Company, or by some other company possessing the power to condemn for railroad purposes; but the said lessee agrees and binds itself that the said condemnation proceedings are to be begun within sixty days from the date of this contract by the Norfolk and Western Railroad Company, or other company possessed of the power to condemn for railroad purposes, and that such condemnation proceedings shall be prosecuted with due diligence to completion, and the said lessee, or its assigns, to have until the first day of September, 1896, to complete their other preparations for mining; provided, the said condemnation proceedings be instituted and diligently prose-

cuted as above mentioned; and the mining of the coal is to begin not later than September 1, 1896; but if the lessee fails to procure said Norfolk and Western Railroad Company, or other company with power to condemn, as above mentioned, to begin condemnation proceedings within the aforesaid sixty days, or, such condemnation proceedings having been begun by such company, it fails to prosecute the same with due diligence, or said lessee fails to begin shipping coal by the first day of September, 1896, as above provided, then, in the event of any or either of these conditions being broken, this contract is to be void at the option of the lessor."

Between the western terminus of the Potomac Branch of the New River Division of the Norfolk & Western Railroad Company and the leased premises is located a tract of land containing about 100 acres, owned by the appellee Ollie H. Browning, wife of James S. Browning. This tract is in the form of a parallelogram, about $1\frac{1}{2}$ miles in length, and divided about equally by Laurel creek, which flows through it from west to east. This land is also underlain by coal, which appellees have been mining and operating for several years.

The construction of a railroad to the leased premises by the lessee having a time limit attached, and being absolutely essential as a means of transportation for its coal output, and the only practicable route being through the lands of the Brownings, the Laurel Creek Coal & Coke Company endeavored to secure a right of way by contract with them. Failing in this, it opened negotiations with the receivers of the Norfolk & Western Railroad Company, who, at the November term, 1895, procured a decree from the circuit court of the United States for the Eastern district of Virginia, authorizing them to extend their branch line to the leased premises, provided the Laurel Creek Coal & Coke Company should give such indemnity as was satisfactory to the receivers for the payment by the lessee company, without any obligation or agreement on the part of the receivers, to reimburse the railroad company all expenses, damages, and liability that might be incurred for securing for said extension a right of way and constructing a railroad thereon.

It is admitted by C. E. F. Burnley, president of the Laurel Creek Coal & Coke Company, that his company is unable to comply with the terms imposed by the receivers through their solicitor, Joseph I. Doran, under the provisions of said decree, and that all negotiations on the subject ceased and determined in April, 1896; that no effort was ever made by the Norfolk & Western Railroad Company, or any other public corporation, to condemn a right of way through the lands of the Brownings, in the county court of Tazewell county, the only tribunal having original jurisdiction in the premises;

and that no further effort had been made by the Laurel Creek Coal & Coke Company since April, 1896, to comply with this indispensable provision of the lease, and that none other would be made by it.

On August 7, 1895, James S. Browning and wife and the trustees of the Southwest Improvement Company purchased the interest of Hattie E. Stras and A. C. Spotts in the land in controversy, and on April 29, 1898, James S. Browning purchased the interest of H. C. Alderson therein. The interest of T. H. Wickham had been sold in a suit to enforce a vendor's lien thereon, and purchased by Edward W. Clark, Henderson M. Bell, and Joseph I. Doran, trustees of the Flat Top Coal Land Association. In September, 1895, B. W. Stras, trustee in the original deed of June 17, 1895, and lessor in the contract of lease of the same date, tendered his resignation to the county court of Tazewell county, which was accepted, and no effort has been since made to secure the appointment of another trustee in his stead.

This was the status of affairs in July, 1898, when Browning and wife filed a bill in the circuit court of Tazewell county against all parties interested in the property in controversy, the prayer of their bill being that the deed of trust and contract of lease be declared null and void, and that they be relegated to the title and interests originally held by their vendors, and that a proper partition be made of the land.

W. L. Read, the only original owner, who had retained his interest in the land, answered the bill, and united in its prayer.

The Laurel Creek Coal & Coke Company and T. H. Wickham filed separate demurrers and answers. The former insisted that it had in good faith endeavored to comply with the terms and conditions of the lease, and to that end had expended \$18,000 in improving the property and in expenses of litigation. It averred that it had been obstructed by James S. Browning, who succeeded in defeating the efforts of lessee to secure a right of way and to construct a railroad as required by the lease.

The circuit court was of opinion that the constituent owners and their vendees should be remitted and restored to their respective rights and ownership in the lands as they stood before the making of the trust deed; that the lease should not stand in the way of a partition, to which it decided the parties were entitled. It therefore declared the lease at an end, and void, made proper provision for ascertaining the value of the improvements put upon the property, and decreed partition of the land, and it is from this decree that an appeal was allowed by one of the judges of this court.

It has been earnestly argued that the deed of trust of June 17, 1895, is void, as violating the rule against perpetuities, and imposing an unlawful restraint on alienation, and that, the deed being void, the lease must also fall

but, in the view which this court takes of the cause, it is unnecessary to consider either of these contentions.

It is apparent from the testimony—indeed, it seems to be conceded—that the Laurel Creek Coal & Coke Company has wholly failed to comply with the vital stipulation of the lease in relation to the construction of a railroad to its property. It attributes this failure to the alleged unwarranted opposition of James S. Browning, and insists that he should be estopped from taking advantage of it. The conflict between appellant and the Brownings has, throughout this litigation, been acrimonious in the extreme. Without undertaking to pass upon the relative merits of that controversy, it is sufficient to remark that there are no such relations, contractual or other, existing between them, as to impose upon the Brownings any legal obligation to allow appellant a right of way over their lands. In that respect they stood at arms' length, and no lawful resistance by the Brownings, made in good faith, to prevent an injury to their lands, outside the leased premises, in condemning it for railroad purposes, can operate an estoppel upon their right to demand partition of their interests in the lands covered by the lease.

The fact that the estimated cost of condemnation and construction of a railroad for $1\frac{1}{2}$ miles through their land is \$43,000, would seem to indicate that the contention of the Brownings that the road would inflict serious injury upon their property, is not without merit.

The trial court was confronted with these conditions: The trustee and lessor, B. W. Stras, had resigned his trust, and no effort had been made to appoint a new trustee. Practically all the beneficial owners of the leased premises desired a cancellation of the lease, and partition of the land. The lessee had wholly failed to comply with the requirement in relation to the construction of a railroad, and admitted its inability to comply, which failure, by express condition of the contract, rendered it void at the option of the lessor, and, confessedly, defeated the sole object which the parties had in contemplation in making the lease and rendered that object impossible of performance. The lessee had abandoned and relinquished all its rights under the contract to one George L. Easterbrooke, Jr., a clerk residing in the city of Philadelphia, who was never on the property, and is not shown to have paid any consideration for the assignment of the lease, or to possess either the capacity or means to comply with its stipulations. Virtually, there was neither lessor nor lessee. Upon this state of facts, it is not perceived how the circuit court could have reached a conclusion other than it did.

The general doctrine is admitted that equity does not favor penalties and forfeitures, and will not, ordinarily, lend its active aid to enforce them, but will leave the parties to

pursue their legal remedies. Nevertheless, in this state the rule is well established that, when a court of equity acquires jurisdiction of a cause for any purpose, it will retain it, and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplish that end. Especially is this true of suits for partition, where, by express provision of the statute, a court of equity "may take cognizance of all questions of law affecting the legal title that may arise in any proceeding." Code Va. c. 114, § 2562; *Pillow v. Improvement Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

Where a contract has failed of its purpose by the default of one of the parties, occasioned by either his inability or unwillingness to comply with its provisions, a court of equity, having acquired jurisdiction of the parties and subject-matter, will not hesitate, at the instance and for the relief of a party not in default, to cancel the contract if it stands as a barrier in the way of doing complete justice in the cause.

In the case of *Cowan v. Iron Co.*, 83 Va. 547, 3 S. E. 120, which involved a mining lease, the court said: "Although the lessee had mined some of the minerals from Cowan's property, and paid him a royalty thereon, it appearing that the lessee had ceased to mine for an unreasonable time, the lease was set aside and annulled." And in the later case of *Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303, also a case of a mining lease, the court held "that, if the lessee fails to discharge his duty, a court of equity will set aside and annul the agreement," and such relief was granted in that cause.

In dealing with this case it was the province of the court to ascertain the intention of the parties in making the lease, and for that purpose to take into consideration their situation, the subject-matter of the agreement, and the object sought to be attained; and if, as stated, that object had been thwarted, either by reason of the inability or unwillingness of the lessee to perform the contract, it was the duty of the court to annul the deed of trust and contract of lease, and relegate the lessors and their vendees to their original rights.

In the case of *Armistead's Ex'rs v. Hartt*, 97 Va. 316, 33 S. E. 616, the court held that: "Although all the objects and purposes of a trust have not been accomplished, yet, * * * if the beneficiaries are sui juris, and desire the termination, a court of equity may decree its termination. If no good purpose will be served by a continuation of the trust, and those interested will not be benefited, the mere objection of the trustee to its termination will be unavailing." 2 Perry, Trusts, § 920.

The court is of opinion that, under the law applicable to the facts and circumstances of this cause, there is no error in the decree complained of, and that it ought to be affirmed. Affirmed.

(99 Va. 547)

GREEVER v. BANK OF GRAHAM et al.
 Supreme Court of Appeals of Virginia. June
 27, 1901.)

**BILLS AND NOTES—COLLATERAL SECURITY—
 FRAUDULENT APPLICATION—VIOLATION OF
 CONDITIONS—INDORSERS—ACTIONS—EVI-
 DENCE—ADMISSIBILITY—COMPETENCY—QUES-
 TIONS—ANSWER—OBJECTIONS—CONDITION
 ON APPEAL.**

1. Where, in an action by a bank against indorsers on a note given as collateral for a note secured by deed of trust, made in 1892, defendants claimed that their indorsement was made on condition that the deed of trust be released, evidence by plaintiff's president as to the value in 1892 and 1893 of the property conveyed by the deed of trust was immaterial.

2. It was not error to refuse to allow evidence of an opinion expressed to the witness by the bank's cashier after the transaction as to the bank's legal rights in the premises, as the cashier was not a party to the transaction.

3. If the party owing the debt secured made a fraudulent application of the note sued on for a purpose different from that for which it was entrusted to him, or he negotiated it in violation of the conditions on which he obtained it, plaintiff could not recover if at the time of the purchase of the note the bank had notice that the party was making such fraudulent application of it.

4. An instruction as to the effect of a fraudulent application of the note sued on, of which plaintiff knew, was not prejudicial to defendants because it omitted any reference to a violation of the condition on which it was given, where an instruction had been given both as to the defense of fraudulent application and violation of conditions.

5. Where the expected answer to a question objected to is not shown, the objection will not be considered on appeal.

Buchanan, J., dissenting.

Error to circuit court, Tazewell county.

Action on a note by the Bank of Graham against J. A. Greever and others. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

Henry & Graham and Chapman & Gillespie, for plaintiffs in error. Hicks & Williams, for defendant in error.

HARRISON, J. The petitioners to whom this writ of error was awarded were the indorsers upon a certain negotiable note held by the Bank of Graham, and the judgment complained of was for \$1,044.60, the balance due on that note. The defense made by the indorsers, as shown by their "statement of defense" filed in response to the demand of the plaintiff bank, was that the note sued on was indorsed by them upon certain conditions, which the bank did not perform, and therefore that the note never became operative and binding upon the indorsers. The bank denied the position taken by the indorsers, and insisted that it was the bona fide holder for value of the note, in due course of business, and without notice of the alleged conditions.

It appears from the record that in November, 1892, the West Graham Woodworking Company executed a deed of trust upon certain real and personal property to secure to

the Bank of Graham the payment of a note for \$5,000, made by the Graham Woodworking Company. That note provided on its face that, whenever additional collaterals should be required by the bank, the obligor would furnish the same. The bank became dissatisfied with its security, and was pressing J. B. Greever, the president of the debtor company, and its chief owner, for additional collateral. Under these circumstances J. B. Greever proposed to Alex. St. Clair, the president of the bank, that he would furnish two well-indorsed notes, one for \$1,000 and the other for \$4,000, in lieu of the \$5,000 note, if the bank would release the deed of trust. St. Clair agreed to this if notes satisfactory to the bank were furnished. When the notes were presented, the president of the bank refused to accept the \$4,000 note and release the deed of trust, saying that he did not know any of the indorsers except J. A. Greever, but offered to take the notes as additional collateral security. Thereupon J. B. Greever stated that he would see J. A. Greever, one of the indorsers. In a few days J. B. Greever returned, and delivered the notes to the bank as additional collateral security for the deed of trust debt, as shown by a contemporaneous assignment in writing executed by him.

The indorsers claim that their names were secured upon the \$4,000 note by Greever upon condition that the deed of trust would be released, thereby enabling Greever to sell the property to better advantage than could be done under the deed of trust.

We are of opinion that the court did not err in refusing to allow the witness St. Clair to answer the question propounded by the defendants calling for the opinion of the witness as to the value of the property conveyed by the deed of trust during the years 1892 and 1893. If this question had indicated a pertinent inquiry, the objection could not be considered, for the reason that the answer expected is not given, and therefore the court could not determine its materiality. The witness might have answered that he did not know the value of the property.

We are further of opinion that the court did not err in refusing to allow the twelfth question and answer in the deposition of J. B. Greever to be read to the jury, which would have put before the jury an opinion alleged by the witness to have been expressed to him by the cashier of the bank after the transaction under consideration, touching the bank's legal rights in the premises. The cashier was not a party to the transaction, and was not present when the negotiation took place. If he ever said what the witness credits him with saying, it was wholly irrelevant, and could in no way affect the rights of the bank.

We are further of opinion that there was no error to the prejudice of the defendants in the three instructions which the court gave, nor in the rejection of the two instructions offered by them.

The second instruction given by the court informed the jury clearly that, if they believed from the evidence that J. B. Greever made a fraudulent application of the note sued on for a purpose different from that for which it was intrusted to him, or that he negotiated the same in violation of the conditions upon which he obtained it, the plaintiff could not recover if they further believed from the evidence that at the time of the negotiation and purchase of the note the bank had notice that Greever was making such fraudulent application, or was negotiating the note in violation of such conditions.

The third instruction was evidently intended to inform the jury as to the evidence they were entitled to consider, and its relevancy in this class of cases. The instruction, however, begins by reiterating what was said in the second instruction as to the fraudulent application of the note, and omits any reference to the violation of the conditions upon which it was obtained; thus, it is contended, giving greater prominence to the defense that the note had been used in fraud of the rights of the indorsers than to the defense that its use was a violation of the alleged conditions upon which the note was indorsed. It is suggested that the giving of this third instruction made it incumbent upon the court to give the first instruction offered by the defendants, which reiterated what had been said in the court's second instruction touching the alleged conditions.

The second instruction fully informed the jury upon both phases of the defense, and it was wholly unnecessary to repeat in the court's third instruction anything theretofore stated for the guidance of the jury with respect to either phase of the defense. Under the circumstances of this case we do not see that the defendants could have been prejudiced by the third instruction given by the court. Indeed, it is difficult to perceive how any other proper verdict could have been rendered.

The judgment must be affirmed.

BUCHANAN, J. (dissenting). I concur in the opinion of the court upon the assignments of error as to the rulings of the circuit court upon the admission and rejection of evidence, but I dissent in so far as it holds that the circuit court did not err in giving instruction No. 3 for the plaintiff, and in refusing to give instruction numbered 4 by the defendants.

By instruction No. 2 given for the plaintiff the jury were told that, if they believed that the maker of the note sued on fraudulently applied it to a purpose different from that for which it was intrusted to him, or that he negotiated it in violation of the conditions upon which he obtained it, and that the plaintiff had noticed that he was making a fraudulent use of it, or was delivering it in violation of the conditions upon which he obtained it, the plaintiff was not entitled to recover.

Instruction No. 3 given for the plaintiff told

the jury in effect that, although they believed that the note was obtained by fraud, or was used for a fraudulent purpose, yet if they believed that the plaintiff took the note in good faith, and without notice, they must find against the defendants, wholly omitting any reference to the other defense,—that the note was negotiated in violation of the conditions upon which it was procured, which, if proved, would have entitled the defendants to a verdict, although they failed to make good the other defense.

A jury, in my judgment, is erroneously instructed who are told in one instruction that, if they believe that if either of two defenses are made out by the evidence, they must find for the defendants, and in another instruction are told that, if they find that one of the defenses is not made out, they must find for the plaintiff.

The defendant's instruction numbered 4 was, I think, a correct statement of the law, and ought to have been given, especially after plaintiff's instruction No. 3 was given.

I think a new trial should be awarded.

Affirmed.

(99 Va. 508)

REPASS v. RICHMOND et al.

(Supreme Court of Appeals of Virginia. June 27, 1901.)

ACTION—BONDS—LIABILITY OF SURETY—ESTOPPEL—NON EST FACTUM—EVIDENCE—ADMISSIBILITY—RES INTER ALIOS ACTA—PRESUMPTIONS—WITNESSES—CORROBORATION—SELF-SERVING DECLARATIONS—ISSUES OUT OF CHANCERY.

1. A county treasurer gave notice to a deputy and the sureties of the latter that the treasurer would move for judgment for the sum in which the deputy was in default, and the deputy filed a bill to restrain such action, admitting the execution of the bond, and the treasurer filed a cross bill, the sureties being parties to both bills. A consent order was afterwards entered, appointing a commissioner to take an accounting to determine the balance due the treasurer. The sureties had not appeared or answered at the time of the accounting, but testified at the same. *Held*, that the conduct of the sureties, not being prejudicial to the treasurer, would not estop them from pleading non est factum as to the bond.

2. Evidence is not admissible, in an action on a bond of a deputy treasurer in which the sureties plead non est factum, as to the character of the bonds given by other deputies and other sureties, and the manner of the execution thereof.

3. Where the surety on a bond testifies that it was in blank when signed by him, and the plaintiff shows former contrary statements by the surety, the latter cannot show, for the purpose of corroboration, that he stated, prior to the institution of the suit, that the bond was in blank when he signed it.

4. The admission of improper evidence on the trial of an issue out of chancery is ground for the reversal of a decree based entirely on the verdict returned by the jury, where the evidence was conflicting, and determination of the issue was based on the credibility of the witnesses, and the court thought he should follow the verdict of the jury thereon.

Appeal from circuit court, Wythe county.

Suit on a bond by J. W. Repass against W. A. Richmond and others. From a decree in favor of defendants, plaintiff appeals. Reversed.

C. B. Thomas, J. H. Fulton, and A. A. Campbell, for appellant. W. S. Poage, Walker & Caldwell, Robert Crockett, and J. L. Gleaves, for appellees.

BUCHANAN, J. J. W. Repass, who was treasurer of Wythe county from July 1, 1883, to June 30, 1895, gave two notices to E. S. Repass, one of his deputies, and the sureties on the bond of the latter, that he would, at the February term, 1897, of the circuit court for that county, move for judgments for the amount his deputy was in default, together with interest and damage thereon. Upon the calling of the notices, the deputy presented a bill to the court praying for an injunction to restrain the plaintiff from a further prosecution of his motions at law, making the sureties on both his bonds, as well as the treasurer, parties defendant. The bill admitted the execution of the bonds, but alleged that the accounts between him and the treasurer were in such a complicated condition that a settlement thereof was necessary by a commissioner of the court, when it would be found that neither he nor his sureties owed the treasurer anything. The injunction was granted as prayed for.

At the April rules, 1897, the appellant answered the bill and at the May rules filed his cross bill, making E. S. Repass and his sureties on both bonds parties defendant.

On June 5th following, a consent order was entered, directing a special commissioner of the court to take an account between the treasurer and his deputy, and report what balance, if any, was due from the deputy. The commissioner took the account, and reported it to the court in August, 1898, by which it appeared that there was a large balance due from the deputy and his sureties on his bond dated February 25, 1890. At the following (September) term of the court the sureties on that bond tendered a plea of non est factum, which the court rejected upon the ground that the filing of the pleas had been unduly delayed. At the next (March) term of the court they filed answers to both the original and cross bills, in which they denied, among other things, that they had executed the bond dated February 25, 1890. Depositions were taken by both parties, and at the February term, 1900, of the court, an issue out of chancery was directed upon motion of the said sureties, over the appellant's objection, to determine whether the bond in question was their true writing obligatory. Upon the trial of that issue the jury found that the said writing was not the bond of the sureties. The motion of the appellant to set aside the verdict was overruled, an order was entered approving it, and directing it to be certified to the chan-

cery side of the court, in which a decree was entered dismissing the original and cross bills as to the parties in whose favor the verdict was found. From that decree this appeal was taken.

The first error assigned is the action of the court in awarding the issue out of chancery.

It is not claimed that under ordinary circumstances it was not a proper case, in the discretion of the trial court, for an issue out of chancery; but it is insisted that the delay of the appellees in denying the execution of the bond, their consent to the order for an account, their appearance before the commissioner as witnesses, and the testimony given by them estopped them from relying upon the defense of non est factum.

It is settled law that whenever an act is done or a statement is made by a party, which cannot be contradicted without fraud on his part and injury to the other party whose conduct has been influenced by the act or admission, the character of estoppel will attach to what would otherwise be a mere matter of evidence. But an estoppel by conduct does not exist where the party setting it up has not relied upon the conduct of the other party, and been induced to do something which he otherwise would not have done. *Bargamin v. Clarke*, 20 Grat. 552; *Dair v. U. S.*, 16 Wall. 1, 4, 21 L. Ed. 491.

As the principle of estoppel invoked by appellant to preclude the appellees' sureties from setting up the defense of non est factum to the bond of their principal rests upon the ground of fraud, and as the effect might be to shut out the truth, it is never applied, as was said by Judge Joynes in *Bargamin v. Clarke*, supra, in any of its branches, upon an uncertain and speculative state of facts.

Both in the original and cross bills to which the appellees were parties defendant it was alleged that they had executed the bond, the validity of which the issue out of chancery was directed to try. At the time the consent decree for an account was entered, they had neither pleaded to nor answered these bills, and did not offer to do so until after the account ordered had been taken and reported to the court. The deputy treasurer claimed in his bill that upon a proper settlement it would appear that he was not indebted to the appellant in any amount, and prayed for an account. The treasurer insisted in his answer and cross bill that there was a large balance due from his deputy, and that there was no necessity for an account, but asked, if the court was of opinion that an account was necessary, that it should be taken as speedily as possible. Before the next term of the court, and within less than 30 days after the cross bill was filed, the appellant gave notice that he would move the judge in vacation to enter an order for an account. The other parties accepted service of the notice, and con-

sented to the order for an account, which directed a special commissioner of the court "to take, state, and report an account of all the tax tickets which were placed by J. W. Repass, late treasurer of Wythe county, in the hands of Emory S. Repass, his deputy, for collection, and what payments he has made to J. W. Repass on account of the tickets which he has collected, and what other credits said Emory S. Repass, as said deputy, is entitled to credit for in his account with said J. W. Repass for claims settled by him, and turned over to said J. W. Repass, commissions, delinquent list, etc., and what balance, if any, there is due from said Emory S. Repass, as said deputy treasurer of Wythe county, on account of tax tickets taken as aforesaid for collection."

The commissioner was also directed to report any other matter which he might deem pertinent, or as to which any party might require him to report.

As before stated, the order for the account was prayed for by the deputy treasurer in his bill, and made upon the motion of the appellant. They had the right to the account, and the court ought to, and no doubt would, have made the order, even if the appellees had not consented to it. Indeed, they had no right to object, as the parties asking it were entitled to it as between themselves, irrespective of the question of the liability of the appellees on the bond in controversy.

The appellees neither made nor attempted to set up any defense until they tendered their plea of non est factum. Their consenting to a decree for an account, to which they had no right to object; their testifying before the commissioner, as witnesses for the deputy treasurer, that they had heard the treasurer admit that the sum due from his deputy was much less than he now claimed; their failure to make any defense until the account came in showing the balance due from the deputy,—are circumstances to be considered in passing upon the plea of non est factum; but they do not amount to an estoppel, for it does not clearly appear that the appellant was, by their conduct, misled to his prejudice, without which, whatever may be its force as evidence, their conduct will not amount to an estoppel. *Bigelow, Estop.* 433, 434, 492, 493; *7 Rob. Va. Prac.* 447, 448.

Upon the trial of the issue the plaintiff offered to prove that when he was first elected treasurer he obtained from the clerk of the county court printed forms of bonds taken by the commonwealth from its officers, and that one of these printed forms was filled out by the clerk of the court for the guidance of the plaintiff in taking bonds from his deputies, and that his custom was, whenever he appointed deputies, to fill their bonds, leaving no blanks except the names of the sureties and the date of the bonds; that, when they applied for the bonds, he

(plaintiff) dated and handed them to the deputies to have their sureties sign them; that in the year 1890 he prepared three bonds—one for each of his deputies—on the same day, at the same time, with the same pen and ink, laid them away until his deputies came to get them to have them signed by their sureties, respectively, when he inserted the dates; that one of those bonds was dated January 17, 1890, another the 24th of that month, and the bond in question in this case the 25th day of February following. The plaintiff then offered in evidence the bonds executed by his other deputies and their sureties, dated, respectively, January 17 and 24, 1890, that the jury might compare them with the bond in issue. All this was objected to by the defendants upon the ground that it was irrelevant testimony. The court sustained the objection, and refused to allow the form furnished by the clerk and the bonds executed by the other deputies and their sureties to go to the jury. The plaintiff then offered to prove that the bonds of his other deputies had been sued on, the suits defended, and that those bonds were filled out when they were delivered to the deputies to be signed, with the avowal that his purpose in offering this evidence was to enable him to get the bonds of his other deputies before the jury, in order that they might inspect and compare them with the bond in controversy. This evidence was also rejected. Each of these rulings is assigned as error.

The defendants were not parties to the bonds of the other deputies. Those bonds were not part of the *res gestæ*, and had no connection whatever with the bond in controversy.

Except in certain cases, where the knowledge, motive, or intention of the party is a material fact in the case,—as it was not in this case,—the general rule is that no reasonable presumption can be formed as to the making or execution of a contract by a party with one person in consequence of the mode in which he has made or executed similar contracts with other persons. Neither can parties be affected by the conduct or dealings of strangers. Transactions which fall within either of these classes are *res inter alios acta*, and evidence of this description is uniformly rejected. *1 Phil. Ev.* 748, 749; *1 Greenl. Ev.* §§ 52, 53.

A. R. Willard, one of the defendants, testified on the trial of the issue out of chancery that the bond upon which he was sued as one of the sureties of the deputy treasurer was not filled up when he signed it. By cross-examination and otherwise, an effort was made to show that this statement was in conflict with his conduct and admissions prior to that time, and that his present claim and statement that the bond was blank when he signed it, and the name of the obligee and the conditions therein were afterwards inserted, was an afterthought. To corrobor-

ate Willard's statement, appellees were permitted to prove by Isaac N. Huddle that he had heard Mr. Willard say about six years before that the bond was blank when he signed it.

The admission of Huddle's testimony upon this point is assigned as error.

It is a general and well-nigh universal rule that evidence of what a witness said out of court cannot be received to corroborate his testimony. 1 Greenl. Ev. § 469; Howard v. Com., 81 Va. 489, 490.

The only exception to this rule given by Mr. Greenleaf is that, where a design to misrepresent is charged upon the witness in consequence of his relation to the party or the cause, it may be shown that he made a similar statement before that relation existed. 1 Greenl. Ev. § 469.

Mr. Phillips, after stating the general rule, says that in one point of view a former statement by the witness appears to be admissible in confirmation of his evidence, and that is where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship. There, indeed, in order to repel such an imputation, it might be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement. 2 Phil. Ev. 974.

Mr. Starkie says it is agreed that such evidence may, under special circumstances, be admitted; as, for instance, in contradiction of evidence tending to show that the account was a fabrication of late date, and where, consequently, it becomes material to show that the same account has been given before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen. 1 Starkie, Ev. 149.

Mr. Taylor, in his work on Evidence (volume 2, § 1476), says that such evidence is not admissible unless the witness be charged with "a design to misrepresent in consequence of his relation to the party or the cause, in which case it may be proper to show that he has made a similar statement before that relation existed." See, also, Howard v. Com., supra; Ellicott v. Pearl, 10 Pet. 415, 9 L. Ed. 475; Robb v. Hackley, 23 Wend. 50; 1 Whart. Ev. § 570.

The witness whose former statement was permitted to go to the jury was not merely a witness, but was also a party to the suit and to the bond whose validity was the matter to be determined by the jury. His relation to the bond was the same when his prior statement was made that it was when he testified in the cause. This being so, it is clear that under the rule as stated by Mr. Greenleaf and the other authorities cited, evidence of his former statements was inadmissible. Not only was the evidence not within the exception to the general rule, but it is obnoxious to another equally well-set-

tled rule of law that a party cannot give in evidence his own declarations, and upon this ground also such evidence is held to be inadmissible. Logansport & P. G. Turnpike Co. v. Hell (Ind. Sup.) 20 N. E. 703.

If this were an action at law, the admission of the evidence in question would be a good ground for setting aside the verdict; but motions for new trials in issues out of chancery are governed by somewhat different rules. Although errors may have been committed by the law court in the trial of an issue out of chancery in admitting or rejecting evidence or in giving or refusing instructions, yet if the chancellor is of opinion that the verdict was unaffected by such errors, or is satisfied, upon a consideration of the whole case, that the result ought not to have been different had there been no error in the trial of the issue, he may refuse to order a new trial, and enter a decree in accordance with the finding of the jury. Watkins v. Carlton, 10 Leigh, 560; Brockenbrough v. Spindle, 17 Grat. 28; Powell v. Manson, 22 Grat. 192; Miller v. Wills, 95 Va. 337, 28 S. E. 337.

The issue out of chancery was tried on the law side of the same court which on its chancery side rendered the decree based upon the verdict, the same judge presiding. There is nothing in the record to show that the judge was of opinion that the improper evidence admitted did not affect the verdict, for he was of opinion that the evidence admitted was material and relevant; otherwise, he would not have admitted it over the appellant's objection. Neither is there anything in the record to show that he was satisfied, upon a consideration of the whole case, that the result ought not to have been different.

After the verdict was certified from the law side to the chancery side of the court, the decree appealed from was entered, which is as follows:

"These causes came on this day to be heard upon the orders and decrees heretofore entered, upon the order of this court on the law side of this court, the verdict of the jury on the issue heretofore directed between J. W. Repass on the one side and W. A. Richmond, Thomas S. Buck, and A. R. Willard on the other, and the motion to set aside the said verdict as shown in the record having been overruled by the court, and the court having certified its approval of said verdict to the chancery side of this court. It is therefore adjudged, ordered, and decreed that the said original bill as to said W. A. Richmond, Thomas S. Buck, and A. R. Willard, and the said cross bill of J. W. Repass, as to said W. A. Richmond, Thomas S. Buck, and A. R. Willard, be, and they are hereby, dismissed, and that the said defendants Richmond, Buck, and Willard will recover of J. W. Repass their costs by them about the defense in this behalf expended."

It is apparent from this decree that the

chancellor was of opinion that the verdict was the result of a fair trial, in which no improper evidence had been admitted, and that, as the evidence upon the issue directed was hopelessly conflicting, and its correct decision depended upon the credibility of the witnesses, he ought to abide by the verdict of the jury. If there had been no error in the trial of the issues which could have influenced the jury in reaching their verdict, the court was manifestly right; but, as it cannot be seen or said that the improper evidence which went to the jury did not affect their verdict, the court's decree, based solely upon the verdict, and not upon a consideration of the whole case, cannot be regarded as free from error.

We are of opinion, therefore, that the decree appealed from should be reversed, the verdict of the jury set aside, and the cause remanded to the circuit court, with direction to order a new trial of the issue, unless upon a consideration of the whole case, including the evidence before the commissioner, which is not before us, he is satisfied what decree should be entered in the case.

Reversed.

(99 Va. 541)

KEISTER v. KEISTER et al.

(Supreme Court of Appeals of Virginia. June 27, 1901.)

PARTITION—LANDS—OWNERSHIP—EVIDENCE—SUFFICIENCY.

El. executed a title bond to convey land to his son and son-in-law K. El.'s heirs afterwards released their claims by deed to the son and K. and their wives, and they partitioned the land by mutual deeds. Subsequently the heirs of El., for a consideration, deeded other land to K. Held, that the deeds and the opinion of one witness, who had been told by K. that the first land came from his wife's father, was insufficient to support a contention that the land was deeded to K. for the use of his wife, but that it belonged to K., and should be partitioned among his heirs.

Appeal from circuit court, Giles county.

Partition by C. W. Keister against one Keister and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

S. W. Williams, for appellant. W. J. Hen-son, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Giles county, and presents but a single question of fact, which is whether the lands that appellant in his bill asks to be partitioned were the maiden lands of his mother, Nancy Keister, deceased, or the property of his father, William Keister, also deceased.

William Keister was twice married; his first wife, Nancy, being a daughter of Isaac Epling, who owned certain lands situated in and near the town of Newport, Giles county. Prior to his death, which occurred between November, 1847, and June 2, 1849 (the exact date not shown), Isaac Epling executed and

delivered to his son, Philip Epling, and his son-in-law, William Keister, jointly, a title bond, in which he bound himself in the penalty of \$1,500 to make or cause to be made to Philip Epling and William Keister title to certain lots of land at Newport, supposed to contain about 10 acres, including a tanyard belonging thereto. This title bond bears date November 19, 1847, and refers to the same land dealt with in the deeds presently to be considered. William Keister and Philip Epling took possession of this property, and were living on it June 2, 1849, when the other heirs of Isaac Epling, deceased, by deed, released to them all claim that they, the heirs of Isaac Epling, had therein, describing the land by metes and bounds, and reciting that William Keister and Philip Epling were living thereon. While this release or quitclaim deed makes William Keister and Nancy, his wife, and Philip Epling and Sophia, his wife, parties of the second part thereto, it explicitly limits the use and benefits of the property to William Keister and Philip Epling, their heirs, etc.

By separate deeds of October 27, 1849, William Keister and Philip Epling partitioned this land between themselves. The deed then made by William Keister and Nancy, his wife, makes Philip Epling and Sophia, his wife, parties to the second part, and sets apart to them by metes and bounds two lots, aggregating 3 acres, of the 10 acres partitioned, designating one of the lots as that upon which Philip Epling lived, and the other as adjoining; but the use and benefits of the lots is limited to Philip Epling, his heirs, etc.

The other deed made by Philip Epling and Sophia, his wife, names William Keister and Nancy, his wife, as parties of the second part, and sets apart and releases to them the residue of the 10-acre tract, but likewise limits the use and benefits of the land to the husband, William Keister, his heirs, etc.

By deed of October 15, 1853, the heirs at law of Isaac Epling, deceased, other than Nancy Keister, in consideration of \$100 in hand paid by William Keister, conveyed with general warranty to him a tract of 40 acres of land situated in Giles county, and owned by Isaac Epling at his death. This land and the 7 acres set apart to him by the deed from Philip Epling and wife of October 27, 1849, William Keister had possession of, used, and controlled as his own from the date of said deeds till his death, a few years ago, with the exception of several small parcels of it, sold off by him many years before his death, and after his first wife's death, which occurred about the year 1858. After William Keister's death, leaving surviving him a widow and a number of children by both his first and second marriage, and descendants of several of his children who had died, the bill in this cause was filed by appellant, C. W. Keister, one of the children of William Keister's first marriage, the object

of which is to have partition of the lands in question among the heirs at law of Nancy Keister, deceased, it being claimed that the lands were the maiden property of Nancy Keister, deceased; that the above-mentioned deeds were made only for the purpose of carrying out a scheme of partition of the lands of Isaac Epling, deceased, adopted by his heirs at law, and conferred no title to the lands therein referred to upon William Keister, but merely set apart to Nancy Keister, his wife, her part of the lands then partitioned.

The widow and the surviving children of William Keister, deceased, by his second marriage, and the infant children of one of them who had died, demurred to and answered the bill, filing with their answer as an exhibit the title bond of November 19, 1847, and contending that the property in question was the property of William Keister, deceased, and should be partitioned among his heirs at law.

Upon the pleadings, the exhibits therewith, and the depositions of witnesses, the circuit court overruled the demurrer, but sustained the contention of the defendants, and decreed that the property be partitioned among the heirs at law of William Keister, deceased, subject to his widow's dower rights therein.

It is not controverted that the title bond before mentioned was executed and delivered by Isaac Epling to William Keister and Philip Epling, and the proof in the cause leaves no room for doubt that they, in the lifetime of Isaac Epling, went into the possession of the property referred to in the title bond, and by virtue of that contract held possession of it jointly until they partitioned it between themselves, and that thereafter William Keister held and occupied the portion allotted to him by that partition, exercising all of the rights of ownership over it until his death. The deeds of October 27, 1849, were evidently prepared by some one unskilled in the preparation of such papers, but they amount to nothing more nor less than a partition of the tanyard property between William Keister and Philip Epling, although the wife of each is mentioned in the respective deeds with her husband as a party of the second part. This is made all the more apparent by the fact, already stated, that in the habendum of each deed the use and benefit of the property is expressly limited to the husband. There had been no effort, so far as this record shows, when the two deeds of October 27, 1849, were made, to partition the lands of which Isaac Epling died seised. On the contrary, his heirs at law, other than Nancy Keister, as we have seen, but a short time after his death, and by their deed of June 2, 1849, released all their claim as such heirs in or to the very property referred to in the title bond of November 19, 1847, and in the possession of William Keister and Philip Epling. It is true that Nancy Keister, as well as her hus-

band, William Keister, is named as a party of the second part to the release, but the same is also true as to the wife of Philip Epling, and it is not pretended that she had, or could have had, any other interest in the land released than a mere contingent right of dower in her husband's portion of it. When this release was made by them, the heirs of Isaac Epling, deceased, were but doing what he had contracted by his title bond to do, and what a court of equity would have compelled them to do had they refused. 22 Am. & Eng. Enc. Law, 970.

As to the 40 acres conveyed to William Keister by deed of October 15, 1853, there is no ground whatever upon which the contention that it, too, was a part of a partition of the lands of Isaac Epling, deceased, and that the conveyance was for the benefit of Nancy Keister, can rest. If it was merely in furtherance of a partition of the lands of Isaac Epling, deceased, begun, as is claimed, in 1849, but shortly after his death, no attempt is made to explain, and no reasonable explanation can be made, for the delay of nearly five years in making this deed. If it was a partition deed, there was no reason for setting out a valuable consideration as moving from William Keister; nor can the omission to mention Nancy Keister in the deed be explained.

It is further contended, however, that it is proven by parol evidence in the cause that William Keister did not claim the land mentioned in the title bond and partitioned between him and Philip Epling, but recognized it as being the property of Nancy Keister, his wife. The deposition of witness O. C. Wingo is relied on to sustain this contention. He undertakes to say that the deed of June 2, 1849, and the two deeds of October 27, 1849, were partition deeds between the heirs of Isaac Epling, deceased. It is clear, however, from his whole deposition, that he could not have known anything whatever as to what was intended by the parties to those deeds, and therefore what he says as to them amounts to no more than an opinion of his, unsustained by any sort of reason given.

As to the deed of October 15, 1853, being a partition deed, he says he does not know. He does state that somewhere about the years 1855, 1856, or 1857 he heard William Keister say that the land he lived on (the seven acres) came to his wife from her father; but on cross-examination he says that he never heard William Keister disclaim the land, and admits that the sum and substance of what William Keister said to him 40-odd years before was that "the land [the seven acres] came through Isaac Epling, Mrs. Keister's father." This is wholly insufficient to overcome the proof already set out above that the land belonged to William Keister, deceased, as decreed by the court below.

It is further argued that, unless these lands are held to have been the property

of Nancy Keister, she got no part of her father's estate.

If this be true, the record fails to show that two other children of Isaac Epling, deceased, got any part of his estate after his death. Whether this was because he had, in his lifetime, made advancements to them, or for some other reason, is not shown, could hardly be shown at this late day, and is immaterial to the issue here.

We are of opinion that the decree of the circuit court is right, and should be affirmed. Affirmed.

(99 Va. 519)

SHARITZ v. MOYERS.¹

(Supreme Court of Appeals of Virginia. June 27, 1901.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—VENDOR AND PURCHASER—PURCHASE PENDING SUIT—PLEADING.

1. Where a deed to a married woman and her husband recited that she was a tenant in common with the grantors, and that it was made for the purpose of partitioning the land, no title vested in the husband.

2. A person who purchases land pending suit against his grantor is bound by the decree.

3. A purchaser pendente lite is entitled, on becoming a party to the action, to be substituted to his grantor's position and rights.

4. Under Code, § 3275, providing that at any time before a final decree a defendant may be allowed to file his answer, an answer of a party joined as a party defendant may be filed at any time before final decree.

Appeal from circuit court, Wythe county.

Bill by Mrs. A. A. Moyers against W. F. Blessing and others to enforce the payment of certain judgments against defendants' real estate. There was an order approving a report of commissioners holding the lands liable for the lien, and appointing commissioners to sell the lands. H. L. Sharitz then petitioned to be made a party defendant, claiming title through one of the defendants, and that the court quiet and establish his title by declaring that defendant W. J. Blessing had no interest in the lands liable to the payment of the judgments against him. There was an order affirming the sale, and the sale was subsequently set aside. From a subsequent order dismissing H. L. Sharitz's petition and decreeing a sale, he appeals. Reversed.

C. B. Thomas, for appellant. M. M. Caldwell and Robert Crockett, for appellee.

KEITH, P. The bill in this case was filed by Mrs. A. A. Moyers to enforce the payment of certain judgments against the real estate of W. F. Blessing and S. J. Blessing, his wife, and James A. Walters. She sets out in her bill that Blessing and wife are the joint owners of a tract of land in Wythe county, containing 30 $\frac{1}{2}$ acres, conveyed to them by Samuel Williams and wife by deed dated March 10, 1870, and that W. F. Bless-

ing is the owner of another tract of land in said county, containing 7 acres and a fraction. She avers that her judgments constitute liens upon these several tracts of land, and that the rents, issues, and profits thereof will not pay them in five years; that Blessing and wife conveyed both tracts by deed of January, 1884, to C. B. Thomas, trustee, to secure to C. A. Ewald the sum of \$100,—and makes Blessing and wife, Walters, Sexton, the assignor, Thomas, trustee, and C. A. Ewald, the beneficiary under the trust, parties defendant.

At the February term, 1895, the cause came on to be heard upon the bill taken for confessed as to all the defendants, and was referred to a commissioner to report the lands owned by the defendants, the liens thereon, and their priorities. The commissioner reported that Blessing was the owner of the 7 acres of land, that he and his wife were the joint owners of the 30 $\frac{1}{2}$ acres of land described in the bill, and that James A. Walters is the owner of a tract containing 107 $\frac{1}{2}$ acres, and stated an account of the judgment against the several defendants.

At the February term, 1896, the cause came on to be heard upon the papers formerly read, the answer of Walters, and the replication thereto, the report of the commissioner, upon certain exceptions, which were sustained, and need not be further noticed; and the court, approving the report in other respects, and holding that the undivided moiety of the 30-acre tract of land and the 7-acre tract were liable for the liens reported against William Blessing, appointed commissioners to sell upon the terms named in the decree.

At a subsequent term the commissioners reported that the moiety in the 30-acre tract had been sold to one J. M. Sayers for the sum of \$120, and the 7 acres to Williams at \$101. In this report the commissioners state that a question has arisen as to the title to the 30-acre tract, and that one Sharitz has filed a petition setting up a claim to it, and the commissioners therefore make no recommendation with reference to its sale. Sharitz filed an exception to this report, and Sayers, the purchaser, also excepted because of a defect in the title to the tract purchased by him.

At the September term, 1896, Sharitz filed his petition, in which he states that on the 7th day of November, 1870, Thomas Yonce executed a deed to William Huffard, trustee, by which he conveyed to him 128 acres of land "in trust for the sole and exclusive use, benefit, and enjoyment of his three daughters, Mary A. Williams, the wife of Samuel Williams, Rachel Williams, the wife of Andrew Williams, and Sarah J. Blessing, the wife of William Blessing, which deed was duly admitted to record in the clerk's office of Wythe county court; that afterwards the said daughters and beneficiaries in said deed made partition among themselves of the said

¹ This cause was affirmed by divided court July 6, 1900, and rehearing granted September 20, 1900.

tract of land; that on March 10, 1871, Samuel Williams and wife and Andrew Williams and wife made a deed of release for partition to William Blessing and Sarah J. Blessing for the portion of land which fell to the lot of Sarah J. Blessing, and William Huffard, trustee, sanctioned said partition by a writing above his signature, appended to said deed." Copies of these deeds were filed with the petition.

The petitioner then avers that on the 7th of November, 1895, he purchased of Sallie J. Blessing the 30 $\frac{1}{2}$ acres of land for the price of \$1,100 cash in hand, as is shown by the deed from Sallie J. Blessing and her husband, filed as an exhibit with the petition. The petition states, "That part of the purchase price mentioned in the deed as paid by your orator was a debt for \$250 due to Charles Ewald, which your petitioner assumed to pay, but which he has not paid, but the payment of which he satisfactorily arranged with said Ewald."

The petitioner further shows that on the 7th of September, 1895, two months before his purchase, an agreement was entered into between A. A. Moyers, plaintiff in this suit, and Sallie J. Blessing, as follows:

"In consideration that Sallie J. Blessing shall pay me twenty-five dollars on Monday next, I agree to release her from all liens reported in the report of Commissioner W. L. Stanley filed in said cause, except a lien of seventy dollars, with interest from this date, which lien against her I will not enforce for six months from this date; and, when said sum of seventy dollars is paid, I then agree to release all liens against her in said report mentioned. This agreement is not binding unless said sum of twenty-five dollars is paid on Monday next."

The petitioner further avers that the amount so agreed to be paid has in fact been paid, and no further claim is now sought to be enforced in said suit against Sarah J. Blessing; that, after the petitioner had made the purchase from Sarah J. Blessing, she and her husband moved to Tennessee, and gave no further attention to the suit; that the petitioner is the bona fide purchaser of said land for a valuable consideration, without actual notice that any suit was pending in which it was claimed that William Blessing had any interest in said land which could be subjected to the payment of the judgments against him.

Petitioner relies upon the deeds from Yonce to Huffard, trustee, and the deed of partition among the daughters of Thomas Yonce, heretofore mentioned, as showing that William F. Blessing had no interest whatever in the 30-acre tract of land, but that Sarah J. Blessing had a full and complete title thereto, which, by her deed, in which her husband united, passed to and vested in petitioner.

The prayer of the petition is that Sharitz may be made a party defendant; that the

court refuse to confirm the sale of the moiety in said land, quiet the title of petitioner to the whole of the tract purchased by him from S. J. Blessing, and establish his title to the same by declaring that William F. Blessing had no interest in the land that was liable to the payment of the judgments against him, and for such other and general relief as to equity and good conscience shall seem meet.

Sharitz having filed his petition, process was directed to be served upon Mrs. Moyers and Walters to answer it; and, the cause coming on to be heard upon the papers formerly read, the report of the commissioners of sale, and the exception to the sale of the 30-acre tract of land, the court confirmed the sale of the 7-acre tract, but declined at that time to pass upon the exceptions with respect to the other tract, and the cause was continued.

Subsequently Mrs. Moyers and James A. Walters filed their answers to the petition of H. L. Sharitz, in which they set forth the proceedings had in this cause, and take the ground that, as the court had acquired jurisdiction over Blessing and wife and their land, they had no power to convey it by their deed of November 7, 1895; that by said deed Sharitz "acquired no other right or interest except such as belonged to Mrs. Sallie J. Blessing or her husband, and this right or interest of theirs had already been condemned to be sold for the payment of the liens which subsisted upon it."

By an order of the September term, 1898, the court sustained the exception of J. M. Sayers, the purchaser of the 30 $\frac{1}{2}$ -acre tract of land, set aside the sale made to him by the commissioners, and directed his cash payment to be returned and his bonds to be canceled.

Upon some day not stated in the order Sharitz was permitted to file his answer, in which he reiterates substantially what was said in his petition.

At the same time I. R. Harkrader, sheriff of Wythe county, and as such claiming to be the administrator of Sarah J. Blessing, presented his demurrer and answer to the same effect; "and on motion of I. R. Harkrader, administrator of S. J. Blessing and of Henry L. Sharitz, they each have leave to file their answers in this cause, and the same are accordingly filed." To the answers thus filed there seem to have been no replications.

Immediately following the order permitting the answers to be filed appears the decree of September term, 1899, which brings the cause on to be heard upon the papers formerly read, but says nothing with respect to the answers, and directs that the petition of Sharitz be dismissed; "and it appearing to the court that one-half undivided interest in said 30-acre tract of land belonged to William F. Blessing, and is subject to the judgment liens against him re-

ported in this cause," it is therefore adjudged, ordered, and decreed that a commissioner be appointed to sell the same upon the terms set out in the decree.

From this decree an appeal was allowed by one of the judges of this court.

We are of opinion that the court erred in holding that William F. Blessing was the owner of an undivided interest in the 30-acre tract of land. This tract is a part of the 126 acres conveyed by Thomas Yonce by his deed dated November 7, 1870, to William Huffard, trustee for his three daughters. The deed of March 10, 1871, which sets out that these three daughters were seised as tenants in common of the tract of 121 acres, proceeds as follows:

"Now, therefore, in consideration of the benefits resulting to the parties hereto from a partition of said land, and for the further consideration of one dollar in hand paid by the parties of the second part to the parties of the first part, the said parties of the first part do hereby release, convey, bargain, and sell unto the said parties of the second part all right, interest, and title which they have in and to two certain parcels of the above tract of land, containing by actual survey about thirty acres and fifty-three poles, bounded and described as follows. * * *

This deed is signed by Samuel Williams and wife and by Andrew Williams and wife, and the effect of it is to partition and set apart to Sarah J. Blessing her share of the 121 acres of land conveyed by Thomas Yonce to Huffard, trustee, for the benefit of herself and her two married sisters, Nancy and Rachel Williams, and does not operate to vest any title in her husband. *Bolling v. Teel*, 76 Va. 492; *Dooley v. Baynes*, 86 Va. 649, 10 S. E. 974.

The further contention of appellees is that at the time Sharitz became the purchaser a decree had been entered by a court of competent jurisdiction, in a cause to which Blessing and wife were parties, by which it had been adjudged and decreed that a title to a moiety of the land in controversy vested in William F. Blessing, and was bound by the judgments against him, and that Sharitz, having purchased it pendente lite, took it subject to what had been decided in the cause of *Moyers* against Blessing.

Upon the other hand, it is contended by Sharitz that, as he had no actual notice of the pendency of that suit, he is not bound by the proceedings in it; no lis pendens having been filed in accordance with the statute.

Disposing of the latter contention first, we are of opinion that the doctrine invoked by the appellant does not apply; for, if Blessing was the owner of the land, it would be bound by judgments against him duly obtained and docketed, and purchasers would be conclusively affected by such judgments.

The doctrine of a court of chancery with respect to a purchaser pendente lite is thus

stated in *Story*, Eq. Jur. § 406: "Ordinarily it is true that the decree of a court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title." And in *Story*, Eq. Pl. § 361, it is said: "The voluntary alienation of property pending a suit, by any party to it, is not permitted to affect the rights of the other parties, if the suit proceeds without a disclosure of the fact, except so far as the alienation may disable the party from performing the decree of the court." And to the same effect is *Mittf. Eq. Pl. p. 172*.

The rule rests upon a principle of public policy; for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. *Story*, Eq. Jur., *supra*. It places the purchaser pendente lite in the shoes of his vendor, and upon becoming a party to the litigation he will be substituted to the position and rights of his vendor.

In this case, when Sharitz filed his petition asking to be made a party to the suit, he virtually prayed that the decree establishing the right of the plaintiff to subject the land in controversy to the lien of judgments against William F. Blessing might be vacated and annulled. There is in terms no such prayer, but the petition asks the court to refuse the confirmation of the sale, that the title of petitioner be quieted under his deed from Sallie J. Blessing, that the court will declare that Blessing had no interest in the land liable to judgments against him, and for other and further relief. Mrs. Blessing had never answered the bill. She doubtless thought that she was protected by the agreement of September, 1896, by which she was released from all liability beyond the sum of \$96. Sharitz was permitted to file his petition and his answer. At that time the sale to Sayers had been set aside upon the ground that the title purchased by him was in controversy. It might well be argued that the effect of that decree was to leave the whole matter open. If the statements of the petition, which are established by exhibits filed therewith, be true; if the answer, to which no replication was filed, be true,—then Sharitz, standing in the shoes of Mrs. Blessing, and occupying a position neither better nor worse than hers, was entitled to have the adverse adjudication made by the original decree of reference annulled, if, indeed, it had not been done already by the subsequent decree which set aside the sale to Sayers, for we think that under our statute Mrs. Blessing had the right, had she seen fit to do so, to appear and answer at any time before a final decree.

Section 3275, Code, is as follows: "At any time before final decree a defendant may be allowed to file his answer, but a cause shall not be sent to the rules or continued because an answer is filed in it, unless good cause be shown therefor."

Without undertaking to discuss at length the effect, if any, of delay in filing an answer, or the extent to which a defendant might be prejudiced thereby; without undertaking to say whether or not the courts can impose any conditions in consequence of such delay, except such as are mentioned in the statute,—we are of opinion that under the circumstances of this case, none of the decrees being final, the answer and petition of Sharitz should have been considered (1 Bart. Ch. Prac. [2d Ed.] pp. 405, 406; *Bowles v. Woodson*, 6 Grat. 78; *Bean v. Simmons*, 9 Grat. 389; *Welsh v. Solenberger*, 85 Va. 444, 8 S. E. 91), and that upon the whole record the judgments against William F. Blessing cannot be enforced against the 30½ acres of land in which he had neither right nor title, “for nothing is better settled in Virginia than that, where statutory enactments do not interfere, only the actual interest of the judgment debtor can be subjected to sale to satisfy judgments against him” (*Dingus v. Improvement Co.*, [Va.] 37 S. E. 353, and authorities cited).

The cause will therefore be remanded to the circuit court, with instructions to proceed in the ascertainment and enforcement of liens upon the land in the bill mentioned in accordance with the views expressed in this opinion.

Reversed.

(42 W. Va. 526)

LAIDLEY v. JASPER.

(Supreme Court of Appeals of West Virginia.
June 13, 1901.)

JUDICIAL SALE—PRESUMPTIONS—SCIRE FACIAS—DEATH AFTER VERDICT.

1. When a report of a judicial sale states that the sale was made “after advertising the sale in the manner and for the time required by the said order,” it will be taken that the publication and posting of notice of sale required by the court’s order were made, unless the contrary appear.

2. If a scire facias to revive a cause is returnable to one term of court, revival is not confined to that term, but may be entered at a subsequent term.

3. If a party die after verdict, the fact does not abate the suit or call for revival.

(Syllabus by the Court.)

Error to circuit court, Cabell county; E. S. Doolittle, Judge.

Action by John B. Laidley against Jackson Jasper. Judgment for plaintiff. Defendant brings error. Affirmed.

Simms & Enslow, for plaintiff in error.
L. D. Isbell, for defendant in error.

BRANNON, P. John B. Laidley, in an action of ejectment in the circuit court of Cabell county, recovered against Jackson Jasper and James Jasper a verdict for a lot of land in the city of Huntington. The defendants made claim for improvements, and the jury fixed the value of the improvements at \$1,500, and the value of the lot without the improvements at \$450; whereupon, under

chapter 91 of the Code, Laidley elected to relinquish his title to the lot to the defendants, and to take the money fixed as the value of the lot; and, the defendants failing to pay that money, judgment was entered under said statute for the sale of the lot, and the lot was sold by a commissioner. James M. Jasper filed exceptions to the sale, and, the court having confirmed it, he took this writ of error.

One exception to the sale is that notice of it was not properly published and posted; but the notice and its publication in a newspaper appear to be adequate, and, as to posting, the sale report certifies that the sale was made “after advertising said land for the time and in the manner required by said order,” which we must take as true until evidence of its untruth is shown.

A second objection is that a scire facias to revive the case against the heir of Jackson Jasper, who died pending the suit, was returnable at one term of court, and the revival was made at another. That is no matter. The scire facias being process issuing out of court, and not the individual act of the party, the revival could be made at any time, and was not confined to the day of its return. *State v. Campbell*, 42 W. Va. 247, 24 S. E. 875. As to the claim that the revival was made at a special term not regularly called, it is apparently waived, and is untenable, as there is no evidence to show the irregularity, and we presume that the term was regularly called. *State v. Winans*, 22 W. Va. 678.

The third exception to the sale was that Isbell, the purchaser, at the date of sale was a defendant in a suit in equity in the United States circuit court of Collis P. Huntington against John B. Laidley, in which an injunction was in force at the date of the sale restraining Laidley from prosecuting the ejectment, and that the case had gone to the supreme court of the United States, and was still there pending. It does not appear by record what was the matter involved in the Huntington suit, or that the injunction operated upon this ejectment or this property, or that Isbell or Jasper was a party. We are asked to look at the case as reported in 176 U. S. 668, 20 Sup. Ct. 526, 44 L. Ed. 630. That is not a part of this record to show facts in this case. Even if it were, we cannot there find legally the necessary facts to say that the injunction tied up this case. An injunction awarded by a federal court against a suit in a state court is contrary to Rev. St. U. S. § 720, and void. This is conceded by the opinion in the supreme court in the report referred to at page 678, 176 U. S., page 530, 20 Sup. Ct., and page 635, 44 L. Ed. Being void, the injunction could be lawfully disregarded. *Ruhl v. Ruhl*, 24 W. Va. 279; *Hebb v. County Court*, 48 W. Va. —, 37 S. E. 676. Still I am not prepared to say that upon the question of confirmation of a sale made while such an injunction is pending it would not

be ground for refusing confirmation by reason of its deterring bidders, promoting sacrifice, and casting cloud over title.

Another exception to the sale is inadequacy of price. The jury valued the property at \$1,950. This is all that appears as to value. The property may have somehow depreciated. No advance or upset bid was offered or guaranteed by Jasper. A property is worth what it brings. A court must see clearly a gross inadequacy, and a sale will not generally be set aside unless a guaranty of a better price be made. Hogg, Eq. 405.

Another error assigned is that the plaintiff had died. His death was after verdict, after the judgment that the defendants pay him money in lieu of judgment for possession, and after the order of sale. Nothing remained to be done but to sell. Death of a plaintiff after verdict does not cause abatement or demand revival. 5 Enc. Pl. & Prac. 798; Code, c. 127, § 1. Therefore we affirm the several orders and judgment complained of.

(49 W. Va. 508)

BALLARD v. CHEWNING et al.

GEISER MFG. CO. v. SAME.

(Supreme Court of Appeals of West Virginia.
June 13, 1901.)

**FRAUDULENT CONVEYANCE—DEED OF TRUST
—DECREE—APPEAL.**

1. That a court may pronounce a deed fraudulent per se, the intent to hinder, delay, and defraud the creditors of the grantor must appear on the face of the instrument, without reference to extrinsic evidence.

2. A deed of trust, to be valid, need not be so certain and definite in its terms as to exclude the possibility of the existence of a secret reservation in favor of the grantor, fraudulent and inconsistent with the avowed purposes of the parties. To render the deed per se fraudulent, such reservation must be apparent on the face of the instrument.

3. It is not necessary to assign in a decree any reason for the decision, and, if a decree is substantially right, it should be affirmed, although the court below may have given an insufficient reason for its judgment.

4. When, in a suit in equity to set aside a deed of trust as fraudulent, the decree settling the principles of the cause recites that the court found the deed to be fraudulent on its face, and did not consider certain parts of the record, including the depositions, such recital is held to be merely the assignment of a reason for the decision, and in the appellate court the whole record will be considered in determining whether the decree is erroneous.

5. A deed of trust, executed by one brother for the use of another, and purporting to secure to the latter a debt of \$2,750 upon partially incumbered property worth not over \$700, and the latter claims to have loaned the former parts of said sum at different times knowing what property he had, and there are other circumstances, as well as conduct, casting suspicion upon the transaction, will be presumed and held to be fraudulent as to the creditors of the grantor.

(Syllabus by the Court.)

Appeal from circuit court, Monroe county;
J. M. McWhorter, Judge.

Bills by Baldwin Ballard against W. S.

Chewning and others and by the Geiser Manufacturing Company against the same defendants. Decree for complainants, and defendants appeal. Affirmed.

Henson & Mason, for appellants. Logan & Patton and John Osborne, for appellees.

POFFENBARGER, J. This is a chancery suit, brought in the circuit court of Monroe county in July, 1897, by Baldwin Ballard against J. W. Chewning, L. B. Dunn, trustee, and W. S. Chewning, to set aside as fraudulent, and as having been made without consideration, a deed of trust dated May 31, 1897, and executed by said J. W. Chewning, conveying practically all of his property, consisting of an undivided one-half of a tract of land containing 125 acres, a tract containing 7 acres, a tract containing 26½ acres, a tract containing 115 poles, 1 mare, 1 horse, 1 mowing machine, and 1 hay rake, to the said L. B. Dunn, upon the following trust and conditions: "In trust to secure W. S. Chewning in a debt of the amount (\$2,750.00) twenty-seven hundred and fifty dollars: Now, if the said debt be paid when due, this deed to be then null and void, otherwise to remain in full force and effect; and said trustee (or, if he refuse to serve, the sheriff is to act as said trustee), at the suggestion of said W. S. Chewning, made at any time after said debts be due and unpaid, shall proceed as the law directs to satisfy said debt, or any part thereof that may be unpaid, with its secured interest, out of the proceeds of said property hereby conveyed,—said property to be sold, as to the personal property, for cash in hand on the premises of said J. W. Chewning; as to the real estate, it shall be sold on the premises, on equal payments of one, two, and three years." In his bill the plaintiff sets up a judgment for the sum of \$294.88 and \$2.75 costs, recovered by him against said J. W. Chewning June 31, 1897, upon a debt contracted a long time before the execution of said deed of trust, and alleges that said deed was executed for no consideration deemed valuable in law; that W. S. Chewning is a brother of J. W. Chewning; that J. W. Chewning does not, and did not at the time of the execution of said deed of trust, owe said W. S. Chewning anything; that W. S. Chewning was never financially able to advance such a sum of money to said J. W. Chewning, or to allow any one to become indebted to him for such an amount, and did not loan the money mentioned in the deed of trust; and that the deed of trust was executed fraudulently, and for the purpose of hindering, delaying, and defrauding the creditors of said J. W. Chewning in the collection of their debts, and expressly for the purpose of hindering, delaying, and defrauding the plaintiff in the collection of his debt. At August rules, 1897, the Geiser Manufacturing Company filed its bill in said court

against the same parties to set aside said deed of trust as fraudulent, and alleges that the defendant J. W. Chewning is indebted to it in the sum of — dollars, evidenced by two notes for \$220 each and one for \$210, dated July 29, 1895, due one day after date, and bearing interest, respectively, from December 1, 1895, December 1, 1896, and December 1, 1897. The notes are filed with the bill as exhibits. W. S. Chewning answered the bill of Baldwin Ballard, and demurred to it also. He denies knowledge of any fraud in the transaction on the part of J. W. Chewning, and also that there was any fraud in the transaction, and alleges that on September 21, 1895, J. W. Chewning wrote him a letter, requesting a loan of \$400 or \$500, and offering to secure the payment of the money by a deed of trust on his land; that in response to this application he loaned him \$450 October 18, 1895, taking his note therefor; that, upon a like application, he loaned him \$550 March 1, 1896, taking his note therefor, and on the 15th day of December, 1896, \$650, taking his note therefor; that when the last of said loans was made J. W. Chewning promised to secure the money thus loaned by a deed of trust, but the matter was delayed until May 31, 1897; that then said J. W. Chewning wanted to borrow \$1,000 more, and a settlement was made, and said amount loaned him; and that at the time of said last loan and settlement the deed of trust was executed. With this answer there are filed as exhibits a letter from J. W. Chewning, requesting said first loan, and the three notes, mentioned in said answer, all bearing interest, and due one day after date. Nothing appears in the answer to show how the debt of \$2,750, secured by the deed of trust, is evidenced, or when it will be due and payable. J. W. Chewning also answered the bill, denying that he is indebted to the plaintiff, that he executed the said deed of trust for the purpose of hindering, delaying, or defrauding his creditors, or any of them, and that he is insolvent, and averring that the debt mentioned in the deed of trust is bona fide, and that he has sufficient property to more than pay all of his indebtedness. W. S. Chewning demurred to and answered the bill of the Geiser Manufacturing Company also, setting up the same defense as that made to the other bill. J. W. Chewning and L. B. Dunn, trustee, also answered the bill in said second suit, and there were general replications to all of said answers. In an answer to interrogatories, J. W. Chewning shows what disposition he made of the money he claims to have borrowed from W. S. Chewning, and files receipts and vouchers for most of the items. In this answer he places the value of his property at \$3,000, although he admits that he paid only \$350 for his interest in the 125-acre tract, \$93 for the 7-acre tract, \$360 for the 26-acre tract, and \$23 for the 115-pole tract. He thinks, however, he "got a

bargain in his land purchases." Only \$72 has been paid on the 26-acre tract, and nothing on the 115-pole tract. There are references in the record to the building of a house on the property, but its value does not appear. Depositions were taken and filed for both plaintiffs and defendants. On the 23d day of March, 1899, both causes were heard together. The decree entered is in part as follows: "These causes came on this 23d day of March, 1899, to be heard upon the plaintiffs' bill and exhibits filed therewith, the separate demurrer and answers of W. S. Chewning to said bills, the joinder of the plaintiff in said demurrer and general replication to said answers, the separate answers of J. W. Chewning to said bills and plaintiffs' replication thereto, upon the answer of L. B. Dunn, trustee, upon the interrogatories filed by the plaintiffs to J. W. Chewning, upon the answer and exhibits therewith of J. W. Chewning thereto, and the objections of W. S. Chewning to the reading of said interrogatories as indorsed against him, upon the depositions of witnesses taken on behalf of the plaintiff, and upon the deposition of witness taken on behalf of the defendant W. S. Chewning, and was argued by counsel; on consideration whereof the demurrer is overruled. The court, without passing on the objections of W. S. Chewning to the reading of the answers, interrogatories, and answers thereto, and without passing on the evidence of the witnesses examined in the cause, is of the opinion that the deed of trust executed by J. W. Chewning to L. B. Dunn, trustee, is void on its face. It is therefore adjudged, ordered, and decreed that said deed is fraudulent per se on the face thereof, and is void, and is hereby annulled, and set aside." It is further decreed that the plaintiffs have liens upon the property mentioned in the trust deed for the amounts of their respective claims; that the cause be referred to a commissioner, and the personal property be sold in order to prevent its waste, the proceeds thereof to be held until the further order of the court. From this decree the defendant W. S. Chewning appealed. In taking his transcript of the record, he omitted the depositions, but they, with all the original papers in the two causes, have been brought up to this court by certiorari.

The only question extensively argued is whether or not the deed of trust is fraudulent per se, the court below having recited in its decree that in the rendition thereof the depositions of the witnesses were not considered, and said deed was held to be fraudulent on its face. The appellant insists that, as the court below did not inquire whether said deed of trust is fraudulent in fact, it would be improper for this court to do so upon appeal from that decree. In this connection he contends that the decree, though settling the principles of the cause, and therefore appealable, is so far interlocu-

tory that this court can only consider such parts of the record as the chancellor has acted upon; citing *Madden v. Madden's Ex'r*, 2 Leigh, 380. In determining whether the deed is fraudulent on its face, we can look to the deed alone. It must be decided upon an inspection of that instrument. Extrinsic evidence cannot be resorted to. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203. The deed of trust involved here fails to set forth who owes the debt purporting to be secured by it, how the same is evidenced, when it will become due, and whether it bears interest. It provides for sale of the property at the suggestion of the creditor at any time after the debt shall become due and payable, and fixes the terms of sale. Unless made with a fraudulent design, and there was a purpose in omitting the name of the debtor and the date of the maturity of the debt, it must be said that the instrument is unskillfully drawn. This cannot be resolved from an inspection of the deed, and in this connection it is wholly immaterial from what that awkward character of the instrument results, since the real question to be determined is the legal effect of its provisions, without regard to the actual intent of the parties in executing it, which properly belongs to the question of fraud in fact. The principles underlying the decisions holding deeds to be fraudulent per se are well and clearly stated in *Hogg, Eq. Prin.* § 189, as follows: "They [the deeds] contain such provisions and stipulations as to property that is perishable or readily consumable—as a stock of goods—as to enable the grantor to remain in possession and control of the property incumbered with the trust, and to indefinitely postpone the execution of the same, and the subjection of the property therein embraced to the payment of his debts. In fact, it is that the provisions of the conveyance are in contravention of the avowed purposes of the grantor in executing the same." In the same section it is further said: "That a court may pronounce a deed fraudulent per se, the intent to hinder, delay, or defraud the creditors must appear on the face of the instrument. This must appear from an inspection of the deed or other writing, without reference to extrinsic evidence." While this deed is silent as to the date at which the debt will become due, and by its terms no sale is to be made until after default in payment, and then only upon request of the trust creditor, it does not affirmatively appear from its face that such sale might or could be unreasonably delayed or entirely prevented. Nobody, save the debtor and creditor, knows when sale can be made under the deed; but, when disclosed, the time may be found to be reasonable and just to all parties, and not such as to indicate any fraudulent intent, or be inconsistent with the terms of the deed. On the other hand, the date of maturity may turn out to be so

far in the future as to clearly indicate collusion between the parties to it to defeat the rights of creditors, and not the existence of a bona fide debt and security for the same. However, no case is recalled in which the court has gone to the extent of holding that a deed of trust, to be valid on its face, must be so certain and definite in its terms as to exclude the existence of a secret reservation in favor of the grantor, fraudulent and inconsistent with the terms of the instrument, and not apparent on the face thereof. In *Livesay's Ex'r v. Beard*, 22 W. Va. 585, *Clafin v. Foley*, Id. 434, *Landeman v. Wilson*, 29 W. Va. 703, 2 S. E. 203, and other cases in which this court has held deeds fraudulent on their faces, the evidence of the fraud clearly appeared in the instruments. The terms of the deed in this case are not necessarily inconsistent with good faith, or the ostensible purpose set forth in it. It is, therefore, not fraudulent per se.

It remains now to say whether, upon this record, the question of fraud in fact can be considered, and, if so, whether it exists, and the deed of trust is, for that reason, void. The record shows that, when the decree appealed from was entered, the cause was ready for hearing, and actually came on to be heard upon all the pleadings, evidence, and papers filed in the case, as shown by the quotation herein made from the decree. By the decree, the deed of trust is declared void, and annulled, and set aside. The effect of the decree is general, covering the whole issue as to the bona fides of the deed, and granting the relief asked for in the bill. It can have but one effect upon the rights of the parties litigant, however the lower court may have reached its decision. When it declared the trust deed fraudulent, deprived W. S. Ohewning of the rights he claimed under it, and declared the existence of liens in favor of the plaintiffs upon the property, the court had before it the entire record. As to the validity of the deed, its decree is co-extensive with the entire record in legal effect. It must be deemed to have passed upon the whole record therefore whether in fact it did so or not. It was not necessary to assign in the decree any reason for the decision; and it is well settled that, if a decree is substantially right, it ought to be affirmed, although the inferior court may have given an erroneous reason for its judgment. *Newell v. Wood*, 1 Munf. 555; *Easley v. Craddock*, 4 Rand. 423; *Silsby v. Foote*, 14 How. 219, 14 L. Ed. 394. The decree recites that the court found the deed to be fraudulent per se, and also that the court did not pass upon certain parts of the record. This can only mean that, because the deed was found to be fraudulent per se, the evidence was not considered, and amounts to nothing more than the assignment of a reason for the judgment of the court. The only question before this court is whether the decree is right or wrong.

whether it shall be affirmed or reversed, and in determining that the entire record may be considered, as in all other cases. The Chewnings are brothers. J. W. Chewning evidently came to Monroe county from Giles county, Va., but just when does not appear. One witness testifies that he came to his present place of residence in 1896. In January, 1898, he exempted his personal property from execution at a valuation of \$63.50. A witness familiar with his real estate values it at \$550. W. S. Chewning is a close, saving, and enterprising bachelor 40 years old, living with his mother and sister at Narrows, Giles county, Va., in rented property, consisting of a house and two acres of land, the rental value of which is placed at from \$25 to \$40 per year; has worked for himself more or less since he was 18 years old, raising melons, wheat, and other farm products on rented land; was railroad watchman for 4 years and 8 months at \$1 and \$1.25 per day; worked at station a while at \$18 per month; has made some money trading, especially in watches and jewelry; keeps some horses, and had two hired out for several months at \$1 per day each; liveryman often sends men to him to hire horses at that rate; had team hauling logs for two years; always kept from three to six cows; sold milk and butter, and raised calves, which ranged on mountain without cost; keeps two brood mares, and raises colts, and turns them into money; never gave in any money for taxation, because advised that it was not taxable unless loaned at interest to a bank or individual in Virginia; and, after making first three loans to his brother, went to Monroe county at his brother's request, and figured up his indebtedness to him at \$1,754.23, including interest, and let him have the difference between that sum and \$2,750, taking the deed of trust in question, and believing it to be a sound and safe investment. Such is his testimony. His good character, thrift, industry, and inclination to save his money are vouched for by other witnesses, though there is no evidence aside from his own statements of his ever having had any money in excess of his immediate necessities. In answer to interrogatories, J. W. Chewning says he used the money he claims to have borrowed from his brother as follows: Of the \$450 of October 1, 1896, he paid John A. McKinzie \$375, for which no receipt is among the papers; C. Broyles, \$34.30, evidenced by note dated December 12, 1896, payable one day after date, and the date has the appearance of having been altered; R. H. Arnot, \$10, note, due one month after date, date torn off, and "1895" written on margin in pencil; T. R. Mitchell, \$59.50, receipt, dated November 30, 1895, reciting that it is payment on produce bought October 26, 1894, and date has evidently been altered; J. W. McCreer, \$11, note, dated November 12, 1895, and due June 1, 1896, eight months

after the money was borrowed; and J. H. Comer, \$30.54, duebill for produce, date torn off, but unsigned indorsement in pencil on back, "Paid Nov. 2nd, 1895." Of the \$550 of March 1, 1896, he claims to have paid W. C. Ballard \$20, duebill, dated November 20, 1896, more than eight months after the money was borrowed; Warder, Bushnell & Glessner Company, \$26.50, note, dated July 11, 1895, due October 1, 1896, and paid October 6, 1896, more than seven months after the money was borrowed; J. A. Miller, \$26.29, receipt, dated June 30, 1896, date apparently altered; Augustus Broyles, \$5, receipt, dated May 1, 1896, date apparently altered; and F. J. Young, \$428, receipt, dated May 10, 1896, over two months after money was borrowed, and reciting that it is the first payment on a \$450 bond. Of the \$650 of December 15, 1896, he claims to have paid S. F. Porterfield \$450, receipt, dated December 18, 1896, stating said amount to be a credit on a bond; Allen Caperton, \$24.59, balance on note, paid December 28, 1896; Augustus Broyles, \$24.22, memorandum of butter and eggs, below which is written in different and older pencil, "This Dec. 20th, 1896, due Augustus Broyles, J. W. Chewning," showing it was given after the money was borrowed. Of the \$995.77 of May 31, 1897, he claims to have paid S. F. Porterfield \$400, receipt, dated October 7, 1897, and \$375, receipt, dated October 30, 1897, both nearly five months after the money was borrowed to pay them with, and stating the payments to be on bonds held by Porterfield; Rowan & Bogges, \$10, duebill, dated August 5, 1897; John A. Brown, \$10, receipt, dated June 28, 1897. There is also a receipt from Hoover and Garvin for \$95.19, dated February 14, 1898. He mentions several other payments, for which no receipts appear. This is by no means a satisfactory showing. It discloses many bald discrepancies and suspicious circumstances, as will be seen from a close inspection of it. It fails to strengthen the position of this respondent, and actually weakens it by giving a manifestly false explanation, thereby tacitly admitting inability to give a true one consistent with his representations in the matter. While the declarations of the grantor, made subsequent to the conveyance, are not admitted to affect the title of the grantee (*Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799), the inability or failure of the grantor to satisfactorily account for the money he claims to have received in consequence of the conveyance, when put upon oath as to the matter, is a circumstance from which fraud on his part in the transaction may be presumed (*Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386; *Clarke v. Van Rieksdyke*, 9 Oranch, 158, 8 L. Ed. 688; *Clements v. Moore*, 6 Wall. 299, 18 L. Ed. 786; *Burke v. Burke*, 84 Mich. 451).

Proceeding now to consider the situation of W. S. Chewning, it is to be remembered

that he is a brother of J. W. Chewning, and "a transaction with a near relative is open to more suspicion than with a stranger, because it is more likely to be intended, not as a real transaction, but as a feigned and collusive arrangement by which it is secretly understood that the donee shall hold the property against the claims of creditors, and still let the debtor receive the benefit from it." 8 Am. & Eng. Enc. Law, 784; May, Fraud. Conv. 236. That this principle is recognized in this state appears from the cases of *Watkins v. Wortman*, 19 W. Va. 78; *Knight v. Capito*, 23 W. Va. 639; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Spence v. Smith*, 34 W. Va. 696, 12 S. E. 828; *Bartlett v. Cleavinger*, 35 W. Va. 719, 14 S. E. 273; *Hutchinson's Ex'r v. Boltz*, 35 W. Va. 764, 14 S. E. 267; and others. Before loaning his brother any money, if he did loan it, he undoubtedly knew what property he had,—probably not over \$700 worth, part of which was incumbered,—for he went to his brother's place when he claims to have loaned him the first \$450, which is probably all any prudent man would have loaned on it. With this knowledge, he says he then loaned him \$450, then \$550, then \$650, and then \$995.77. He must have known, before the last two loans were made, that his brother was insolvent by reason of his indebtedness to him alone. This is not in keeping with his reputation for prudence, caution, and closeness in a financial sense. It is irreconcilable with the principles of ordinary business transactions. There is no direct evidence that W. S. Chewning ever had so much money as he claims to have loaned his brother, although he undertakes to show his financial ability in the manner hereinbefore set forth. Nobody testifies to having seen it, or positively known of its existence. One witness says Chewning told him at one time that he had about \$1,000 he could invest in building and loan association stock, but preferred not to do so. It is claimed to be the accumulation of many years, but it does not appear that he has ever had any business transaction in which such an amount of money could have been used, nor that he had ever loaned, deposited, or been taxed with any considerable sum of money. From his personal history and transactions, as already detailed, the court could not presume that he possessed the amount named. The natural inference, if any, would be the contrary. Another suspicious circumstance is the refusal of W. S. Chewning, when brought into court upon a bill charging him with fraud, to disclose how this \$2,750 is evidenced, and when it will become due. Upon this question both his answer and deposition are silent. This borders very closely upon an admission that this most important fact, upon which depends the time when sale can be made, was intentionally and fraudulently omitted from the deed of trust. The omission was specifically charged in the bill of the Gelsner Manufac-

turing Company to be intentional and fraudulent. The fact is peculiarly within the knowledge of the respondent, and probably known to none save himself and his brother. In an answer where fraud is denied, the denial should be full and specific. 8 Am. & Eng. Enc. Law, 777, note, and cases there cited; *Wait, Fraud. Conv. § 162*. This omission from the deed of trust did not make it per se fraudulent, because it was not necessarily evidence of fraud. From the failure to supply it in the answer or evidence, it is fair to presume that the omission was for a fraudulent purpose. It is not desirable or necessary, however, to hold positively that a presumption of fraud arises from such an omission, and it will be simply considered in connection with other suspicious circumstances to which attention has been directed. The evidence of fraud in the case is circumstantial, but this court has held that: "Where a deed is attacked by the creditors of the grantor as fraudulent, in ascertaining whether the fraudulent intent existed in the minds of the grantor and grantee, the court will look into the circumstances surrounding the transaction, circumstantial evidence being not only sufficient to establish such fraud, but, on account of the secrecy of such transactions, is often the only evidence that can be obtained." *Bartlett v. Cleavinger*, 35 W. Va. 719, 14 S. E. 273. The rule as to proof of fraud is stated in 8 Am. & Eng. Enc. Law, 654, as follows: "It is not always necessary, however, that direct affirmative or positive proof of fraud be given. It may be, and usually is, proved by circumstantial or presumptive evidence. If the evidence is sufficient to satisfy the mind and conscience of the existence of the fraud, it will be sufficient, although it does not lead to a conviction of absolute certainty. The fraud need not be proved beyond a reasonable doubt." The conclusion, upon this state of the law and the facts in the case, is that there is no error in the decree of said circuit court in this cause from which the appeal was taken, and it is therefore affirmed.

(49 W. Va. 642)

MAXWELL v. KENT.(Supreme Court of Appeals of West Virginia.
June 18, 1901.)**APPEAL—REVIEW—INSTRUCTIONS—EJECTMENT.**

1. In an action of ejectment, in which the controversy turns wholly upon the location of a boundary line between the lands of the litigating parties, and competent, material, and weighty evidence is adduced by both parties in support of their respective claims as to the true location of the line, and there is a verdict for the defendant, such verdict should not be set aside as being against the weight of the evidence.

2. An instruction given at the request of the defendant, and covering only a part of the theory of the defense to which it relates, and tending to prove which there is evidence in the case, is open to criticism because of its nar-

rowness; but if no general instruction stating the law upon such theory is given in the case, and the instruction is not in such terms as to give undue importance to the evidence referred to in it, and it is manifest that the giving of such instruction has not operated to the prejudice of the plaintiff, the judgment will not be reversed on account thereof.

3. If, in an action of ejectment, the case is such that the rights of neither of the parties are in any way dependent upon any forfeiture under the laws relating to taxes, and there is no evidence in the case of the payment of taxes on any of the property by either of them; and the jury are instructed, at the instance of the defendant, that, if they believe from the evidence the land in controversy is included in the defendant's deed, and he has been in actual possession of any part of the land embraced in the boundary described in his deed, said possession extends to his exterior boundaries, and if continued for a period of 10 years, and having paid all the taxes on the same for that period of time, they must find for the defendant,—the giving of such instruction, although obviously objectionable, is not a reversible error, when it appears that the plaintiff could not have been prejudiced thereby.

4. A ruling of the court below to which no exception is taken will not be noticed in the appellate court.

5. When evidence is excluded, and the action of the court in excluding it is relied upon in the appellate court, it must appear on the record that the evidence rejected was or would have been relevant, material, and important, to make its rejection available as a ground of error.

(Syllabus by the Court.)

Error to circuit court, Raleigh county; Joseph M. Sanders, Judge.

Action by Alfred B. Maxwell against John T. Kent. Judgment for defendant, and plaintiff brings error. Affirmed.

McCreery & Keatley and A. P. Farley, for plaintiff in error. McGinnis, McGinnis & Ball, for defendant in error.

POFFENBARGER, J. In March, 1898, A. B. Maxwell brought an action of ejectment in the circuit court of Raleigh county against John T. Kent, claiming in his declaration a long strip of land,—about 222 poles in length, and averaging something over 9 poles in width; the southwestern boundary line thereof being straight, and the opposite line irregular, and 9 poles distant from the other at the western end, and 8 poles distant from it at the other end. Only part of this strip, containing 10½ acres, is in controversy,—less than 3 acres of it near the eastern end of the strip. About six years before the suit was commenced, Kent cleared the disputed land, and so moved the division fence between him and Maxwell as to inclose it with his land, and has since cultivated it. The question involved is purely one of boundary lines; the land mentioned in the declaration being claimed as part of a large tract of 226 acres belonging to Maxwell, and bounded as follows: Beginning at a white pine on the Giles, Fayette, and Kanawha turnpike road; thence N., 22° E., 179 poles, crossing White Stick creek at 25 poles, and the location of said road at 140 poles, to two white oaks, one of them

marked "F," on the division line between Stuart and Beckley; thence with the same reversed, N., 68° W., 202 poles, recrossing the road to a large chestnut and gum; thence leaving said line S., 22° W., 179 poles, crossing White Stick creek at 108 poles, to a locust stake near the top of a high ridge; thence S., 68° E., 202 poles, crossing Berry's branch, to the beginning. The earliest deed in the record, relating to this tract, bears date March 17, 1854. Adjoining this tract on the southeast, and owned with it by Maxwell, lies another tract, of 15¼ acres, bounded as follows: Beginning at a corner of the last-mentioned tract, on a white pine on the Giles, Fayette, and Kanawha turnpike road, and with said road N., 43½° E., 69 poles, crossing White Stick creek at 50 poles; N., 11° E., 48 poles; due north, 14 poles; N., 50° E., 18 poles; N., 21° W., 10 poles; N., 33° W., 11 poles, to the intersection of the first-mentioned tract, and with the same reversed, S., 22° W., 156 poles, to the beginning. The white pine and locust stake corners of the 226-acre tract are in dispute. They are, respectively, the southeastern and southwestern corners. The controversy turns upon the location of these two corners. According to the calls of the deed, the tract is a parallelogram in form, and the other two corners are well known, and not disputed by either party. All of its lines exceed in length the distances called for in the deed; the northern and southern lines being 20 poles too long, and the eastern and western 32 poles too long, as contended for by the plaintiff, and about 20 or 21 poles according to the contention of the defendant. Plaintiff claims the white pine stood at a certain point in the road, and was grubbed out many years ago. Starting from that point, the line crosses White Stick creek at 41 poles instead of 25, and the road at 168 poles instead of 140. There is also a discrepancy in the length of the lines of the 15¼ acre tract, the beginning corner of the survey of which is the same white pine. However, there is evidence tending to prove the white pine corner is at the point claimed by the plaintiff. By deed dated November 15, 1853, Alfred Beckley, who originally owned the 226-acre and 15¼-acre tracts, and the lands adjoining on the south, east, and west, conveyed to Thomas Warden a tract of land containing 192¼ acres, known as the "Tyree Tract," and lying east of the Maxwell lands. Its description calls for the same white pine as one of the corners (the southwestern), while its eastern line begins on the division line between Stuart and Beckley, is parallel with the eastern line of the 226-acre tract, is 200 poles long, and runs to a white oak marked "B" for the southeastern corner, and thence N., 68° W., 162 poles, to a stake 1½ poles to the right, north, of the white pine. The white oak marked "B" is well known, and there is a marked line from it to the point claimed by

the plaintiff as the place at which the white pine stood. Allowing 3° for variation, this line was run N., 65° W., and indicates that the claim of the plaintiff is correct. The distance to White Stick creek is stated in this deed to be 60 poles, following the road, and in the deed to the 15¼-acre adjoining tract to be 50 poles, but is found by measurement to be about 60 poles. John Greer, an old man, testifies that a pine tree marked as a corner, and standing at the point contended for by the plaintiff, was seen by him when a boy, and was then known as the "Eugene Fleason Corner"; that it had often been pointed out to him by interested parties, now dead, as the Fleason corner; and that he and a man by the name of Blankenship grubbed the tree up many years ago. Samuel L. Davis testifies that he had known it as the "Fleason Corner," and had helped to make one or more surveys running to that corner, and on one occasion helped Alfred Beckley to survey the Tyree tract, in which survey they ran to said point, and Alfred Beckley had spoken of the corner at that time. Edwin Prince, a former owner of the Tyree tract, had regarded that point as the corner. There was other evidence tending to support the claim of the plaintiff on this point, and but little direct evidence, other than what has been noted, tending to disprove his claim as to this corner. For the location of the other disputed corner, the plaintiff relies principally upon the fact that a line run from the white oak marked "B" through the point claimed by him for the white-pine corner will close with the line from the gum and chestnut (the western line) at a point 211 poles distant from said gum and chestnut corner; that being the length of the eastern line as claimed by him. At this point of intersection there is no stake or anything to indicate that it is the corner, except that it is near the top of a ridge; nor is there any marked line to it from the alleged white-pine corner, although it runs part of the way through uncleared land. The defendant claims this corner is some 20 or 25 poles further north on the line running from the gum and chestnut. Two other tracts, formerly owned by Alfred Beckley, corner with this 226-acre Maxwell tract at the southwest. One is known as the "J. O. Addison Tract," lying on the west; the line dividing it from the Maxwell tract being the line from the gum and chestnut, 179 poles long, and terminating at the locust stake. In the line of the Addison tract a white-pine corner is called for in the deed, by running from the locust-stake corner N., 67° W., 140 poles. This white-pine corner seems to be well known, and a line run from it S., 66° E., 150 poles, terminates at the point claimed by the defendant for the locust-stake corner. South of the Addison tract, and cornering at the locust stake, lies the Otis Colwell tract. Its eastern line is a continuation of the line from the gum

and chestnut. The locust stake is the beginning corner, from which the deed calls for S., 23° W., 162 poles, to a chestnut and chestnut oak. A line run from the chestnut and chestnut-oak corner, which seems to be well known, N., 28° E., following a marked line, 175½ poles, reaches the point claimed by the defendant for the locust-stake corner. The line from the white-pine corner of the Addison tract is marked, also. It will be noticed that these lines overrun. J. H. Lemon testifies that about eight years before the date of the trial he accompanied D. W. Beckley and George Prince, who were then running a line to the locust-stake corner, and they then found at the point claimed by the defendant traces of an old fence which had been destroyed by fire, leaving whole rails and pieces of rails remaining on the ground, and Beckley at that time "kicked over a locust stake there." Afterwards he was there when the line was run for Kent, and the stake was gone, and the fence was all gone. Since this action was commenced he had been back there, and found a locust stake within five feet of where Beckley had found the old one, but not the same stake. The stake was produced at the trial, and identified by Lemon and others. It was found near the top of a ridge, in a depression made by the uprooting of a tree, and covered up with leaves and trash. In another part of his testimony Lemon says he saw the first stake there 18 or 19 years ago. T. K. Scott, John T. Kent, and William Willis also testify to the finding of the stake at that point, but not to the existence of the old stake mentioned by Lemon. Willis owns part of the Otis Colwell tract; says his line to the point where the stake was found is well marked; he has been at that corner often, and saw a fence there years ago, and it cornered there at a right angle. He also testified to the existence of marked trees along a line from that point towards the disputed white-pine corner on the turnpike. Joseph Caldwell once owned the 226-acre tract, and J. F. Miller testifies that in 1853 or 1854 he worked for Caldwell on said land, and, among other things, built a fence for him just inside of the line here in dispute, and intended for the line fence between Caldwell and Beckley. He says he has recently gone over the ground and found evidences of the old fence he built, and that the corner of the fence was at the point at which the stake was found. From that point it ran with the lines towards the gum and chestnut in one direction, and southeast towards the turnpike where the white pine is called for. He, as well as several other witnesses, testified to other facts tending to prove that the southern line runs from the point where the stake was found, and that a fence once stood on it, such as the character of the timber, undergrowth, stumps along the line, and marked trees along it, and another supposed line

a few rods south of it. The deed to the several tracts here mentioned and others, relating to contiguous lands, were introduced as evidence in the case. The result of the trial was a verdict for the defendant. A motion by the plaintiff for a new trial was overruled, and the action of the court excepted to. Upon the petition of the plaintiff, assigning this and numerous other rulings of the court as errors, the case is in this court upon a writ of error.

The giving of the following instruction at the instance of the defendant is assigned as error: "The court further instructs the jury that marked lines and ancient fences are elements of proof to be considered, when applicable, in all questions of boundary; and in this case if the jury believe that there was an ancient fence at or near the locust stake called for as a corner of the 226-acre tract owned by Joseph Caldwell, which marked his boundary line at that point, the line of said fence, as an element of proof, is entitled to consideration in determining the true line of the land in controversy, and the marked lines on the land in controversy are entitled to more weight than the marked lines to adjacent tracts." In his argument against the propriety of this instruction, the plaintiff in error assumes that the location of the white pine beginning corner as claimed by him is clearly proven, and that, three of the corners of the tract being thus made certain, the closing of the lines of the tract of land according to the courses stated in the deed locates the missing corner—the stake corner—at the point claimed by him. If there were no evidence tending to show that the white-pine corner on the turnpike is further north than the point claimed by the plaintiff, the instruction should have been refused. It being clear and undisputed that the northern and southern lines of the tract are parallel, and the course and location of the western line being undisputed, it is absolutely certain that, if the stake corner is at the point claimed by the defendant, the white-pine corner cannot be at the point claimed by the plaintiff; and thus is presented a well-defined question of fact for the jury,—as to whether the white-pine corner is at the point contended for by the plaintiff, or far enough north on the turnpike to place all the land claimed by Kent south of it, and therefore outside of Maxwell's line. As already shown, there is evidence in the record indicating that the locust-stake corner is where the defendant claims it is, and also some contradictions and inconsistencies, although not irreconcilable, in the evidence introduced by the plaintiff to prove his claim as to the location of the white-pine corner. The evidence relating to the existence of an old fence and the time and purpose of its erection is only part of the defendant's evidence as to the location of the locust stake. It is relevant and material. It was entitled to consideration by the

jury, and so the court said by this instruction. The defendant had right to have the attention of the jury directed by an instruction to all the evidence relating to his claim respecting the locust-stake corner, but, as he has contented himself with a direction of their attention to part of it only, it is difficult to see how the plaintiff is thereby injured. Before leaving this phase of the case, it is deemed proper to advert to another fact which is inconsistent with the claim that the evidence adduced by the plaintiff respecting the white-pine corner is conclusive. The eastern and western lines of the tract are supposed to be parallel. The western line is well marked and undisputed, and is found by survey to be S., 24 $\frac{1}{4}$ ° W. The eastern line, surveyed as claimed by the plaintiff, is N., 26 $\frac{1}{2}$ ° E. Putting that line on the same bearing as the western line would certainly throw its southern terminus at a point further north and east of the point claimed by the plaintiff, and probably at about where the defendant claims the corner is. It must be borne in mind, also, that the southern line, surveyed upon the theory of the plaintiff, is only 218 $\frac{1}{2}$ poles long, and the northern line 222 poles long, while in the deed these two lines are stated to be equal in length. Correction of the bearing of the eastern line would decrease, if not wholly obviate, this discrepancy in the length of the lines. While the instruction is open to criticism by reason of its narrowness, the plaintiff is not injured or prejudiced by it, for there is no general instruction covering the theory of the case to which the evidence noted in the instruction relates. It is not, therefore, a repetition and improper, as laying too much stress upon that particular part of the evidence in the case.

The action of the court in giving the following instruction for the defendant is also excepted to: "If the jury believe from the evidence in this case that the defendant, John T. Kent, obtained his title from the true owner of the land by deed, and that the boundaries described in said deed include the land in controversy, and that the said defendant, John T. Kent, has been in actual possession of any part of said land embraced in the boundary described in said deed, said possession extends to his exterior boundaries; and if continued for a period of ten years, and having paid all the taxes on the same for that period of time, the jury must find for the defendant." The argument against it is that there is no proof that the defendant ever paid any taxes on the land, or that he had been in possession of any part of the land in controversy for the period of 10 years. That part of the instruction relating to the payment of taxes must have been inadvertently inserted. There is no evidence of the payment of taxes by either of the parties, nor is the case one in which the payment of taxes

would be material. There is no intimation in the record that either of the parties claims under any forfeiture respecting any part of the land. However, it is clear that the plaintiff could not have been prejudiced by this reference in the instruction to the payment of taxes. The jury must have ignored that part of the instruction or all of it, for, to have reached their verdict upon the theory of the instruction, they must have found that Kent had paid the taxes on the land. That they could not have found, for there is no evidence of it. The instruction, in effect, tells the jury that the defendant, in order to prevail in the trial, must prove his actual possession and payment of the taxes on the land. That is more than the law required of the defendant in this case, and the instruction was prejudicial to the defendant, rather than to the plaintiff, if it had any effect. While there was no evidence that the defendant had been in possession of any part of the land in controversy for 10 years, there was evidence of his having had actual possession of part of the land included in his deed for more than 10 years, and that is enough to warrant the giving of the instruction on that point. *Garratt v. Ramsey*, 26 W. Va. 345; *Congrove v. Burdett*, 28 W. Va. 220. The plaintiff himself admits that he and the defendant had together built a line fence, on what he (plaintiff) claims to be the line, "twelve or thirteen years" before the date of the trial of this case (April, 1899). This is virtually an admission of defendant's occupancy of his land at that time, and sufficient evidence to justify the giving of the instruction.

It is claimed the court erred in refusing to give instruction No. 6 asked for by the plaintiff. The record shows it was refused "on the ground that it came too late," but is silent as to the time when it was requested. In his petition for the writ of error the plaintiff says it was requested before the jury retired to their room, but the petition is not part of the record of the case in the circuit court. It is no evidence of what occurred there. In *Winters v. Null*, 31 W. Va. 450, 7 S. E. 443, this court held that "the appellate court will not reverse a judgment because the court refused to give instructions submitted to him after the jury have been directed to retire, as being too late, unless it affirmatively appears that the court below manifestly abused the large discretion given it in all such matters." There being nothing in this record to show under what circumstances the instruction was refused, it follows that there is nothing in it from which this court can find that the lower court abused its discretion, and the exception must be held not to be well taken.

Complaint is also made that the court refused to permit witness Milton Curtis, a surveyor, who had surveyed the land in controversy, and testified that it is embraced in the deed to the Maxwell 226-acre tract, to

answer the question, "Did you make a correct survey of that, according to the title papers you had?" He had already testified that he had made the survey from the description of the land set forth in the deeds, and gone over it in detail, showing how he had made it. The correctness of his measurements and reading of the instrument was not questioned. His answer to the question could have added nothing to the value of his testimony. The jury already had his opinion that the land in controversy belonged to the plaintiff, and his reason therefor. What more could he have said for the plaintiff? Upon what principle was the plaintiff entitled to have a mere repetition of the witness' testimony, it being perfectly clear and well understood?

The court refused to permit the same witness to say whether he had surveyed the defendant's land, and this action of the court is excepted to. But he was afterwards allowed to testify that he had assisted the county surveyor in making such a survey. In reference to that he was thoroughly examined by both parties, and pointed out, as did the county surveyor, also, the inconsistencies of this survey, and its failure to harmonize with the descriptions and surveys of adjacent lands. Whatever the value of this may have been to the plaintiff, he had the benefit of it, and cannot be heard to complain because it did not go in just at the time he sought to introduce it. If it was intended to obtain anything other than the existence of these discrepancies in the answer, there is nothing in the bill of exceptions to show it, and this court is therefore unable to say whether it is material or not. "When evidence is excluded, it must appear on the record that the evidence rejected was or would have been important and material or relevant to the issue. So that it is advisable to show to the court what it is expected to prove in answer to the question propounded." *Hogg, Pl. & Forms*, 428, and cases cited.

A. B. Maxwell, while testifying in his own behalf, was asked if Alfred Beckley ever owned the land where Mr. Kent lives now, or part of it, and replied: "Yes, sir; he owned all the land in the neighborhood,—Kent's and mine, too, and Tyree's." It is argued that this was error, but the record shows no exception.

The court admitted, over the objection of the plaintiff, deeds made by Alfred Beckley to Dyer, Allison & Co. and James H. Phillips, conveying to them, respectively, the Addison and Otis Colwell tracts, hereinbefore mentioned as being contiguous to the 226-acre tract. In this the action of the court was so clearly right that no discussion of the matter is necessary.

It is objected that the court refused to strike out the testimony of J. H. Lemon relating to the locust stake, the substance of which has been given. Such a stake was

one of the monuments mentioned in the deed, and the witness testifies to having seen it at a point which it is not unreasonable to say was the corner at which the deed located it. His testimony on this point was relevant and material, and was properly admitted.

A further objection is that the court refused to permit T. K. Scott, witness and surveyor, to say how the running of the division line as contended for by the defendant would affect a small lot belonging to J. M. Williams, and touching what the plaintiff claims is the white-pine corner. There is nothing in the record to show when or from whom Williams obtained the lot, nor anything from which it appears that such evidence was either relevant or important, for which reason the exception is insufficient, even if it could have been shown that the circumstances were such as to render it admissible.

It remains now to consider the action of the court in overruling the motion for a new trial. If the court improperly rejects evidence offered by either of the parties, and it is excepted to, and there is a verdict against the exceptor, it will be set aside, even though the court may believe that the verdict of the jury ought not to and would not have been different had the evidence been admitted. *Corder v. Talbott*, 14 W. Va. 277. But a judgment will not be reversed because evidence was excluded from the jury unless such exclusion was to the prejudice of the exceptor. *Tompkins v. Kanawha Board*, 21 W. Va. 225. Where the evidence is conflicting, a new trial will not be granted. *Id.* That a new trial may be had, manifest wrong and injustice must have been done. It is not enough that the court would have rendered a different verdict. *Shrewsbury v. Miller*, 10 W. Va. 116. A new trial will not be granted because evidence admitted was irrelevant, if it could not possibly prejudice the opposite party. *Huffman v. Alderson's Adm'r*, 9 W. Va. 616. Where the verdict of the jury is such as to clearly indicate prejudice, passion, or corruption in arriving at their conclusion, the verdict should be set aside. *Unfried v. Railroad Co.*, 34 W. Va. 260, 12 S. E. 512. When the verdict is against the weight of evidence, it should be set aside and a new trial granted. *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13. But the verdict of a jury ought not to be interfered with by granting a new trial if, when most favorably considered in support of the verdict, it does not still appear that the verdict was plainly not warranted by the evidence. *Gwynn v. Schwartz*, 32 W. Va. 48, 9 S. E. 880. From the evidence in this case, as hereinbefore substantially detailed, it appears that there is evidence in support of the claims and contentions of the defendant, and therefore upholding the verdict. The plaintiff introduced evidence conflicting with it, but it is

only the evidence of facts tending to establish one theory of the case, while that of the defendant tends to support another and conflicting theory. It was purely a question of fact as to whether the boundary line was at one place or at another, with competent, material, and weighty evidence before the jury in favor of both locations, and nothing conclusive as to either of the parties. Moreover, there is nothing in the record or verdict indicative of partiality, passion, or prejudice, or disclosing any special circumstances or conditions which would warrant interference with the verdict upon the principles laid down in *Unfried v. Railroad Co.*, supra; *Gilmer v. Sydenstricker*, 42 W. Va. 53, 24 S. E. 566; and *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686. The motion for a new trial was properly overruled, and judgment rendered for the defendant. The judgment of the circuit court is therefore affirmed.

BRANNON, DENT. and McWHORTER,
JJ., concur.

(61 S. C. 25)

STATE v. WOLFE.

(Supreme Court of South Carolina. July 1, 1901.)

COURT OF GENERAL SESSIONS—JURISDICTION —OBSTRUCTING HIGHWAY.

1. Under Const. 1895, art. 5, § 18, providing that the court of general sessions shall have jurisdiction in all criminal cases except those in which exclusive jurisdiction shall have been given to inferior courts, when it shall have appellate jurisdiction, the court of sessions has concurrent jurisdiction with the magistrate court of one indicted for willfully obstructing and closing the public road by erecting a house thereon.

2. An indictment for obstructing a highway by building a house thereon is not based on Cr. Code, § 365, providing that, if any person shall obstruct a highway, and shall not immediately remove the obstruction when required, he shall be punished, as such section applies only to temporary obstructions.

Appeal from general sessions circuit court of Orangeburg county; Buchanan, Judge.

William W. Wolfe was indicted for obstructing a public road. From an order remanding the case to a magistrate's court because the court was without jurisdiction, the state appeals. Reversed.

P. H. Hildebrand and Abram H. Moss, for the State. Glaze & Herbert, for respondent.

GARY, A. J. The appellant was indicted for willfully, maliciously, and unlawfully obstructing and closing the public road which connects two highways by building, erecting, and maintaining a house or structure over said public road, which, it was alleged, has been used continuously and uninterruptedly by the public for more than 20 years last past. After introducing testimony for the defense, the defendant's counsel moved to

withdraw the case from the jury, and send it to the magistrate's court because of lack of jurisdiction under the statute in the court of general sessions. In acting upon the motion, his honor, the presiding judge, said: "After the state had rested in this case, and after some evidence for the defendant had been introduced, and after the statement of Dr. Keller had been read to the jury, upon the convening of the court after evening recess, a motion to withdraw the case was made by counsel for the defense upon the ground that section 365 provides for the trial of this character of offenses by the court of magistrates; the new constitution of 1895 having altered the jurisdiction from that formerly entertained by it, in that it provided that certain cases should be concurrently entertained by the court of general sessions and by the court below. In looking at this exception, we find that the section providing for the punishment for "obstruction of a highway is not included, from which the court concludes that it was the purpose of the framers of the constitution that this character of offenses should not be tried, or jurisdiction concurrently entertained by this court with that of the magistrates. The motion, therefore, to withdraw, made by counsel for the defense, as above indicated, the court thinks should be granted, and for the reasons mentioned above." The presiding judge granted an order referring the case to the committing magistrate; whereupon the state appealed.

Section 18, art. 5, of the constitution is as follows: "The court of general sessions shall have jurisdiction in all criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and in these it shall have appellate jurisdiction. It shall also have concurrent jurisdiction with, as well as appellate jurisdiction from, the inferior courts in all cases of riot, assault and battery and larceny." Section 365 of the Criminal Code (2 Rev. St. 1893, p. 385) is as follows: "If any person shall cause any obstruction to be placed in any part of the said highway, or on any bridge or causeway thereof, so as to obstruct or render dangerous or difficult the passage of carriages or other traveling thereon, and shall not immediately remove the same when required, he shall be deemed guilty of a nuisance, and on conviction thereof before a trial justice shall be fined in a sum not exceeding \$10 nor less than \$2, and shall be further liable for the expenses of removing the said nuisance." We quote with approval the following language of Mr. Chief Justice McIver in his dissenting opinion in the case of *State v. Harden*, 11 S. C., at pages 873, 874: "Again, I do not think the indictment can be regarded as framed under the statute, but that the words 'contrary to the form of statute' should be rejected as surplusage, and the indictment be regarded as one at common law, as in *Sartor's Case*. It is a well-established rule

of criminal pleading that an indictment for an offense created by statute must follow the words of the statute; and, if it does not, it cannot be sustained, except by the rejection of the words 'contra formam statuti' and treating it as an indictment at common law, which may be done in those cases where the offense existed at common law, and has not been abrogated by any statute, as in this case now under consideration. The statute under which it is suggested that this indictment is framed is section 18, c. 44, p. 267, Gen. St., taken from section 2, Acts 1824; 9 St. at Large, p. 545. But the indictment cannot be regarded as framed under that section, for it omits one of the material ingredients of the offense there described. Under that section the mere placing an obstruction in a public highway does not constitute the offense, but it consists in not immediately removing such obstruction when required. Hence, to sustain an indictment under this section, it requires not only an allegation that defendant placed an obstruction in the public highway, but also that he failed and refused to 'immediately remove the same when required'; and this latter allegation is not contained in the indictment in this case. This section was doubtless intended to prevent the temporary obstruction of public highways by the stopping of carts, wagons, or other vehicles in such highways, and refusing or neglecting to remove such impediments to travel when required." See, also, *State v. Switzer*, 59 S. C. 225, 87 S. E. 818. For the foregoing reasons, it is apparent that the indictment was not framed under section 365 of the Criminal Code (2 Rev. St. 1893, p. 385), and the punishment therein prescribed can have no effect in determining the question of jurisdiction. The presiding judge was of the opinion, it seems, that the court of general sessions did not have jurisdiction, because the offense charged in the indictment was not mentioned in section 18, art. 5, of the constitution, wherein are enumerated the cases in which the court of general sessions and magistrates shall have concurrent jurisdiction. Section 21, art. 5, of the constitution provides that magistrates shall have exclusive jurisdiction in such criminal cases as the general assembly may prescribe; such jurisdiction not to extend to cases where the punishment exceeds a fine of \$100, or imprisonment for 30 days. The foregoing sections of the constitution show that the court of general sessions has concurrent jurisdiction in all cases except those in which the general assembly may prescribe exclusive jurisdiction in cases cognizable before magistrates, or in which exclusive jurisdiction shall be given to other inferior courts; also, that the court of general sessions cannot be deprived of concurrent jurisdiction by the general assembly in any case of riot, assault and battery, or larceny. His honor was, therefore, in error in his construction of the foregoing section of the constitution.

There is still another reason why the order of the circuit court should be reversed. The case of *State v. Cooler*, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181, decides that under the constitution of 1868, when a trial justice had jurisdiction of a criminal case, such jurisdiction was exclusive. The provisions of the present constitution are, however, quite different from those of the constitution of 1868. Under the constitution of 1895 it is necessary for the general assembly to manifest an intention to confer exclusive jurisdiction on inferior courts, and this intention is not shown by simply giving jurisdiction to the inferior court. Any other construction would render meaningless the word "exclusive," in section 18, art. 5, of the constitution. Furthermore, the words of section 21, providing that magistrates shall have exclusive jurisdiction in such criminal cases as the general assembly may prescribe, such jurisdiction not to extend to cases where the punishment exceeds a fine of \$100 or imprisonment for 30 days, show that it was necessary for the general assembly to do more than prescribe the punishment, not exceeding a fine of \$100 or imprisonment for 30 days, in order to confer exclusive jurisdiction on magistrates. There is no statute manifesting such intention. It is the judgment of this court that the order of the circuit court be reversed.

(61 S. C. 28)

Ex parte KREPS.

(Supreme Court of South Carolina. July 1, 1901.)

JUDGE-DISQUALIFICATION.

Under Rev. St. § 2293, providing that no judge shall preside on a trial where he may be connected with either of the parties by consanguinity or affinity within the sixth degree, and section 1980, subd. 6, providing that in reckoning degrees of kindred the computation shall go up to the common ancestor, and then down to the person claiming kindred, each step being reckoned as a degree, where it appeared that one once removed from the common ancestor was the father of a daughter who intermarried, and was the mother of one who thereafter became a party to the action, the judge, who was four times removed from the common ancestor, was not disqualified because of the relationship.

Appeal from common pleas circuit court of Saluda county; Townsend, Judge.

Petition by L. L. Kreps and N. H. Watson, at instance of Ellen Watson, to have will of M. B. Watson proved in due form of law. From order admitting the will to such proof, respondent, Ellen Watson, appeals to circuit court, and from order dismissing such appeal she appeals. Affirmed.

C. J. Ramage and J. N. O. Gregory, for appellant. Sheppard Bros., E. W. Able, and P. B. Watters, for appellees.

GABY, A. J. In pursuance of notice, and after the introduction of testimony, Walter Satcher, judge of probate for Saluda coun-

ty, admitted to probate in due form of law the will of M. B. Watson, deceased. Thereafter a motion was made for a new trial before the probate judge aforesaid "on the ground that there was not sufficient evidence to sustain said order, and on the further ground that Walter Satcher is related to said N. H. Watson and the wife of said L. L. Kreps within the sixth degree." The following statement appears in the record: "Several affidavits were then introduced, the purport of which was that Walter Satcher was the father of the judge of probate, Walter Satcher; that Willis Satcher was the father of Walter Satcher, Sr.; that Arthur Satcher was the father of Willis Satcher; that Sam Satcher was the father of Arthur Satcher, and was the common ancestor; that Sam Satcher was the father of Amos Satcher, who was also a brother of Arthur Satcher, above named; that Amos Satcher was the father of Lois Satcher, who intermarried with Watson; that Lois Watson was the mother of N. H. Watson, and wife of L. L. Kreps, parties to this action." The attorneys of Mrs. Ellen Watson filed a joint affidavit, stating that when the will was admitted to probate they did not know of any relationship between the parties hereinbefore mentioned. The motion was refused, whereupon Mrs. Ellen Watson appealed to the circuit court. His honor, Judge Townsend, granted the following order: "After hearing argument pro and con upon the exceptions to the decree of the probate judge of Saluda county, dated the — day of —, 1900 and it appearing that the probate judge is not related to the petitioners within the sixth degree, and it further appearing that the respondent, Ellen Watson, did not raise the question of relationship at the original hearing of the case to prove will in solemn form, and it appearing still further that there is no showing upon the part of Ellen Watson that she did not know of the existence of the relationship between the petitioners and probate judge, upon motion of John C. Sheppard and Eugene W. Able it is ordered that the motion for a new trial be, and the same is hereby, dismissed." The appeal herein is from said order.

The first question that will be considered is whether the probate judge was related to the parties aforesaid within the sixth degree. It is true, Mr. Blackstone, in the second volume of his Commentaries (page 207), does say: "The method of computing these degrees, in the canon law, which our law has adopted, is as follows: We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree, for from the father to each of them is counted only one. Titius and his nephew are related in the second degree,

for the nephew is two degrees removed from the common ancestor, viz. his own grandfather, the father of Titius." This was said with reference to the inheritance of lands by the next of kin. In the same volume (page 504) he, however, uses this language: "If the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator, as the statutes of Edward III. and Henry VIII., before mentioned, direct. In consequence of which we may observe: * * *

(3) That the nearness or propinquity of degree shall be reckoned according to the computation of the civilians, and not of the canonists, which the law of England adopts in the descent of real estates; because in the civil computation the intestate himself is the terminus a quo the several degrees are numbered, and not the common ancestor, according to the rule of the canonists." In discussing the methods of acquiring personal property, in the same volume (page 515), he says: "The next of kindred here referred to are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration." It will thus be seen that at common law the rule was different for determining the degree of consanguinity as to the next of kin in the inheritance of real and personal estates. In order, no doubt, to have a uniform rule, subdivision 6, § 1980, Rev. St., was enacted, which provides that "in reckoning the degrees of kindred, the computation shall begin with the intestate and be continued up to the common ancestor, and then down to the person claiming kindred, inclusively, each step inclusively being reckoned as a degree." Section 2296, Rev. St., is as follows: "No judge or other judicial officer shall preside on the trial of any cause, where he may be connected with either of the parties, by consanguinity or affinity, within the sixth degree." This section is not affected by section 6, art. 5, of the constitution, which provides that "no judge shall preside at the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him, by affinity or consanguinity, within such degree as may be prescribed by law"; for under the provisions of section 10, art. 17, of the constitution, "all laws now in force in this state, and not repugnant to this constitution, shall remain and be enforced until altered or repealed by the general assembly." Neither the rule of the common law as to consanguinity of kindred in the descent of real estate by inheritance, nor that as to personal effects, has, in strictness, any application to this case. But, in no event, do we see how the rule of the common law as to real estate could be invoked, as it is superseded by subdivision 6, § 1980, Rev. St., which applies alike to real and personal estates. In 16 Am. & Eng. Enc. Law (1st Ed.) 708,

it is said: "In England and in the United States statutes of distributions modeled upon the 118th novel of Justinian have been enacted, which defines with precision the order of preferences among kindred. In construing these statutes the courts have generally applied the rule of the civil law in ascertaining the proximity of the kindred. In determining lineal consanguinity, each step up or down from the decedent counts as one degree. Thus an intestate or his son or father are related in the first degree, and intestate and his grandson or grandfather are related in the second degree. In determining collateral consanguinity, the rule is to count up from the intestate to the common ancestor, and then down to the person whose kindred with the intestate is sought to be ascertained. In this computation each step, both in the ascending and the descending line, counts as one degree. Thus an intestate and his brother are related in the second degree, and an intestate and his cousin in the fourth degree." This is the rule in South Carolina. Under this interpretation of the law, the other exceptions present merely abstract questions, and will not be considered. It is the judgment of this court that the order of the circuit court be affirmed.

(61 S. C. 6)

McALISTER v. HAMILTON.

(Supreme Court of South Carolina. June 22, 1901.)

RES JUDICATA.

1. Where the judgment below is affirmed on appeal because of an equal division of the justices, it is res judicata as to questions raised therein.

2. Where the parties are the same and the subject-matter is the same, and the supreme court on appeal in the former case disposed of the whole matter by fixing the amount which one party should pay to the other, it is res judicata on second trial.

Appeal from common pleas circuit court of Oconee county; Gary, Judge.

Action by Charles McAllister against W. O. Hamilton. Complaint dismissed, and plaintiff appeals. Affirmed.

M. F. Ansel and Cothran & Cothran, for appellant. Stribling & Herndon, for appellee.

GARY, A. J. The facts out of which this controversy arose are set out in the decree of his honor, the circuit judge, which is as follows: "This case is a continuation of the controversy involved in the case of Hamilton v. McAllister, reported in 49 S. C. 230-242, 27 S. E. 63. The facts of that case are fully stated there, and need not be repeated here. In that case the court decided as follows: 'The circuit judge has gone too far, however. He ought to have contented himself with a reformation of the contract by giving plaintiff credit on his indebtedness to defendant as of the 19th November, 1894, for the sum

of \$431.85, which result is reached by us in this way: The witness, Fred White, testified that he counted the trees on land taken by Mrs. C. H. Blemann to be 612; on lands claimed by both McAlister and Wickliffe, 348 trees; and on McAlister's land, undisputed, 456 trees. These aggregate 1,416 trees. By a calculation it will be seen that plaintiff agreed to pay 70.565 cents per tree, thus making the 612 trees lost by plaintiff through title of Mrs. Blemann worth \$431.85. The plaintiff should be required to keep his contract as to the trees on McAlister's own land. * * * Defendant should be required to pay nothing to plaintiff, but should only be required to enter a credit, as of 19th November, 1894, on the two notes still outstanding, for the amount of \$486.85, as hereinbefore ascertained, and also the privilege to Hamilton, for and during the remainder of the year 1897, to cut and remove the timber on lands of defendant under his contract.' Now, McAlister, defendant in that case, brings his suit as plaintiff in this case against Hamilton, as defendant, who was plaintiff in that, alleging that Hamilton, in carrying out the contract as interpreted by the supreme court, cut from McAlister's land 864 trees more than he was entitled under the contract, of the size designated therein, alleged to be worth \$609.80, and asking judgment against Hamilton for that amount. Hamilton answers, denying all the allegations of the complaint, which are relied on to charge him with being due the plaintiff anything, and especially pleads that the whole matter is *res judicata*. By consent of counsel, the whole case is submitted to me for decision on the plea of *res judicata*. My judgment is that this plea should be sustained. The parties are the same, and the subject-matter is the same, and the supreme court seems to me to have disposed of the whole matter by fixing the exact amount that Hamilton should pay McAlister for his timber, and the exact time Hamilton should have in which to cut the whole of the timber of the dimensions named. It is not claimed that Hamilton has not paid the whole amount decreed to be paid by him for the timber, or that he has in any other way failed to comply with the contract as decreed by the supreme court. The only contention is that Hamilton actually got more trees left on the McAlister land proper than was considered in the calculation made by the supreme court. But it should not be forgotten that the trees were bought in bulk, for a round sum, and not by the tree, and the calculation resorted to by that court was not to ascertain and decree what number of trees Hamilton should be allowed to cut, for he had bought them all, but to ascertain the amount of credit McAlister should give him for the trees taken by Blemann. The supreme court was endeavoring to modify the circuit decree, which ordered a rescission of the whole contract, so as make it more fa-

vorable to plaintiff in this case, by ascertaining the amount of credit plaintiff should enter by reason of the trees lost to Hamilton on his contract. The court did ascertain this from the undisputed testimony in that case, and decreed accordingly. There should be an end of litigation. Plaintiff had his day in court. The matters contended for by him in this case are now *res judicata*. Let the complaint be dismissed, with costs."

The plaintiff appealed, upon several exceptions, which it is not necessary should be considered in detail, as the practical question is whether there was error in sustaining the defense of *res judicata*. The decree of the circuit judge is sustained by the reasoning upon which it is based. The opinion in the former case concludes as follows: "This being my conclusion concurred in by Mr. Justice Jones, although not concurred in by the other two justices, the effect is that the judgment of the circuit court is modified in accordance with the views hereinbefore announced by me. It is accordingly so adjudged." The matter now in dispute was considered and disposed of by the court, and no question was left open by the former opinion. We fail to see how it can be brought again in review. *Jennings v. Parr*, 54 S. C. 109, 32 S. E. 73. It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J., concurs in result.

McIVER, C. J. (concurring). It seems to me that there was error in sustaining the plea of *res judicata*. That plea is based upon the alleged judgment rendered by this court in a previous case between these same parties, relating to the same subject-matter, in which the defendant herein brought an action against the plaintiff herein to rescind a written agreement entered into by said parties for the sale by McAlister to Hamilton of all the timber trees of certain special dimensions growing on the land of McAlister, known as the "Gibson Tract," for the sum of \$1,000, to be secured by three notes of Hamilton, payable to McAlister at different dates, and also to cancel said notes, and to require McAlister to refund to Hamilton the money paid by him to McAlister on the note first becoming payable, with interest from the date of such payment. See the case of *Hamilton v. McAlister*, 49 S. C. 230, 27 S. E. 63. That action was based upon the ground that said written agreement was entered into under a mutual mistake as to the boundaries of said tract of land. The circuit judge who heard that case (his honor, Judge Benet) held that the agreement should be rescinded, the notes canceled, and the amount paid on the first note by Hamilton should be refunded, and rendered judgment accordingly. From that judgment McAlister appealed to this court, when this court was equally divided—two of the justices holding that the circuit judge

had gone too far in rescinding the entire agreement and canceling the notes, and were of opinion that the judgment should be modified in accordance with the views stated in the opinion of Mr. Justice Pope and concurred in by Mr. Justice Jones, while the other two justices dissented, holding that the judgment of the circuit court should be reversed and the complaint dismissed. From this it would seem that no judgment was ever rendered in the former case between these parties, and hence there would be no room for the plea of *res judicata*. But, as I infer from what is stated in the complaint in this case, all parties seem to have treated the views presented by Mr. Justice Pope, and the conclusion which he reached in the former case, concurred in by Mr. Justice Jones, as the judgment of this court in that case; and, while I do not agree to the correctness of that view, yet I am not disposed to interfere with this action of the parties. The only points upon which the entire court was agreed in the former case were that Judge Benet has erred in rendering judgment that the written agreement should be rescinded, the notes given in conformity to its terms canceled, and the money paid by Hamilton to McAlister should be refunded. Assuming, however, as the parties seem to have done, that the judgment of this court in the former case was in accordance with the view presented by Mr. Justice Pope in his opinion in that case, still I think it afforded no basis for a plea of *res judicata*, for the reason that the question presented in the present case was not, and could not, at that time have been, adjudicated in the former case. The only object of the calculation or estimate made by Mr. Justice Pope in his opinion was to ascertain what was the number and value of trees which Hamilton lost by reason of the claim of Mrs. Biemann to a part of the land upon which Hamilton had bought all of the trees of the specified dimensions, in order to determine what credit Hamilton should be allowed on the contract price of the trees which he bought, or rather supposed he was buying. In other words, the only question made in the former case was what credit Hamilton should have on his contract with McAlister on account of the loss of the trees taken by Mrs. Biemann; and there was not, and could not have then been, any question raised as to the number or value of the trees which Hamilton was to get from McAlister. The question in the present case is whether McAlister is entitled to claim from Hamilton pay for all the trees cut by him on the land of McAlister, at a price which each tree was estimated to be worth in the former case, when the sole object was to ascertain the amount of credit to which Hamilton was entitled by reason of the trees which he lost through the claim of Mrs. Biemann. That is a totally different question from that raised and determined in the former case, and is not concluded by the plea of *res judicata*.

But, aside from the defense set up by the plea of *res judicata*, it seems to me very clear that the plaintiff is not entitled to recover in this case, and that there was no error in dismissing the complaint. The plaintiff having contracted to sell all of the trees of certain specified dimensions, at a lump sum, on his Gibson tract of land, he is not entitled to recover anything more than the contract price, even though the number of such trees should turn out to be much greater than was estimated. The fact that the plaintiff may have sustained some loss by reason of an erroneous estimate made in the former case, as seems to be the fact, if the allegations of the complaint in the present case be true, cannot affect the present inquiry. I concur, therefore, in the result.

(S. C. 23)

TOWN COUNCIL OF CROSSHILL v. OWENS.

SAME v. SPEARMAN.

(Supreme Court of South Carolina. June 29, 1901.)

CRIMINAL LAW—APPEAL—EVIDENCE.

1. Where defendant pleads guilty to a violation of a city ordinance, and, without any complaint as to his sentence being beyond the limits of the law, he appeals, he cannot be heard to complain thereof on appeal.

2. Where defendant is compelled to testify on trial on a criminal charge, though he does not object to being sworn and is the only witness, his conviction will be set aside.

Appeal from common pleas circuit court of Laurens county; Benet, Judge.

J. M. Owens and J. C. Spearman were convicted of selling intoxicating liquors, and appeal to the circuit court. From an order dismissing the appeals, defendants appeal. Affirmed in one case, and reversed in the other.

W. R. Richey, for appellants. Sease, Furgeson & Featherstone, for respondents.

POPE, J. Each of the defendants was separately indicted by the town council of Crosshill, S. C., for selling, within the limits of said town, intoxicating liquors. The defendant J. E. Spearman entered a plea of guilty when brought before the intendant of said town and charged with such crime, but the defendant Dr. J. M. Owens entered a plea of not guilty. At his trial he was the only witness sworn, and he testified that: "He sells malt for medical purposes. Sold one glass of cider, but found that it contained too much alcohol, and decided not to sell any more cider. Sold some of De Witt's Stomach Bitters. Instructed Reed, his clerk, not to sell more than a bottle of malt to one man at a time for medical purposes." Whereupon the defendant J. E. Spearman was sentenced by the said town council to pay a fine of \$50, or in lieu thereof 30 days' imprisonment in the county jail of Laurens, S. C., and the defendant Dr. J. M. Owens was ordered

to pay a fine of \$50, or be imprisoned for 30 days in the county jail of Laurens, S. C. From these several judgments the defendants appealed to the court of general sessions for Laurens county. When the said appeals came on to be heard by his honor, Judge W. C. Benet, he passed a short order dismissing the appeal in each case, and remanded each of the defendants to the lower court to enforce its judgment in each case. Each of the said defendants has appealed to this court.

We need not set out the grounds of appeal, so far as J. E. Spearman is concerned, for he pleaded guilty, and there is no complaint as to his sentence being beyond the limits of the law. He cannot be heard to complain now.

One of the grounds of appeal presented by Dr. J. M. Owens goes to the root of the matter of his conviction, viz that he was required to give testimony while he was on trial for a crime. Section 17 of article 1 of our state constitution provides: " * * Nor shall he be compelled in any criminal case to be a witness against himself." He was the only witness sworn. While we do not express any opinion as to the effect of his testimony, still we are bound to reverse the judgment against him on the ground that he was compelled to testify against himself. Because the defendant made no objection to his being sworn, and no objection as to his testifying, does not alter his constitutional right. A man might subject himself to punishment for contempt if he objected to testifying when forced or called upon to do so. It is not in accord with the orderly administration of justice to swear a defendant as a witness against himself in any court. Indeed, as we have seen, the constitution forbids it. If a defendant asks to be sworn when charged with a crime, that presents a different question. He certainly may be sworn as a witness in his own behalf. But in the case at bar the defendant was the only witness sworn for the prosecution, and it does not appear that he asked to be sworn. There must be a new trial as to Dr. J. M. Owens. The judgment of this court is that the judgment of the circuit court as to the defendant J. E. Spearman be affirmed. It is the judgment of this court that the judgment of the circuit court as to the defendant Dr. J. M. Owens be reversed.

(61 S. C. 12)

STATE v. GREEN.

(Supreme Court of South Carolina. June 26, 1901.)

SELLING LIQUORS—EVIDENCE.

1. Under an indictment for selling liquors, a sale on a day other than that alleged in the indictment may be shown.

2. Where defendant was indicted for maintaining a liquor nuisance, evidence that liquors were found in a room over which defendant had control was admissible.

3. A self-serving declaration of defendant in a criminal case is inadmissible.

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4. The fact that the name of a witness was not mentioned in the indictment as one to whom liquor was sold did not render him incompetent to testify as to any fact tending to prove that he saw defendant sell liquor to any one or more persons named in the indictment.

5. On trial for keeping and selling liquors, evidence to show that defendant had control of the room in which the liquors were found is admissible.

Appeal from general sessions circuit court, Spartanburg county; Benet, Judge.

Bloom Green was convicted of maintaining a nuisance by keeping liquor for sale, and appeals. Affirmed.

The following were the exceptions: "(1) In allowing the witness Henry Wilson to testify, over defendant's objection, that he purchased whisky from the defendant on other days than the one named in the indictment, to wit, 8th day of April. (2) In refusing to strike out the testimony of the witness Henry Wilson that he bought whisky of the defendant, and admitted that he did not know when it was, for the reason that it might have been after the finding of the indictment in this case. (3) In allowing the witness R. M. Floyd to testify, over defendant's objection, that he found whisky in an adjoining room to the one occupied by the defendant. (4) In allowing the witness R. M. Floyd to testify, over defendant's objection, that he thought he found a bottle of whisky in the bureau drawer where he first saw the defendant. (5) In sustaining the objection of the solicitor in the following testimony of witness R. M. Floyd upon the cross-examination, to wit: 'Q. You don't know who occupied that room? A. No; I only know what Mr. Green told him right there.' At this point the solicitor objected, and the judge sustained the objection, saying that any statement made by defendant that makes for his benefit is not admitted. (6) In allowing the witness Dave Alverson to testify over defendant's objection, when the said Dave Alverson's name did not appear in the indictment. (7) In allowing witness Alverson to testify that he paid Mr. Green, the defendant, to allow his furniture to stay in the room in which it was kept, over defendant's objection. (8) In allowing the witness Walter Perry to testify, over defendant's objection, that he had bought whisky on several occasions, over defendant's objection that the said witness' name did not appear in the indictment, and that the times he testified to having bought whisky from defendant were other than the times mentioned in the indictment. (9) In allowing the witness A. L. Foster to testify, over defendant's objection, that he had bought whisky from the defendant at other times than the time mentioned in the indictment, and for the further reason that the said witness' name did not appear in the indictment."

O. P. Sims, for appellant. U. X. Gunther, Asst. Atty. Gen., for the State.

McIVER, C. J. The defendant was indicted, tried, and convicted under an indictment containing three counts, for violating the dispensary law. In the first count the defendant was charged with selling spirituous liquors on the 8th of April, 1900, to certain persons named in that count. In the second count the defendant was charged with unlawfully keeping and maintaining a nuisance on the 8th day of April, 1900, and on divers other days both before and since that day up to the taking of this inquisition, by keeping a place where liquors were unlawfully sold, and where persons were permitted to resort for the purpose of drinking alcoholic liquors, and where alcoholic liquors were kept for sale. In the third count the charge was that on the 8th day of April, 1900, the defendant did unlawfully store and keep in his possession contraband spirituous liquors. From the judgment rendered the defendant appeals to this court upon the several exceptions set out in the record, a copy of which will be incorporated by the reporter in his report of this case.

The first and second exceptions, relating to the same subject, will be considered together. They rest upon the allegation that the testimony of the witness Henry Wilson was incompetent. The point of the first exception is that the witness named was permitted to testify that he had bought whisky on other days than the one named in the indictment. It is well settled that it is not necessary to prove the precise day on which the offense charged was alleged in the indictment to have been committed, unless time is of the essence of the offense charged, as it clearly is not here. See *State v. Braham*, 13 S. C., at page 392, and the cases there cited, which has been expressly recognized in the recent case of *State v. Reynolds*, 48 S. C., at page 385, 26 S. E. 679, as well as the still more recent case of *State v. Prater*, 59 S. C. 271, 37 S. E. 933. As to the point made in the second exception, that the sale testified to by this witness might have been made after the finding of the indictment in this case, it may be said that this position rests upon conjecture only, for which there is not only no foundation in the "case," but, on the contrary, the testimony there reported tends to show that the sale was made prior to the preliminary examination, and hence, necessarily, prior to the finding of the indictment. These two exceptions must, therefore, be overruled.

The third exception, relating to the testimony of the witness Floyd cannot be sustained, for the reason that the defendant was not only charged with selling liquor to the persons named in the first count in the indictment, but was also charged, in the second count, with maintaining a nuisance, and, in the third count, with keeping and storing contraband liquors, and the testimony of Floyd was quite pertinent to either of these two last charges, and was, therefore, compe-

tent. Especially is this so where there was testimony tending to show that the defendant had the use and control of the adjoining room, referred to in this exception.

The fourth exception raises the question of the competency of the testimony of Floyd "that he thought he found a bottle of whisky in the bureau drawer where he first saw defendant"; and it is claimed (as we infer, for no argument was submitted for defendant) that "he thought" implied that he was expressing an opinion merely, and not stating a fact. We do not think so. On the contrary, it was a statement of fact as to which he was not certain. The fourth exception must be overruled.

The fifth exception is very clearly untenable. No authority is necessary to show that there was no error in ruling out the declarations of the defendant.

The sixth exception cannot be sustained. While it is true that Dave Alverson was not named in the first count of the indictment as one of the persons to whom the defendant had sold liquor, which may have rendered him incompetent to testify that he had bought liquor from the defendant if he had been asked whether he had bought liquor from the defendant; but he was not asked any such question, nor did he undertake to give any such testimony. The fact that his name was not mentioned in the indictment did not render him incompetent to testify as to any fact tending to sustain either or both of the charges contained in the second or third counts of the indictment. Indeed, we see no reason why he was not a competent witness to prove that he saw the defendant sell liquor to any one or more of the persons named in the first count in the indictment as the person to whom the defendant had sold liquor; but, as a matter of fact, he gave no such testimony.

The seventh exception imputes error to the circuit judge in permitting the witness Alverson to testify that he paid the defendant for allowing his furniture to remain in the adjoining room to that occupied by defendant. There was no error in this, as it was quite pertinent as tending to show that defendant had the control of such adjoining room, and thus competent to sustain the charges contained in the second and third counts of the indictment, as the adjoining room seemed to be the place where it was claimed that defendant kept his liquor. The seventh exception is therefore overruled.

The eighth and ninth exceptions, imputing error to the circuit judge in receiving the testimony of Walter Perry and A. L. Foster, being based upon the same ground, will be considered together. The first objection—that the names of neither of these witnesses appeared in the indictment—has already been disposed of by what has been said in considering the sixth exception, and the other objection—that the times testified to by these witnesses were other than the date specified

In the indictment—is likewise disposed of by what has been said above. These exceptions must likewise be overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

(61 S. C. 17)

STATE v. MARCHBANKS.

(Supreme Court of South Carolina. June 26, 1901.)

LIQUOR NUISANCE—EVIDENCE—REMARKS OF JUDGE—NEW TRIAL.

1. Where the indictment charged defendant with maintaining a liquor nuisance "at his residence," evidence that he gave a person whisky to drink at the house of one P., where defendant lived, supports the indictment.

2. Defendant was indicted for keeping a liquor nuisance. Evidence was introduced that persons came away from the place curning and making a great noise in the nighttime, and that witness had given money to his son to get whisky for him at such place. *Held* admissible.

3. Remarks of the judge during the trial, but no part of the charge, are not open to the objection that they were a violation of the provision of the constitution forbidding a judge to charge as to matters of fact.

4. The asking of leading questions is within the discretion of the trial court.

5. The refusal of the trial court to grant a new trial for insufficiency of evidence cannot be reviewed.

Appeal from general sessions circuit court of Anderson county.

John Marchbanks was indicted for keeping a liquor nuisance, and appeals. Affirmed.

Defendant appeals on following exceptions:

"(1) Because his honor erred in permitting the witness Tom Hallum to testify, over the objection of the defendant, that the defendant gave him whisky to drink over at Mr. Tom Prater's, whereas the indictment charged maintaining a nuisance at defendant's residence, and not at the residence of Mr. Tom Prater; being unresponsive to the indictment and prejudicial to the defendant. (2) Because his honor erred in not instructing the jury to disregard the testimony of Tom Hallum as to the sale or handling of liquor at Mr. Tom Prater's house. (3) Because his honor erred in admitting the testimony of James Durham on the ground that the same might be competent if connected with the charge, and in failing to charge the jury to disregard such testimony, as not being connected with the charge. (4) Because his honor erred in not excluding the testimony of Dan Williams, under the objection of the defendant, in reply to the question, 'How do you know that you sent up there once?' and in allowing him to state, over defendant's objection, 'I gave him (his boy) a quarter and told him to go up to Mr. Marchbanks for some whisky;' such answer being hearsay and irrelevant. (5) Because his honor erred in holding as follows: 'I find, in liquor cases, every witness that swears in a dispensary case is reluctant to testify;' such expression being in violation of the constitution

of the state (article 5, § 26), that 'judges shall not charge juries in respect to matters of fact,' but shall declare the law. (6) Because his honor erred in holding as follows: 'I find that in liquor cases every witness that swears in a dispensary case is reluctant to testify,'—as he thereby created the impression that the witnesses for the state were reluctant and unwilling witnesses, and as such were entitled to be believed, and, further, were keeping in the background and unsaid other evidence which would show the guilt of the defendant. (7) Because his honor erred in not excluding the testimony of Dan Williams, under the objection of the defendant, in answer to the question, 'Would they be quiet and orderly in going over to his house?' because such question was leading, and the response, 'Well, they appeared to be; sometimes they went across my field, and I did not know where they were going,' such answer being irrelevant and uncertain. (8) Because his honor erred in refusing to grant defendant's motion for a new trial on the ground that, admitting all of the evidence of the state to be true, it was not sufficient, as matter of law, to sustain a conviction, in that the evidence does not show that there was any habitual bartering, selling, or drinking of liquor, but that the transactions were disconnected and casual."

E. M. Rusker and Blythe & Blythe, for appellant. U. K. Gunter, Asst. Atty. Gen., for the State.

McIVER, C. J. The defendant was indicted, tried, and convicted under an indictment containing a single count, in which the defendant was charged that "on the 20th day of March, 1890, and on divers other days, both before and since that day, up to the taking of this inquisition, the [defendant] did willfully and unlawfully keep and maintain a place at his residence, in the county of Anderson and state aforesaid, where alcoholic liquors are sold, bartered, and given away, and where persons are permitted to resort for the purpose of drinking alcoholic liquors as a beverage, and where alcoholic liquors were kept for sale and delivery, thereby then and there keeping and maintaining a common nuisance." The defendant appeals on the several grounds set out in the record, a copy of which will be incorporated by the reporter in his report of the case.

The first and second exceptions, raising objections to the competency of the testimony of the witness Tom Hallum, will be considered together. These objections are based upon the ground that the testimony of that witness related to a transaction—giving him whisky to drink—which occurred at Tom Prater's; and, as the charge in the indictment was that the defendant maintained a nuisance "at his residence," such testimony was incompetent, and the jury should have

been instructed to disregard such testimony. Inasmuch as the testimony which is set out in the "case" tends to show that defendant lived on Tom Prater's place, and as the testimony objected to was as follows: "What do you know about his handling liquor? Well, he give me some to drink sometimes. Where was he? Over there at home. Where? Over at Tom Prater's,"—it seems to us that such testimony was competent. These exceptions must therefore be overruled.

The third exception imputes error in admitting the testimony of James Durham. The testimony of that witness was to the following effect: That he lived about 200 yards from the defendant; that he had seen men going over there in the daytime, sometimes very quiet and sometimes a little noisy on leaving there; that he heard noise over there at night, sometimes as late as midnight, and cursing, shooting, and running horses. We cannot say that such testimony was incompetent, as it tended to show circumstances indicating that the defendant's place was a place where spirituous liquors could be obtained, and though possibly, in themselves, slight evidence, yet not incompetent. The third exception is overruled.

The fourth exception, imputing error to the circuit judge in not excluding the testimony of the witness Dan Williams, will next be considered. The testimony of that witness was as follows: "Do you know Mr. Marchbanks? Yes, sir. What do you know about his having liquor? Well, I do not know that I know much about it, but I sent up there once." Defendant's counsel, interposing, asked the witness the following question: "How do you know that you sent up there once? I told my boy to go up there once. (Defendant's counsel objects. No ruling.) By the Solicitor: Go on. I gave him a quarter, and told him to go up to Mr. Marchbanks for some whisky." This was a circumstance which, though slight in itself, might tend to show that Marchbanks kept liquor for sale, as the witness would scarcely have given his boy money to buy liquor unless he had reason to believe that he could get what he wanted at the place to which the boy was directed to go. The fourth exception is overruled.

The fifth and sixth exceptions, relating to the same subject, will be considered together. The error here imputed in the circuit judge was in using the following language: "I find that in liquor cases every witness that swears in a dispensary case is reluctant to testify;" and in exception 5 the imputation is that such a remark is in violation of the provision of the constitution forbidding judges to charge a jury in respect to matters of fact; and in exception 6 the imputation is that the circuit judge, in using such language, created the impression that the witnesses for the state were reluctant and unwilling witnesses, and were keeping back

evidence which would show the guilt of the defendant. It will be observed, however, that this language was not used by the circuit judge in his charge to the jury, for the charge, as set out in the "case," contains nothing of the kind, but the language was used in the progress of the trial, while the witnesses were being examined. It is quite clear, therefore, that there was no violation of the constitutional provision, as has been frequently held. See *State v. Turner*, 36 S. C., at pages 543, 544, 15 S. E. 602; *Ober & Sons Co. v. Blalock*, 40 S. C., at page 37, 18 S. E. 264; *State v. Crawford*, 30 S. C., at page 350, 17 S. E. 799; *Norris v. Ollinkscales*, 47 S. C., at page 519, 25 S. E. 797; *State v. Mitchell*, 49 S. C., at page 413, 27 S. E. 424; *Cave v. Anderson*, 50 S. C., at pages 293-300, 27 S. E. 693; *Wilson v. Railway Co.*, 52 S. C., at page 539, 30 S. E. 406. See, also, *State v. Atkinson*, 33 S. C., at page 100, 11 S. E. 693. These two exceptions must be overruled.

The seventh exception, which imputes error in allowing a leading question put to one of the witnesses, cannot be sustained. It has been so often held that such an objection is left to the circuit judge, who must necessarily be invested with large discretion in the conduct of a trial, with which this court will not interfere, unless there is some abuse of discretion (of which there is and can be no pretense here), that it is unnecessary to say more. The seventh exception is overruled.

The eighth exception imputes error to the circuit judge in refusing the motion for a new trial upon the ground of insufficiency of the evidence to sustain the charge. As it has been so frequently held as to supersede the necessity for any citation of authority that such a question must be left exclusively to the circuit judge, this exception must likewise be overruled. For we cannot say that there was absolutely no testimony tending to sustain the charge, and it is beyond our province to pass upon the sufficiency of such testimony. The judgment of this court is that the judgment of the circuit court be affirmed.

(60 S. C. 559)

ALSTON et al. v. LIMFHOUSE et al.

(Supreme Court of South Carolina. June 22, 1901.)

TEMPORARY INJUNCTION—FINDINGS OF FACT—APPEALABLE ORDER—REFERENCE.

1. An order for a temporary injunction is made without prejudice to the rights of the parties on the final hearing, and no fact decided upon said motion is concluded thereby, and when the other issues are tried they are to be determined without reference to such order.

2. An order granting a temporary injunction is not appealable.

3. Where action is brought to perpetually enjoin trespass on land, and defendants deny title in plaintiff, the defendants have a right to demand that legal issues be first tried, and a

reference to the master to take testimony is erroneous.

Appeal from common pleas circuit court of Charleston county; Gage, Judge.

Action by Charles Pringle Alston and Susan Pringle Alston against J. F. Limehouse and others. From an order granting a temporary injunction, and from an order referring the case to a master to take testimony, defendants appeal. Appeal from order granting injunction dismissed, and order of reference reversed.

Smyth, Lee & Frost and Walter Hazard, for appellants. Mitchell & Smith, for appellees.

GARY, A. J. The appeals herein are from orders of his honor, Judge Gage, granting a temporary injunction, and from an order of his honor, Judge Gary, referring it to the master to take the testimony in the above-entitled cause, and report the same to the court. As the questions presented by the exceptions are largely dependent upon the pleadings, it is necessary to set out the complaint, which is as follows: "First. The plaintiffs are selsed in fee simple, and are in actual possession of a tract of land in Georgetown county, in the state of South Carolina, on Waccamaw Neck, in what was the old parish of All Saints, Waccamaw, containing about 2,000 acres, butting and bounding north on land of Ward, east on the Atlantic Ocean, south on lands of Donaldson, and west on the Waccamaw river. Second. That the said tract of land includes a large area (about 600 acres) of salt marsh, more or less subject to the daily flux and reflux of the tide, and lying between the eastern part of said tract, commonly called 'Dubordieu Island,' and the highland of the rest of the tract, which said marsh area is interspersed and intersected by runnels or small creeks and natural drainways, wherethrough the water daily brought in by the tide returns to the ocean. Third. That the said salt marsh is the breeding place and habitat of clams and other shellfish, and is also resorted to by wild ducks and other birds, and said creeks and runnels are in places the site of oyster beds and banks, and also the resort of fish. That in and under the original grant from which the title of these plaintiffs is derived, all and singular the entire marsh lands and beds of the creeks were granted and included by direct metes and bounds of the grant; the same running back from the Atlantic Ocean to the Waccamaw river, and including all the marshes and creeks between the two. That, in addition thereto, the grant gave in express terms to the grantees the exclusive and sole right and privilege of hunting, fowling, and fishing within the limits of the said grant. Fourth. That the said land has been owned and in the exclusive possession of the plaintiffs and their ancestors for more than a century, and of the parties

through whom they claim since the date of the grant, 'in 1733. That for more than a century the plaintiffs or their ancestors have exercised and maintained the exclusive possession and dominion over all the said marshes, creeks, and drainways, according to the nature of the property, and their possession has never been before contested. Fifth. That now so it is that certain parties have undertaken to trespass and invade upon plaintiffs' said marsh and creeks, and to take and remove the clams and other shellfish from the beds of the creeks, and also fish and seine and remove the fish from said creeks, and, in addition, to habitually trespass upon, shoot, frighten, and scare off the game upon the said described property. Sixth. That the said marshes are dependent for their value in great measure for their use for the purpose of maintaining and preserving the game, and for maintaining and preserving the oyster beds and banks and clams and other shellfish therein, and by fishing in said creeks, and of the continuous trespass thereon by parties, destroys the value thereof. Seventh. That certain parties, to wit, the parties above named as defendants herein, J. F. Limehouse, Jonas Happy, Abner Leonard, Sim Leonard, Oliver Sellers, and A. M. Hills, whose names are as above given, have, as plaintiffs are informed and believe, been the parties who have been engaged in the said trespass and invasion and depredation. That the said parties are, as plaintiffs are informed and believe, and so allege and charge, without financial ability to meet any judgment or execution at law, and the same, if even brought for damages against them, would be valueless, and that proceedings at law would necessitate continuous and incessant and a numerous multiplicity of suits against each successive trespasser for each successive trespass. Wherefore plaintiffs pray judgment that the said parties be permanently enjoined from in any wise trespassing upon said property of plaintiffs, and that in the meantime, until the hearing of the case on the merits, a temporary injunction do issue from this honorable court, restraining and enjoining them from such trespass." The answer of the defendants to the foregoing complaint in substance denies all the material allegations thereof.

On the hearing of the case in this court, a preliminary question was raised that the court was without jurisdiction, as the said orders were not appealable. We will first consider whether the orders of his honor, Judge Gage, were appealable. Those orders are as follows:

"These are two actions for injunctions. They were heard together, are dependent on the same fact, and I will make one order, to stand as the order for each case, just as if separately entitled therefor. The motions before me are for a continuance of the temporary injunctions heretofore granted until

the issues raised by the pleadings have been tried. The motions were heard on complaint and answer, and affidavits submitted by both sides. The argument was elaborate and helpful. The cause is very interesting. The plaintiffs claim title to several thousand acres of land in Georgetown county, stretching from Waccamaw river on the west to the Atlantic Ocean on the east. Within the description of the land are certain water ways, the habitat of clams, oysters, fish, ducks, and birds. The defendants are fishermen, follow that craft for a livelihood, and have been accustomed to catch shellfish in the said water ways, and they do so under claim of right, to wit, because the streams are navigable. The plaintiffs vest their title in the beginning on letters patent from Charles II. to the eight lords proprietors, 24th March, 1663; a grant from the rest (seven) of the lords to one of them, John Lord Cateret, 5th December, 1718; a deed of lease and release from Cateret to John Roberts, 18th and 19th February, 1730; a grant from George II. to John Roberts, 13th September, 1736. In the grant last named there is this language, to wit: 'Together with all woods, underwoods, timbers, timber trees, lightwood pitchings, lakes, ponds, fishing waters, water courses, pastures, feedings, marshes, swamps, ways, easements, profits, commodities, advantages, emoluments, hereditaments, and appurtenances, * * * together with the privileges of hunting, hawking, fishing, and fowling in and upon the same, etc.' The contention of the plaintiffs is this: That the absolute title to the entire area embraced within the boundaries of their grant is in them, except the beds of such streams as are shown to possess the capability of floating useful commerce, and in those streams they own to low-water mark absolutely, and below that they have the exclusive right of fishing. The contention of the defendants is this: That the streams in which they have taken oysters are navigable, that in such streams the plaintiffs have no exclusive title below high-water mark, and the plaintiffs are not entitled under the terms of their paper title to the exclusive right to take oysters. I think there is no question but that the alleged place of trespass lies within the boundaries of the grant, and there is no question but that plaintiffs have proved a good paper title to the soil, above water, within that area. I do not understand the defendants to contend, by answer, proof, or argument, that they have acquired a right by prescription to take oysters from the lands and waters in question. The real contest before me was about these issues, to wit: (1) At what particular place did defendants take oysters? (2) Were the waters at those places navigable? (3) Do the plaintiffs' exclusive rights stop at low or high water on navigable streams? (4) What exclusive right of fishing did the words of the aforementioned grant convey to

John Roberts, and were the same rights transferred to the plaintiffs?

"The first two are questions of fact; the last two are questions of law. The verified complaints do not specify in what water way the oysters were taken, or at what spot on the plaintiffs' land the trespasses were committed, but alleges generally a trespass thereon. At what place the trespass was done is matter of proof. The verified answers deny entry at every place except in navigable tide water streams and creeks, and the defendants' affidavits specify the creeks to be those called Jones, Town, Old Man's, and Dubordieu. Therefore, the only issue now is the right of defendants to take oysters in these four creeks. The testimony tending to prove these four water ways navigable is scant. Only two of the witnesses swear to facts. They are Cain and Munnerlyn. If the issues were contested, I should not feel warranted in finding that they were water ways of sufficient depth and width to float useful commerce. But the plaintiffs offer no testimony contra, so I assume the streams above named are navigable. It is not contended by the plaintiffs that the aforementioned grant undertook to convey to the grantee the soil underneath a navigable stream. But the plaintiffs do contend that the grantees took exclusive title to the soil down to low-water mark; and that the defendants deny. That issue is hardly relevant now, for the proof shows the defendants gathered oysters in the natural growth lands in the beds of the four navigable streams. It does not show that they gathered oysters on that area which lies betwixt high and low tide. Nevertheless, the question has been made, and I shall not shun it. The fact is, on the Georgetown coast flood tide covers a vast area of land, which at low tide is exposed to view. For convenience, I shall term that area 'marsh lands.' In this country the tides have no relevancy to navigability. It was otherwise in England, whence the common law and its terminology came. There tide waters and navigable waters were convertible terms. Here, if a water course is navigable, it is so because the depth and width of it are sufficient to float useful commerce. If the depth and width of a stream are augmented by a periodical increase of water, called 'tide,' that fact may make the stream navigable at those points in it where it is so in fact, to wit, in its channel, but not navigable where it is not so in fact, to wit, out of the channel in the marshes. The state owns (because it has refused to sell) the beds of navigable streams, not because they are covered with water, tide, or otherwise, and not because inhabited by fish, but because they are ways, convenient to float useful commerce. There is no greater reason why it should preserve for the public the fish in navigable than in nonnavigable streams, or the fish in water than game on the land. 'By the common law, the doctrine of the dominion over and owner-

ship by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable; "tide waters" and "navigable waters," as already stated, being used as synonymous terms in England.' *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 436, 13 Sup. Ct. 110, 36 L. Ed. 1018. The reasonable conclusion, therefore, is that the marsh lands within the plaintiffs' boundaries belong absolutely to the plaintiffs.

"This brings us to the next inquiry, and that is the construction of the words in the grant from George II. to John Roberts, hereinbefore quoted. The language purports to convey, in brief, fishing waters, water courses, feedings, marshes, swamps, easements, profits, advantages, emoluments; together with the privileges of hunting and hawking and fishing. If the king had the power to make the grant, the plaintiffs' predecessors took the rights for which the plaintiffs now contend. It makes little difference that the subsequent conveyors did not, in *ipsisssima verba*, convey the aforementioned rights when they made deeds to the lands. The rights were first conveyed with the land, and a subsequent conveyance of the land carried the rights as well. I have not examined if the king had the power to convey the rights and privileges he undertook to convey to John Roberts on 15th September, 1730. I assume that he did. Of late years the general assembly has undertaken to regulate oyster fishing in the 'public waters' of the state. 20 St. at Large, p. 1097. That statute devolves on the sinking-fund commission the power and duty to make a survey of oyster lands in public waters, and to lease the same in perpetuity. There is a provision in the statute which exempts from its operation those lands occupied by persons under existing laws, and held under grants issued under the laws of the state. The agent of the sinking-fund commission swears that the waters in dispute are, in effect, such waters. If it is true, the terms of the statute and the affidavit of Mr. Gibbes are not conclusive of the question here, but they are relevant to the issue.

"Finally, are the plaintiffs entitled to injunctions until legal issues made by the pleadings have been tried before the proper tribunals? Issue has been joined, and the action is ripe for trial. The rule is, the party asking for an interlocutory injunction must show (1) a clear legal right, and (2) well-grounded apprehension of immediate danger thereto. I have found the legal right. The affidavits of the defendants show likelihood of immediate injury thereto, if not restrained. It is therefore ordered that the injunctions heretofore granted be continued with like force and effect until the further order of the court. Geo. W. Gage, Circuit Judge. Chester, S. C., 13th July, 1900."

"It having been brought to the attention of the court that no restraining order has heretofore been issued by this court, but the

same was heard upon a rule to show cause why a temporary injunction should not be issued, and, therefore, that there was no injunction pending at the date of the filing of the order hereinbefore made to be continued: Now, in order to carry out the decision herein filed, it is ordered that the defendants, Mitchell Nesbit, Faith Johnson, Max Sindab, Cain Rutledge, James Greer, Saul Car, Sam Car, and D. H. Smith, and each of them, the servants, agents, employees and attorneys of them, and each of them, be, and they are hereby, enjoined and restrained from in any wise hunting, fishing, fowling, or otherwise trespassing upon the lands and premises of the plaintiffs described in the complaint herein, until this case be heard and decided on the merits, or until further order of the court. Geo. W. Gage, Circuit Judge. 28th July, 1900."

On a motion for a temporary order of injunction, the circuit judge, in considering the issues raised by the pleadings, should indicate that their consideration is solely for the purpose of determining whether the plaintiff has a *prima facie* right to an order of injunction. His order should not purport to dispose of the issues upon the merits, as was done in this case. The language of Judge Gage cannot be construed as a finding upon the facts in such a manner as to affect the merits of the case. It must be regarded as used for the purpose of showing that he was justified in granting the temporary order of injunction, and not as in any manner affecting the other question in issue. No fact decided upon such motion is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said orders. In the case of *South Carolina & G. R. Co. v. East Shore Terminal Co.*, 48 S. C. 315, 26 S. E. 613, the court says: "The order was necessarily made without prejudice to the rights of the parties upon the final hearing of the case; as much so, as if the words 'without prejudice,' etc., had been inserted in the order. The circuit judge did not have the power, on the hearing of said motion, even if he had so desired, to decide the case upon its merits. The effect of said order was the same as if the circuit judge had stated in the order that it was only to remain in force until a decision could be made upon the merits,"—citing *Garlington v. Copeland*, 25 S. C. 41, and *Sease v. Dobson*, 34 S. C. 345, 13 S. E. 530. Ordinarily, an order granting a temporary injunction is not appealable, and under the foregoing construction of said orders we see no reason why this case should not fall within the operation of the general rule. Having reached the conclusion that the said orders are not appealable, the other exceptions to these orders will not be considered.

We will next consider whether the order of Judge Gary was appealable. That order is as follows: "A motion has been made in both of these causes for an order of reference; and, after hearing counsel, and it appearing

that the applications in both cases depend on the same questions, and have been heard together, and it being agreed that one order shall be made to be entered in both causes: Now, therefore, it is ordered that it be referred to F. L. Wilcox, Esq., to take the testimony in both of the above-entitled causes, and report the same to the court." Both equitable and legal issues were raised by the pleadings. The equitable issues were triable by the court in the exercise of its chancery powers, while the legal issues were triable by jury. The right to a perpetual injunction was dependent upon the result of the legal issues. The parties, therefore, had the right to demand that the legal issues first be tried. One of the incidents of this mode of trial is the right to have the testimony taken before the jury, and not by a referee. It has been suggested that the circuit judge had a right to order a referee to take the testimony preparatory to a trial of the equitable issues. The answer to this is that there is no such limitation in the order. On the contrary, it is in general terms to take all the testimony in the case; not only that pertaining to the equitable issues, but also that pertaining to the legal issues. This latter could not be done without depriving the defendants of a substantial right, and this rendered the order appealable. Besides, the order is premature, and may become wholly unnecessary; for, as has been said, if the determination of the legal issues be in favor of the plaintiffs, then, in all probability, no further testimony will be needed to dispose of the equitable issues. If, on the other hand, the determination of the legal issues be in favor of the defendants, that will effectually dispose of the equitable issues. This order was, therefore, not only appealable, but, for the foregoing reasons, erroneous. It is the judgment of this court that the appeals from the orders of Judge Gage be dismissed, and that the order of Judge Gary be reversed.

(61 S. C. 1)

ALSTON et al. v. LIMEHOUSE et al.
(Supreme Court of South Carolina. June 22, 1901.)

EFFECT OF APPEAL—JURISDICTION—JURY TRIAL—TRESPASS.

1. Where an appeal has been perfected from an order in a pending case, the court is without jurisdiction to hear a motion to transfer the cause to another calendar, and is not affected by Act Feb. 15, 1901, amending section 11 of the Code of Civil Procedure, where the order was made before the passage of the act.

2. To deny to a party a mode of trial to which he is entitled, is error from which an appeal will lie.

3. Where complaint alleges that defendants have trespassed on plaintiff's land, and seeks to enjoin the same, and the allegations of ownership are denied by plaintiff, it raises an issue of title which either party has the right to have tried by a jury without framing issues.

Appeal from common pleas circuit court of Charleston county; Gary, Judge.

Action by Charles Pringle Alston and Susan Pringle Alston against J. F. Limehouse and others. From an order refusing to transfer case to calendar 1 on motion of defendants, they appeal. Reversed.

Smythe, Lee & Frost and Walter Hazard, for appellants. Mitchell & Smith, for appellees.

GARY, A. J. The record in this case contains a copy of the complaint, of the order of his honor, Judge Gage, dated 13th July, 1900, and of the order of his honor, Judge Gary, dated 5th October, 1900, similar in all respects to the copy of the said complaint and orders set out in the case having the same title as this, in which the opinion has just been filed. 39 S. E. 188. It also contains the following: "That on the 27th day of August, 1900, said cause was, according to indorsement made upon the complaint by the plaintiff's attorneys, docketed by the clerk of the court of common pleas on calendar No. 2, and thereafter, on the — day of September, 1900, plaintiff gave due notice of motion before his honor, Judge Gary, then presiding in the circuit court, for an order of reference to take the testimony in the cause, which motion came on to be heard before Judge Gary, presiding judge, in the circuit court, at Sumter, S. C., on the 5th day of October, 1900, and after hearing and argument thereon, he made the following order. [Then follows a copy of the order of 5th October, 1900, hereinbefore mentioned.] Defendants' attorneys gave due notice to plaintiffs' attorneys that on the call of the docket a motion would be made to transfer the case from calendar No. 2 to calendar No. 1. Such motion was made, and refused in the following order: 'This cause coming on to be heard, on motion of the defendants for an order striking the cause off docket No. 2, as having been "improperly docketed," and placing the same on docket No. 1, as involving matter triable by jury, and after hearing argument thereon, it is now ordered that the motion be refused. Ernest Gary, Presiding Judge. 19th November, 1900.' That thereafter the defendants gave notice of appeal from the said order of Judge Gage of 13th July, 1900, and Judge Gary of October 5, 1900, and the case, with exceptions, for such appeals was made up and settled before the hearing of the motion before Judge Gary, presiding judge, at Georgetown; after hearing which the order of November 19, 1900, was made by Judge Gary." The exceptions are as follows: "(1) Because it is respectfully submitted that his honor, the circuit judge, erred in entertaining jurisdiction of this case after the same had been taken by appeal to the supreme court of the state, which appeal has been duly perfected. (2) Because it is respectfully submitted that his honor, the circuit judge, erred in refusing to

strike the case off docket No. 2, and place the same on docket No. 1, inasmuch as this case involves matters properly triable by a jury. (3) Because it is respectfully submitted that his honor, the circuit judge, erred in refusing the motion to strike the cause off docket No. 2 as having been improperly docketed, and place the same on docket No. 1, inasmuch as the defendants are entitled to a trial by jury, because the issues raised in the pleadings herein, and their right to such trial never having been waived by them, they cannot be deprived thereof by the order of the court. (4) Because it is respectfully submitted that his honor, the circuit judge, erred in refusing to transfer the cause to docket No. 1, inasmuch as this case involves the question of title to real estate, and other issues triable solely by a jury, and the case should, therefore, have been transferred."

Exception numbered 1 will first be considered. It does not appear whether the return had been filed in the supreme court at the time Judge Gary granted the said order. If the return had been so filed, the supreme court thereby acquired jurisdiction, and the circuit judge, of course, was without jurisdiction to grant the order. The act approved February 15, 1901, entitled "An act to amend section 11 of the Civil Code of Procedure of this state, relating to the jurisdiction of the supreme court" (23 St. at Large, p. 623), is not applicable to this case, as the order was made before the passage of the act. But, even if the return had not been filed, the circuit judge did not have the power to make said order, as the case comes within the terms of section 356 of the Code, which provides that "in cases not provided for in sections 346, 350, 351, 352 and 353, the notice of appeal shall stay proceedings in the court below upon the judgment appealed from," as the case does not come within the provisions of said sections. *State v. Port Royal & A. Ry. Co.*, 45 S. C. 470, 23 S. E. 383. Under this construction the other questions presented by the exceptions are not properly before the court for consideration. But, as the practical question raised by the exceptions has been decided incidentally in the case hereinbefore mentioned, in which the opinion has just been filed, we will state the authorities sustaining our conclusion. By reference to the said order, it will be seen that the ground of the motion to transfer the case from calendar No. 2 to calendar No. 1 was that it "involved matter triable by jury." The practical effect of said order was to deny to the defendants a trial by jury. It is settled beyond controversy in this state that it is error, from which an appeal will lie, to deny to a party a mode of trial to which he is entitled by law. Therefore the question to be considered is whether the defendants were entitled to a trial by jury of any issue raised by the pleadings. The complaint alleges that the plaintiffs are the owners in fee simple,

and are in the exclusive possession of the land therein described upon which the defendants have trespassed. These allegations are denied by the defendants. This raised an issue of title which either the plaintiffs or the defendants had the right to have tried by a jury. In the case of *Bank v. Peterkin*, 52 S. C. 236, 29 S. E. 546, Mr. Justice Jones, voicing the opinion of the court, says: "The proper practice, when an issue of title to land is raised in the answer, whether in proceedings to partition land or to foreclose a mortgage thereon, is to order the case to be transferred to the docket for trial of issues of facts by the jury, and the jury must try the questions of fact on the issues raised by the pleadings. *McGee v. Hall*, 23 S. C. 292; *Reams v. Spann*, 28 S. C. 533, 6 S. E. 325; *Carrigan v. Evans*, 31 S. C. 265, 9 S. E. 862; *Capell v. Moses*, 36 S. C. 561, 15 S. E. 711. In the last-mentioned case Mr. Justice Pope, speaking for the court, said most explicitly: 'Unless a jury trial is waived, actions that involve such issues must be placed on calendar 1, and submitted to the jury; and no interference with such trials, such as framing issues, must be had.' This was spoken with reference to an action to partition land, but it applies as well to actions of foreclosure. It applies to any cause in equity wherein is raised the issue of title to land, which, if successful, would defeat plaintiffs' recovery as against the party setting up title." This ruling is sustained by the following authorities: *Sumner v. Harrison*, 54 S. C. 353, 32 S. E. 572; *Holliday v. Hughes*, 54 S. C. 155, 31 S. E. 867; *Heyward v. Farmers' Co.*, 42 S. C. 138, 19 S. E. 963, 20 S. E. 64; *Threatt v. Mining Co.*, 42 S. C. 92, 19 S. E. 1009; *Mayo v. Railroad Co.*, 40 S. C. 517, 19 S. E. 73. Both legal and equitable issues are raised by the pleadings, and, as the right to equitable relief is dependent upon the legal issue, that should be first tried. *Knox v. Campbell*, 52 S. C. 461, 30 S. E. 485. It is the judgment of this court, that the order of the circuit court be reversed.

(49 W. Va. 528)

WATSON v. FAIRMONT & S. RY. CO. et al.
(Supreme Court of Appeals of West Virginia.
June 18, 1901.)

STREET RAILWAYS—FRANCHISE FROM CITY—
GRANT TO INDIVIDUAL—EMINENT DOMAIN—
INJUNCTION—CONSTRUCTION OF ROAD—
RIGHTS OF ADJOINING OWNER—NUISANCE.

1. When the legislative act incorporating a city provides that "the council of said city shall have power to grant and regulate all franchises in, over and under the streets, alleys and public ways of the said city, under such restrictions as shall be provided by ordinance, but no exclusive franchise shall be granted to any individual or corporation," the legislature thereby delegates to the council of such city authority to pass an ordinance granting to an individual or a corporation the right to construct and operate a street railway in the streets of such city.

are not more than 7 feet 5 inches wide, and, by placing the track on one side of the road at this narrow place, vehicles will be able to pass running cars, although the operation of the railway will cause some inconvenience, and possible danger, to persons using wagons and carriages on that street.

The specific grounds of demurrer assigned are: First, that injunction is not the proper remedy for the injury sustained by the plaintiff, because he has an action at law for his damages, the object of the suit being not to prevent the taking of private property for public use, but merely to prevent damages thereto by reason of the lawful construction and operation of a work of internal improvement; second, that the bill does not allege facts from which it appears that he will be irreparably injured, although it does allege that the plaintiff will suffer such injury; third, that, even if the averments assailing the validity of the ordinance and the regularity of the incorporation of the company are true, the plaintiff, suing in his own behalf only, cannot complain of such invalidity and irregularity. Of these, the second need not be noticed; and, of the other two, the last will be considered first, to the end that the case may be stripped of irrelevant discussion, and the real question disclosed.

It is argued for the appellee that the ordinance is void because it amounts to a surrender of the police power of the city over the streets. The authorities cited in support of this contention are cases in which the question decided is that the council has power to repeal an ordinance granting privileges in the street which it had no legal authority to grant, and are therefore absolutely void. They were contests between the city and the grantee of the franchise, and are in no sense applicable to this case. They are found in *Telegraph Co. v. Hess* (N. Y. App.) 26 N. E. 919, 13 L. R. A. 454; *Columbus Gaslight & Coke Co. v. City of Columbus* (Ohio Sup.) 33 N. E. 292, 19 L. R. A. 510; *Lake Roland El. Ry. Co. v. Mayor, etc., of City of Baltimore* (Md.) 28 Atl. 510, 20 L. R. A. 126; and *City of Norfolk v. Chamberlaine*, 29 Grat. 534. It is further contended that the franchise granted McMechen could not be assigned by him. The only case cited which seems to bear any relation at all to this proposition is *Richardson v. Sibley*, 11 Allen, 65, 37 Am. Dec. 700, which holds that a corporation created for the purpose of constructing, owning, and managing a railroad for the accommodation and benefit of the public cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business. But legislative authority to make the assignment is not wanting in this instance. The council expressly gave its consent thereto in the ordinance itself, and it had legislative author-

ity so to do. The legislature delegated full power and authority over the subject-matter to the city council by the provision in the charter of the city that "the council of said city shall have power to grant and regulate all franchises in, over and under the streets, alleys and public ways of the said city, under such restrictions as shall be provided by ordinance, but no exclusive franchise shall be granted by said council to any individual or corporation." In this connection, counsel for appellee direct attention to clause 10, § 69a, c. 54, of the Code, providing that "no franchise or right of way, acquired by virtue of this act, shall be sold, leased or otherwise transferred, without the consent of the legislature first had and obtained." An examination of the section in which this clause is found leads to the conclusion that, to say the least, it is very doubtful whether it applies to a franchise such as this, granted by a city; and, if it does, it is necessary to repeat that McMechen obtained such consent.

Another claim is that equity has jurisdiction to restrain the enforcement of an invalid ordinance, the execution of which injuriously affects the private rights of the complainant. *Deems v. Mayor, etc.* (Md.) 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339. It by no means follows from this that he may enjoin the execution of a valid ordinance. This ordinance grants no privileges not ordinarily conferred upon street-railway companies. It is legally certain as to the location of the road, for it authorizes its construction upon all streets 20 feet or more in width, and the location of the streets is presumably well known and clearly defined. It is not exclusive on its face nor in its operation, and the council had legislative authority to pass it. It is a valid ordinance, and its execution cannot be enjoined upon the authority of the case cited.

The charter of said railway company contains this clause: "The railroad which this corporation proposes to build will commence at or near Scottdale in Marion county, West Virginia, and run thence by the most practicable route through the city of Fairmont and to points at or near Monongah in the county of Marion and state of West Virginia, and will run to such other points in the counties of Marion, Monongalia and Harrison in the state of West Virginia as may be deemed practicable." It further states that the corporation is formed "for the purpose of constructing and operating a railroad in the state of West Virginia." It nowhere states that it is to be a street railway, and counsel for the appellee contend that under this charter the company is not authorized to construct and operate a street railway; citing *Joyce, Electric Law*, 150; *Com. v. Erie & N. E. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471; *Borough of Stamford v. Stamford Horse R. Co.* (Conn.) 15 Atl. 749, 1 L. R. A. 375; and *Mazet v. City of Pittsburgh*, 137 Pa. 553, 20 Atl. 693. The last case concerns a paving

contract between the city and an individual, and the contest is between them. It bears no sort of relation to the question raised. *Borough of Stamford v. Stamford Horse R. Co.*, holds that the town may restrain the company from laying its track in a street not designated in its charter, specifying the streets to be occupied; the sole authority of the company being contained in the charter, and having been obtained directly from the legislature. The Fairmont Company is operating under a franchise obtained from the city council under powers delegated to it by the legislature, as well as under its charter or certificate of incorporation. This is a very important distinction between the two cases. Another is that in the case cited the proceeding was at the suit of the town, and not of an individual. In *Com. v. Erie & N. E. R. Co.*, the proceeding was on the part of the state, under a statute expressly authorizing it, and therefore different from this in two essential particulars. The citation in *Joyce* is found not to touch the question at all. As to whether a street railway is included in the term "railroad" must be determined in each case from the intent and purpose of the statute. 23 Am. & Eng. Enc. Law, 942. "An eminent domain statute will include electric street railroads within the words 'steam and horse railroads,' even though electricity was unknown when the statute was passed." *Joyce*, Electric Law, 163. It is not necessary to the decision of this case that the statute be construed in this respect. Nor is it important for the purposes of this suit whether the charter of the company authorizes it to construct and operate a street railway. The company is a mere agency in the exercise by the city of Fairmont of the power conferred upon it by the legislature to legalize the construction of the railway in its streets. It is a work of internal improvement and of great public concern, and it is comparatively unimportant by what agency or instrumentality it is effected. If the company, in constructing such a railway, is doing an act not authorized by its charter, the state, by a direct proceeding for the purpose, may restrain it from so doing, and probably forfeit its charter, but the legality of the act cannot be questioned collaterally; nor, as a general rule, can the act be enjoined by an individual. "The fact that a corporation is about to exceed its corporate powers, or to commit any other unlawful act, is not, alone, a sufficient ground for the interference of chancery at the suit of a person who is not a member of the company. This rule rests upon the obvious principle that no person can complain of a wrong without showing some special injury to himself. If a corporation exceeds its franchises, or commits any other breach of the law, this is an injury to the public generally; and it is well settled that for an injury to the public generally the individuals composing the public cannot sue

separately, but the state must sue on behalf of all." *Mor. Priv. Corp.* § 1041. "It is well settled that a court of chancery has jurisdiction to grant equitable relief against a corporation at the suit of an individual, whenever a sufficient case for equitable relief is shown, upon the ordinary principles of equity jurisprudence; and the fact that the act of the corporation against which relief is sought involves an unauthorized exercise of corporate power, or other breach of the law, is wholly immaterial under these circumstances." *Mor. Priv. Corp.* § 1042. For whatever damage the construction and operation of the railway may inflict upon the property of the plaintiff, if any, he has an adequate remedy at law. Section 9, art. 3, of the constitution gives him compensation for such damages; and this court, in construing said section in *Spencer v. Railroad Co.*, 23 W. Va. 406, and *Arbenz v. Railroad Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371, holds that his remedy therefor is an action at law, and, further, that the owner of a lot adjoining a street upon which a railroad company proposes to locate its track under permission of the town council cannot enjoin the company from building its track in such street in front of his property until his compensation for damages is ascertained and paid, whether he is the owner of the fee in such street or not. Thus, having an adequate remedy at law for such damages as may result to his property from the act complained of, the plaintiff is precluded, upon the ordinary principles of equity jurisprudence referred to by *Morawetz*, from coming into a court of equity for such relief, and to complain of an alleged wrong or injury to the public generally committed by said company. In this view of the case, it is a matter of no consequence to him whether the company is acting in excess of the powers conferred by its charter, for it would be estopped from setting up as a defense in his action against it for the damages the illegality of the act in question. The rule mentioned by *Morawetz* is well illustrated in *Beach, Priv. Corp.* § 397, as follows: "Thus, where a railway company is organized under a valid charter, and is shown to have done corporate acts under it, this is sufficient to establish a prima facie right to take property by eminent domain, and this prima facie right cannot be successfully assailed in a mere collateral proceeding. Proof that the petitioner is a corporation de facto is all the law requires in this class of cases. Evidence, although it may be slight, of corporate acts done by petitioner, is accepted as sufficient. Thus, where it appears that an engineer has been appointed, the line of the road has been located, and other steps taken towards the building of the road, these are corporate acts sufficient to show that the petitioner is a corporation de facto."

The act of the railway company sought to be enjoined here does go to the extreme of

taking private property for public use, and no stricter rule should be applied in this case than in the case of such a corporation in the exercise of the powers of eminent domain. The construction of the railway track in the street under the ordinance is not a taking of the plaintiff's fee in the street. In *Spencer v. Railroad Co.*, 23 W. Va. 406, this court held that "If a railroad company, with the consent of the town council, builds its road through the streets of a town, the fee of the ground on which the street is located being in the adjoining owners of lots, the railroad company does not take the property of such lot owners, but only an easement from such town,—a simple right of way so long as the council has an easement in such ground to use it as a street." This is approved in *Arbenz v. Railroad Co.*, *supra*.

That this work of internal improvement may be built and operated, it is not necessary that the grantee of the franchise should be incorporated at all. "Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right." 8 Am. & Eng. Enc. Law, 585. "A franchise may be defined as a privilege or authority vested in certain persons, by grant of the sovereign, to exercise powers or to do and perform acts which without such grant they could not do or perform." Lewis, Em. Dom. 135. "While no rule of law demands it, they are usually conferred upon corporations, for obvious reasons of good business policy." 8 Am. & Eng. Enc. Law, 586. This seems, also, to dispose of the objection by counsel for appellee that the city council had no authority to grant the franchise in question to McMechen, a private individual. Upon this contention, they cite *Joyce, Electric Law*, 150, 151, 202, and 2 *Dill. Mun. Corp.* pp. 859, 861. The sections cited in *Joyce* do not mention the question, and in *Dillon*, at page 861, the case of *Brown v. Duplessis*, 14 La. Ann. 842, is adverted to, holding that such grant may be made to private individuals.

The subjection of the streets to the use of the street-railway company is simply the imposition thereon of an additional burden or servitude for the benefit of the public, although the company, the holder of the franchise, is privately interested in the enterprise in a manner different from all other persons. While it operates in the premises for private gain, it is at the same time an agency or instrumentality in the hands of the public authorities for the accomplishment of public ends, purposes, and benefits. The public interest in such cases is dominant, and that of the company and all other private persons is subordinated thereto by the law, but the constitution guarantees compensation for private property taken and damaged thereby. Moreover, the public highways are not held for any particular or exclusive sort of use by the public. As new methods of use and occupation,

consistent with the old methods, result from invention, discovery, and progress, they must be admitted. The tracks of street railways being laid even with the surface of the street, so they may be passed over by the vehicles ordinarily in use without any serious inconvenience, nobody is thereby excluded from the free use of the streets. While the ordinary modes of use may be somewhat impeded thereby, this consideration must yield to the advantages resulting from the promotion of trade and intercourse, the uniting of distant portions of the city, the establishment of closer relations between it and its suburbs, commercially and socially, and the conduciveness to the health and comfort of the citizens by enabling them to live beyond the crowded thoroughfares. The street railway has become one of the usual and well-recognized modes of conveyance in all the cities and larger towns of the country, and as thoroughly a quasi public institution as any other common carrier. The city council of the city of Fairmont, clothed by the legislature with plenary powers over the subject, having given the necessary consent to the establishment in that city of the railway in question, its construction and operation are by lawful authority. The legislature having thus authorized the work, the execution thereof cannot be enjoined by an individual upon the ground that it is a public nuisance and specially injurious to his property, even in a case in which he might do so had such authority not been given. This is well settled in *Spencer v. Railroad Co.* and *Arbenz v. Railroad Co.*, *supra*, and in *Taylor v. Railroad Co.*, 33 W. Va. 30, 10 S. E. 20. In *Spencer v. Railroad Co.* the law is so declared in the syllabus, and in the opinion Judge Green says, after citing many decisions: "It is obvious, therefore, that when a railroad company is authorized by the legislature by an express statute, or when authorized by a town council by authority of a legislative statute, which is the same, it cannot, either at law or in equity, be sued or enjoined, if it is proceeding to build its road in such street carefully and skillfully, and in a manner least injurious to others. And, if the constitution gives the owner of an adjoining lot no redress, the injury he sustains must be regarded as *damnum absque injuria*." The doctrine is reiterated in *Arbenz v. Railroad Co.* Point 2 of the syllabus in *Taylor v. Railroad Co.*, *supra*, is as follows: "Where a person or corporation is vested with authority by the legislature to do an act, it will be protected from all responsibility, and liable to no suit at law or in equity, provided what it is authorized to do is done carefully and skillfully, though without such authority it would have been a nuisance; but, if done carelessly and unskillfully, and damages result from such carelessness and want of skill, it will be responsible." In *McEldowney v. Lowther* (decided March 23, 1901) 33 S. E. 644, this court held that a person owning

property adjoining a street can restrain a telephone company from erecting a telephone line on the side of the street next to his property, when the council has authorized the erection of only one line on said street, and the company, in pursuance of the ordinance, has already put its one line up on the other side of the street; the plaintiff showing that the erection of the second and unauthorized line will be injurious to him. Had the council authorized it, the second line might have been put up, although injurious to the property holder. Such being the law, the injunction in this case cannot be sustained upon the contention that the construction and operation of the railway will be a public nuisance.

The only remaining inquiry, and the real question presented by the bill, is, can the plaintiff, whose property is not to be taken or destroyed, and thus virtually taken, by the railway company in the construction and operation of its road, but only injured and damaged, enjoin the construction of the railway until his damages are ascertained and paid? It has already been shown herein that in building its road the railway company does not take the plaintiff's fee in the street, and the bill does not claim that his adjoining property will be destroyed, or practically so, by the railway; nor does this appear from the facts alleged. Thus, the situation is the same as in the Spencer and Arbenz Cases. In the former of these two cases the court held: "If a railroad company, without taking the land, damages it by the construction of its road, the owner of the land cannot, as a matter of right, enjoin said company so proceeding with the construction of its road till such damages are ascertained and paid; for section 9 of article 3 of our constitution, while it gives a right in such cases to recover of a railroad company such damages in an action at law, does not give a right to such injunction, as it does not require in such case that the damages should be paid or secured in advance of the construction of the road." This doctrine was approved and reiterated in the Arbenz Case. The only qualification of the rule is that announced in the case of *Mason v. Bridge Co.*, 17 W. Va. 396, —that, under peculiar circumstances, as where the property injured is entirely destroyed in value as effectually as if it had been actually taken by the railroad company in constructing its road, and the property is thereby virtually taken, the owner of the property may enjoin the company from proceeding with the building of its road until his damages are ascertained and paid or secured. But this case does not fall within this exception to the rule, as clearly appears from the averments of the bill, as well as from the facts disclosed by the evidence in the case. For the reasons aforesaid, the decree of the circuit court perpetuating the injunction must be reversed, the demurrers to the bills sustained, the injunction dissolved, and the

bills dismissed, and the defendants must recover their costs in the court below as well as in this court.

(49 W. Va. 520)

PETHTEL v. McCULLOUGH et al.

(Supreme Court of Appeals of West Virginia.
June 13, 1901.)

RES JUDICATA—DISMISSAL—LACHES—PLEADING.

1. An order dismissing a case agreed is a bar to another suit on the same cause of action.

2. A suit by one creditor to enforce a debt against land of his debtor fraudulently conveyed. Another creditor files a petition in the cause setting up another distinct debt against the debtor, and to subject the same land. The second creditor is not a party to the first suit, nor are his rights mentioned therein. An order under the title of the first suit dismissing the case agreed, on the motion of the plaintiff, does not dismiss the petition of the other creditor, or bar its further prosecution.

3. Laches in prosecuting a suit not operating to bar it.

4. Petition: When dismissal of main suit carries with it a petition.

5. Cross bill: When dismissal of original bill carries with it a cross bill.

6. A pleading bearing one name will often be treated and acted upon as one under another name, and operate to perform its functions, in the courts of equity, if such pleading contains proper matter to answer such purpose.

(Syllabus by the Court.)

Appeal from circuit court, Pleasants county; J. W. Vandervort, Special Judge.

Suit by Isaac Pethtel against James W. Williamson, one McCullough, and others. Decree for plaintiff, and defendants Williamson and wife appeal. Affirmed.

Hall & Hall, for appellants. John F. Barron, for appellee.

BRANNON, P. Isaac Pethtel brought a chancery suit in the circuit court of Pleasants county against James W. Williamson and others to enforce a judgment in his favor against Williamson against land which Williamson had conveyed to Brooks, and Brooks had conveyed to Williamson's wife, and to set aside as fraudulent the conveyances of Williamson to Brooks and of Brooks to Williamson's wife. C. P. Smith appeared and filed a petition in the case, setting up a debt on which he had recovered a judgment against Williamson, and seeking to set aside the same conveyances as fraudulent, and to subject the same land to Smith's debt. The petition was allowed to be filed, and Smith was ordered to be made a party defendant in the cause. Smith was not a party to Pethtel's cause; nor was he, or his debt or rights, mentioned in that cause. Afterwards this order was made in the cause: "Isaac Pethtel v. J. W. Williamson and Others. The matters in difference in the above-styled suit having been settled, on motion of the plaintiff this cause is dismissed agreed." Afterwards a special judge was elected to hear the case; Williamson objecting to his election, and claiming that there was no pending case

for any further action. No other party appeared. Williamson moved to dismiss the cause, but the court refused to dismiss. He demurred to the petition, and his demurrer was overruled. He made no further appearance. The court made an order dismissing the case as to Pethtel on the ground that his rights had been adjudicated by the said order of dismissal, but refusing to dismiss the petition of Smith and directing the case thereafter to proceed in Smith's name as plaintiff upon the matters set up in his petition; and after notice to the parties that the suit would go on upon Smith's petition, and the parties not appearing thereafter, upon the petition taken for confessed a decree was entered for Smith's debt, holding said conveyances void as to it, and subjecting the land to its payment. Williamson and wife appeal. A question might be made as to Mrs. Williamson's right to appeal, but we shall decide the case on the merits.

What is the effect of an order of "dismissed agreed"? It is a bar to another suit upon the same cause, on the principle of a compromise decree on the merits in equity, or a retraxit at common law, either of which is a bar to another suit. *Hoover v. Mitchell*, 25 Grat. 387, holds it prima facie final, at least; but *Wohlford v. Compton*, 79 Va. 333, holds it final as to all matters which were actually, or might have been, litigated in the suit. In *Siron v. Ruleman's Ex'r*, 32 Grat. 223, it is so declared. In *Jarboe v. Smith*, 10 B. Mon. 257, 52 Am. Dec. 541, it is held a bar "between all parties on the original cause of action, unless there is an express stipulation that another suit may be brought." Such is the great weight of authority. 1 Freem. Judgm. § 262; 1 Herm. Estop. 296; 1 Van Fleet, Former Adj. § 33. One decision of the United States supreme court denies this position. *Haldeman v. U. S.*, 91 U. S. 584, 23 L. Ed. 433. But *U. S. v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601, holds the doctrine stated. So, 2 Black, Judgm. § 706, says that it is settled law. The point is not decided in *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143. The words "dismissed agreed" are very strong. Though the order is abbreviated, so far as it goes it imports compromise and adjustment, and a decree ending the case on that ground. A compromise decree is final. *Lockwood v. Holliday*, 16 W. Va. 651; *U. S. v. Parker*, supra. A dismissal agreed is equivalent to a retraxit at common law, which is an "open, voluntary renunciation of his claim in court, and by this he forever loses his action." 3 Bl. Comm. 296. In the words of the court in *Hoover v. Mitchell*, cited, this short expression is "a declaration of record, sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves in their own way, and that the suit is dismissed agreed." But in this case the order is longer, clearer, and expressly certifies an adjustment by the parties.

While such a dismissal bars the demand set up in the bill of Pethtel, does it also bar relief to Smith upon the judgment set up in his petition? That petition sets up the pendency of Pethtel's suit and its purposes, and asks that Smith be made a party thereto, and that relief be given him in it; and by order of the court in the cause the petition was allowed to be filed in it, and Smith was made a party defendant to the cause, and his petition was sent to rules to issue process on it and mature it for hearing, which was done. Afterwards this dismissal was entered under the name and title of "*Isaac Pethtel v. J. W. Williamson and Others*." It is contended that this dismissal carried the Smith petition out of court, as well as Pethtel's bill, and, further, that it bars not only Pethtel's cause of suit, but also that of Smith. It neither carried the petition out of court, nor does it bar Smith's cause of suit. As to whether it extinguished Smith's petition, we must not let the facts that it was filed in Pethtel's suit, and that Smith became a party to that suit, carry us too far. We must look at substance. It has been a practice in the Virginias to use petitions for purposes and to an extent which will not be found to be sanctioned by books on general equity practice. Viewed as petitions, strictly, they cannot perform the office of bills. Petitions are properly used only to get orders in the case on grounds presented in and arising out of its pleadings, not to bring in new causes of suit. 16 Enc. Pl. & Prac. 501. I doubt whether an order of court making a stranger a party to a bill, not naming him or his right, makes him a party to that bill or in the cause. I think it does not. The bill must be amended to do so. *Shinn v. Board*, 39 W. Va. 497, 20 S. E. 604. But when, as in this case, one creditor files a bill to enforce a lien on land, and another lienor comes into the case because he has a lien on the same land, and does so by a pleading which he calls a "petition," we need not limit that pleading technically to the function of a petition, but treat it as a bill. This practice of filing petitions was once more frequent in this state than now, under the statute providing that one lienor may sue for all, and that, whether he does so or not, others may come in and enjoy the benefit of the suit for their relief by presenting their claim before the commissioner taking an account of liens. Bart. Ch. Prac. 363. And I think a petition could be presented in the suit, presenting a lien. In such case the petition should have form and parties as a bill. It would be a bill. It could not be decreed upon unless it has parties. But without that trouble the lien may be presented before a commissioner; for where the bill is filed by one lienor for all, or, whether so filed or not, there is a reference to convene liens, section 7 of chapter 139 of the Code makes the proceeding one for the benefit of all lienors. If in such a case the dismissal

of the main suit would carry with it the petition, such result would not follow in this case, because this is not that character of suit, but a suit to set aside a fraudulent conveyance, in which our cases hold that other lienors need not and ought not to be parties. Hogg, Eq. 598, fully discusses the subject. Though Smith's pleading is called a "petition," it is essentially an original bill, and constitutes a separate suit. We must judge it by its nature, no matter what its author calls it, and no matter that it is filed in another suit. We must give it legal effect according to its matter. *Riggs v. Armstrong*, 23 W. Va. 760; *Skaggs v. Mann*, 46 W. Va. 209, 33 S. E. 110; *Cleavenger v. Felton*, 46 W. Va. 249, 33 S. E. 117; *Martin v. Smith*, 25 W. Va. 579, 583; *Lively v. Winton*, 30 W. Va. 562, 4 S. E. 451; *Sturm v. Fleming*, 22 W. Va. 404. In these cases we find petitions treated as original bills, cross bills treated as original bills, and petitions as bills of review. We do not dispense with good pleading and formality, and regularity of proceeding, evincing the fine lawyer. By no means are we to be so understood; but when a court is called upon either to disregard a pleading as inefficacious for relief, or to give it efficacy for relief, then we must not look at formality or mere name, but at the substance. Does the pleading have the elements or matter of a pleading, for which it is claimed to answer? Now, in character this petition is an original bill, informal as to parties, but that does not dismiss it. It sets up a judgment in favor of Smith against Williamson, and seeks to enforce it against a tract of land, and to remove fraudulent deeds out of the way. It has nothing to do with the prosecution or defense of Pethtel's suit; aids nothing in its prosecution or defense. The one might fail; the other succeed. If Pethtel had failed to get relief, could not Smith get it on his petition? It contained all necessary allegations. It had not one iota in common with Pethtel's bill, except that the two separate debts bound the same land. The petition possessing all the elements of an original bill, depending in no wise upon the success of Pethtel's bill, we cannot say that the dismissal of Pethtel's bill carried down the Smith petition. Take the case of a cross bill. The general rule is that when filed purely in defense of the original bill, the dismissal of the original dismisses the cross bill; but when, in addition, the cross bill contains new matter on which it seeks affirmative relief, such dismissal does not dismiss the cross bill, because as to this new matter it has the elements of an original bill, and the cross bill still stands for action. 5 Enc. Pl. & Prac. 662; *Oil-Land Co. v. Vinal*, 14 W. Va. 637, 698; *Ragland v. Broadnax*, 29 Grat. 401; *Story, Eq. Pl.* (10th Ed.) § 399, note. If this is so as to a cross bill, more so as to this petition, because a cross bill is filed in a pending suit, containing matter in defense of it, and it may be

also new matter for affirmative relief, whereas, this petition has no matter of defense of the other suit, but is purely an independent proceeding by a stranger to that suit for independent relief on its own new facts. Pleadings and matters purely of defense go with dismissal, but where they seek relief on an independent cause they do not. 6 Enc. Pl. & Prac. 984. The question whether that dismissal is a bar to Smith, as *res judicata*, has been virtually answered. If it did not dismiss Smith's petition, because it was an original bill, stating a separate cause of action, it is difficult to say that it is a bar to that distinct, different cause of suit stated by Smith. The order says that, "the matters in difference in the above-styled suit having been settled, on motion of the plaintiff this cause is dismissed." The fact that it was dismissed on Pethtel's motion indicates that it was only matters in controversy between him and Williamsons that had been settled. And it says matters "in the above-styled suit"; that is, the Pethtel suit. Smith's matter was not in Pethtel's suit. If no other consideration would forbid denial of relief to Smith because of this dismissal, the general rule that it is of the essence of *res judicata* as a bar that it shall be on the very matter, and that this must be certain, and, when doubtful upon which of several issues the decree went, it is no bar, would justify relief to Smith. *Bigelow, Estop.* 61; 1 *Bart. Ch. Prac.* 401. "If upon the face of the record anything is left to conjecture as to what was decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214. That matter must have been necessarily decided. *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809. By way of application of these authorities, I will say that we must hold that the adjustment applied to Pethtel's cause and his suit, and we cannot declare that it applied to Smith. Was that necessarily included in the order? Was it necessarily passed on? Could not that order apply alone to Pethtel's suit, in the name of which alone it was entered?

As to the demurrer to the petition: All it lacks is a caption naming formal parties, or a prayer for process against named parties, one or the other of which it should have, under good pleading. *Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238. But the petition names the persons interested, and states their interest in the matter of the petition, sets up the case fully, and prays for relief. All parties interested in it were served with process to answer it.

As to laches in prosecuting the suit for seven years and three months: All the parties still living and able to show their defense, under the cases bearing on the question when a suit will or will not be dismissed for failure to prosecute with diligence after it is brought I do not think we would be warranted in dismissing the suit for this cause.

It takes longer delay, and death of parties or loss of evidence, to call for such a dismissal. *Crawford's Ex'r v. Patterson*, 11 Grat. 374; *Hayes v. Goode*, 7 Leigh, 452; *Mayo v. Carrington*, 19 Grat. 74; *Buster v. Holland*, 27 W. Va. 511; *Tapp's Adm'r v. Rankin*, 9 Leigh, 478; *James River & Kanawha Co. v. Littlejohn*, 18 Grat. 80. We affirm the decree.

(49 W. Va. 459)

CECIL et al. v. CLARK et al.

HALL et al. v. SAME.

(Supreme Court of Appeals of West Virginia.
June 13, 1901.)

TENANT IN COMMON—WASTE—ACCOUNTING—TROVER—MEASURE OF DAMAGES.

1. When a tenant in common has become liable for damages for waste, under section 2, c. 92, Code, by the removal of coal from the premises, the co-tenant injured may waive the tort, and require an accounting for money had and received, when the coal has been sold by such tenant.

2. If a tenant in common takes possession of the premises to the exclusion of his co-tenant, and lease the same to third parties for the purpose of the mining and removal of the coal therefrom, at a specified sum per ton, as royalty for the coal so removed, the co-tenant so excluded may require an accounting to him for his just proportion of such royalty, as the proper measure of damages for such waste.

3. When a tenant so taking possession and leasing the premises for operating the coal purchases front lands in his own right, and not as common property, which are absolutely essential for right of way for the removal of the coal, in accounting to his co-tenant for his proportion of the royalty when the tort has been waived legal interest on the amount of money invested in the purchase of such front lands is a just compensation for the use thereof.

4. The measure of damages in trover is the value of the property and interest thereon from the time of conversion.

(Syllabus by the Court.)

Appeal from circuit court, Summers county; J. M. McWhorter, Judge.

Actions by W. P. Cecil and others and J. R. Hall and others, respectively, against E. W. Clark and others, trustees of the Flat Top Coal-Land Association. Decrees for defendants, and complainants appeal. Affirmed.

J. S. Clark and A. W. Reynolds, for appellants. Flournoy, Price & Smith, Mollohan & McClintic, E. W. Wilson, and John Osborne, for appellees.

McWHORTER, J. As will appear in 44 W. Va. 659, 30 S. E. 216, the tract of land involved in these cases, described as containing 850 acres, was claimed in entirety by the trustees of the Flat Top Coal-Land Association, who had taken possession thereof, and leased it to the Elkhorn Coal & Coke Company and the Shamokin Coal & Coke Company, denying the right of plaintiffs to any part or interest therein; that it was there held that the defendants, the trustees, were tenants in common,

entitled to and holding eleven-twentieths thereof, with the plaintiffs, who were entitled to nine-twentieths; and the causes remanded for further proceedings to be had therein. Such proceedings were had that on the 27th day of January, 1899, a decree was rendered distributing the royalties to the parties according to their ownership, as decided in said 44 W. Va. 659, 30 S. E. 216, from which decree defendants also appealed, and on the 24th day of January, 1900, by this court, said decree was affirmed. 35 S. E. 11. On the 27th of September, 1900, Commissioner Lively, to whom the cause had been referred, filed his report, to which report the following exceptions were filed: By the plaintiffs: "Because the said commissioner failed to include in his statement of royalties received by the trustees of the Flat Top Coal-Land Association the sum of \$1,144.60 paid to them October 25, 1895, as shown by the statement filed with the deposition of G. L. Estabrook, Jr., as Exhibit G. L. E. Jr., 'B,' page 76 of the printed record on the last appeal in these causes, and failed to charge said trustees with any part of said sum." By the trustees, the defendants: "First. Because under the last decision of the supreme court of appeals in this case the matters and figures contained in the said report are irrelevant. Second. Because the said commissioner has charged the defendants with large sums, being the royalties received by the defendants on coal mined from the land in controversy, whereas the said defendants are not properly chargeable with the said royalties, or liable to pay the same, or any part thereof, to the complainants. The complainants are entitled to damages for the waste committed only, the measure of which is the value of the coal in place, which, under the circumstances of this case, is the purchase price at which the coal land could have been purchased. Third. Because the said commissioner, in his said report, has charged the defendants with a large amount representing interest on royalties by them, whereas the said defendants are not properly chargeable with any interest thereon. Fourth. Because the said commissioner, in his said report, and in his calculations therein contained, has charged the defendants with interest upon interest to the extent of \$4,236.81. Fifth. Because the said commissioner, in his said report, had adopted an erroneous basis for the calculations of the value to the complainants of the use of the defendants' front lands in connection with the mining operations upon the property in controversy, allowing to the defendants only the interest upon the cost price of the said front lands. Sixth. Because the said commissioner, in his said report, statement No. 1, has failed to allow the defendants credit for a certain sum of \$186.40, together with the interest thereon, representing the royalties upon coal mined from lands other than the land in

controversy. (See supplemental record, page 73.) Seventh. Because the said commissioner, in his said report, statement No. 2, has failed to allow the defendants credit for a certain sum amounting to \$1,512.80, together with the interest thereon, representing royalty upon coal mined from lands other than the land in controversy. (See supplemental record, page 70.) Ninth. Because the defendants the trustees of the Flat Top Coal-Land Association are entitled to be subrogated to all the rights of the representatives and heirs of Manilius Chapman in respect to the judgment of said Manilius Chapman against A. A. Chapman, set up in the cause of Bartlett & Co. v. said A. A. Chapman, in which the interest of said A. A. Chapman in the land in controversy allowed said defendants credit for the amount of said judgment against any fund realized in respect to the A. A. Chapman interest in said land. Tenth. Because the said trustees are entitled to be subrogated to all the rights of Manilius Chapman in respect to the balance of \$2,044.22, with interest due thereon, shown by the hotchpot settlement of the estate of Henley Chapman before Commissioner Broderick, filed in this cause; and said Commissioner Lively should have allowed said defendants credit for said sum, with its interest, as an offset in this case." By the heirs of A. A. Chapman, deceased: "The heirs of A. A. Chapman, deceased, viz. Susan Chapman, S. J. Chapman, Fannie Steele, Ella C. Orr, W. C. Orr, and A. C. Orr, except to so much of the report of Commissioner Lively filed in this cause on the 27th day of September, 1900, as only charges the defendants E. W. Clark, etc., trustees, the Shamokin Coal & Coke Company, and the Elkhorn Coal & Coke Company with waste at the rate of 10 cents per ton on the coal mined, and to the allowance of anything for frontage charges: (1) Because the true rule of accounting for this waste is the value of the coal at the pit mouth; (2) because a wrongdoer is entitled to no compensation for wrongdoing; (3) because the commissioner allows a credit to the defendants above named for the expenses of operating the mines and mining properties since September, 1895." By W. H. H. Allen: "W. H. H. Allen excepts to the report of Commissioner W. W. Lively, filed in this cause on the 20th day of August, 1900, in so far as it reports, or may be construed as reporting, that the heirs of A. A. Chapman are entitled to any part of the moneys which may be decreed to be paid by Tyler & Doran, trustees, or Clark, trustee, or either of them as such trustee, on account from coal taken from the land in the bill and proceedings mentioned before his purchase of the interests formerly belonging to said Chapman. The said Allen objects and excepts to any decree at this time decreeing any part of said fund or money to said heirs, on the ground that the ownership of said moneys is now in litigation be-

tween him and said heirs in this cause, and that the pleadings in respect to said controversy are not now matured, and in such condition that the court can decree and settle such ownership of said money between him and such heirs." And on the 26th day of October, 1900, when the defendant trustees tendered and asked to file their amended answer and cross bill, to the filing of which plaintiffs objected in writing, which objections were sustained, and the filing of said answer and cross bill refused, and on motion of said defendants the court permitted the same to be filed and treated as an affidavit in support of the exceptions of said trustees to said commissioner's report, and it was so accordingly filed, and it being suggested to the court by E. W. Clark, trustee, that Sidney F. Tyler, one of the trustees of the Flat Top Coal-Land Association, and one of the defendants herein, had resigned as such trustee, and had no further interest in the causes, and that Joseph I. Doran had been appointed a trustee in his place, and also suggested the death of H. M. Bell, a defendant, and one of such trustees, the causes were abated as to said Tyler, Trustee Doran was admitted as a defendant in each of said causes, which were ordered to proceed against said Doran and E. W. Clark as surviving and present trustees of said Flat Top Coal-Land Association, and the causes were on that day heard upon the papers formerly read, the orders and mandates of the supreme court of appeals, the report of Commissioner Lively, the depositions and papers filed therewith, the exceptions thereto, the said amended answer and cross bill treated as an affidavit as aforesaid, and upon the motion of the trustees to recommit this cause to a commissioner for the purpose of taking further testimony and ascertaining the amount of the damages to which plaintiffs were entitled on account of waste committed on the land in controversy prior to September 5, 1895, and on motion of said trustee to give them further time to take testimony to show the proper measure of damages, which motions were overruled, and the court also overruled the first, second, third, fifth, eighth, ninth, and tenth exceptions of said trustees to the said report of Commissioner Lively, and sustained their fourth, sixth, and seventh exceptions; overruled all the exceptions of the heirs of A. A. Chapman, deceased, to said report, and sustained the exceptions of plaintiffs, and corrected the report accordingly, and confirmed said report as so corrected and amended, except as to that part thereof relating to the special statement made at the instance of A. A. Chapman's heirs, based upon a charge of 50 cents per ton for coal mined from said land which was not approved by the court; ascertained that there was due at date of the decree, on account of amounts received by the defendant trustees of the Flat Top Coal-Land Association

for coal mined from the land in controversy, including interest to that date, the sum of \$81,629.41, after allowing said trustees credit for costs of management and use of their front lands, and that there was also due on account of this interest on the amounts recovered by the decree of January 27, 1899, and on account of \$5,000 retained by said trustees under said decree, the further sum of \$5,523.54, after allowing said trustees credit for costs of management and use of front lands since September 5, 1895; directed George E. Price, special receiver, to collect from Trustees Clark and Doran said two sums of \$81,629.41 and \$5,523.54, with interest on said sums from said date of decree; and directed said trustees to pay said two sums and interest to said receiver, and directed the receiver to pay out the same as follows: To attorney for Mary E. Painter, two-ninths; to attorney for Elvira Pendleton's heirs, two-ninths; to attorney for Araminta French's heirs, two-ninths; and to attorney for Sarah E. Torbett, one-ninth. The court overruled the exceptions and objections of W. H. H. Allen, and ordered the special receiver to pay over the one half of the fund recovered for waste upon the interest of A. A. Chapman, deceased, prior to November 15, 1894, to wit, the sum of \$8,381.14, to the several heirs as indicated, and that he retain the other half of said interest in his hands until the further orders of the court, to await the determination of the questions arising upon the petition of P. W. Strother, which he filed on that day, claiming that he had, as attorney, a contract with said A. A. Chapman's heirs for one-half the recovery in their favor as attorney's fees, and praying that his lien be protected therein; said sum, as well as the remainder of the two-ninths over and above the sum of \$16,762.27, the said A. A. Chapman's interest for waste prior to November 15, 1894, to be loaned by the receiver. The receiver was ordered to collect from the bank of Bramwell the 20 per cent. of all sums which may have been deposited in said bank to credit of these suits since the date of the decree of January 27, 1899, and directed to be held by said bank to await the determination of the questions adjudicated by this decree, and to pay out the seven-ninths thereof in the same manner as the first two sums mentioned, and the other two-ninths to be loaned upon good security, until the further order of the court, or to be held, with decree for costs against the defendants.

From this decree the defendants appealed, and assigned the following errors: "(1) The court erred in overruling the defendants' exceptions to the said commissioner's report. (2) The court erred in refusing to permit the said cross bill to be filed. (3) The court erred in refusing to refer the causes to a commissioner for the purpose of taking testimony and ascertaining the true measure of

the damages for said waste. (4) The court erred in refusing to grant the defendants time to take further testimony to prove additional facts bearing on the measure of the said damages. (5) The court erred upon the whole case by said decree of October 28, 1900, which was prematurely rendered. All proceedings in the causes previous to the last aforesaid decision of the supreme court, and previous to said decree, had been taken with reference to an accounting for rents and profits. The testimony which had been taken, in so far as it had any bearing upon the question of compensation to the plaintiffs, had been taken, the questions propounded, and the answers of the witnesses consequently given, with reference to an accounting for rents and profits; much being omitted which is material in ascertaining the measure of damages; and the decision of the causes in that state of the record was a practical denial of a hearing to the defendants upon the subject of the measure of damages. (6) The court erred in adopting the royalties received by defendants as the proper measure of the plaintiffs' damages. Under the circumstances of this case, the true measure of said damages was the value of the coal as if the plaintiffs had sold the coal field to the defendants. (7) The court erred in refusing your petitioners' subrogation to the rights of the representative and heirs of Manilius Chapman in respect to the judgment of said Manilius Chapman against A. A. Chapman, set up in the cause of Bartlett & Company vs. said A. A. Chapman, in which the interest of said A. A. Chapman in the land in controversy was sold to one W. H. H. Allen. This judgment is one of the aforesaid claims particularly pleaded and set up by your petitioners' aforesaid cross bill, in which also appears that part of the record of said cause of Bartlett & Co. vs. A. A. Chapman which was filed with the petition of W. H. H. Allen in these causes prior to the entry of the decree of September 5, 1895, from which said first appeal was taken. (8) The court erred in refusing your petitioners' subrogation to the rights of Manilius Chapman in respect to the balance of \$2,044.22, with interest thereon, shown by the hotchpot settlement of the estate of Henley Chapman before Commissioner Broderick, filed in these causes previous to the aforesaid decree of September 5, 1895. This is also one of the aforesaid claims which is particularly pleaded and described in the aforesaid cross bill. As to this and the next preceding assignment of error, see printed record upon the first appeal, part 1, pages 214 and 1021. (9) The court erred in other particulars apparent upon the face of the record, all of which are relied upon, and will be more specifically assigned at the bar of the court."

In making his report, the commissioner took the royalties actually received by the defendant trustees from the lessees as the correct measure of damages, and the best

evidence thereof, and charged the defendants therewith, crediting them with a just and proper proportion of the administrative expenses, and allowing them certain amounts ascertained for the use of front lands which they had purchased for the purpose of enabling the lessees to operate the leased premises. Defendants, by their exceptions, contend that "the complainants are entitled to damages for the waste committed only, the measure of which is the value of the coal in place, which, under the circumstances of this case, is the purchase price at which the coal land could have been purchased." By the decree of September 5, 1895, it is recited: "And it appearing from the pleadings and the depositions that the defendants E. W. Clark, S. F. Tyler, and H. M. Bell, trustees, have collected and received from under the leases aforesaid large sums of money as royalties on the coal mined from and under said land, and it being charged in their bill that said trustees have also taken from said tract of land timber and other material of great value and quantity, and converted the same to their use, and it being claimed by the said E. W. Clark, S. F. Tyler, and H. M. Bell, trustees, that they have put upon said tract of land valuable improvements at considerable cost, and enhanced the value of said lands thereby, the court is of opinion that an account should be taken of said rents or royalties so received by plaintiffs (defendants), and for the timber and other materials taken by them as aforesaid, if any such timber was so taken, as well as of the improvements made on said tract of land by the said trustees, if any, and of the value of said improvements to the said tract of land, and the extent of its enhancement in value by reason of such improvements, and the value of said land when the defendants entered thereon, together with all taxes paid by said defendants on said land;" and the causes were referred to a commissioner to ascertain and report such facts. And by said decree it was further provided: "And the heirs of Henley Chapman and William H. H. Allen, being entitled to four-tenths, Sarah E. Torbett the one-twentieth, of all royalties hereafter accruing and payable under the leases to the Elkhorn Coal & Coke Company and the Shamokin Coal & Coke Company under the decision herein, it is further adjudged, ordered, and decreed that the said Elkhorn Coal & Coke Company and the said Shamokin Coal & Coke Company shall each pay to the Bank of Bramwell, at Bramwell, West Virginia, to the credit of these causes, four-tenths and one-twentieth of all rents or royalties payable under the said leases, and each of them, for coal, timber, and for the material taken from said tracts of land from said coal company from this day until the further order of the court,"—which clearly fixes the basis for ascertaining the measure of damages by the said commissioner. On the 27th of January, 1899, a decree was en-

tered by the circuit court requiring the Bank of Bramwell to pay over to George E. Price, special receiver, appointed in these causes, \$5,335.67 of rents and royalties paid into said bank under said former decree up to November 19, 1898, as well as 80 per cent. of any other sum or sums which might be therein deposited to the credit of these causes by said coal companies under said decree of September 5, 1895; and also requiring said trustees to pay over to the said receiver the sum of \$18,267.41 of the \$23,267.41 collected by said trustees under the suspending bond, whereby they were enabled to collect such rents and royalties, instead of the same being deposited in said bank; the residue of said sum, to wit, \$5,000, being left in the hands of said trustees; and 20 per cent. of all which might thereafter be deposited in said bank to the credit of these causes,—to await the determination of the questions as to whether said trustees were entitled to any sums or amounts on account of frontage charges and expenses incurred by them in the management of said property, and the question whether said trustees should be required to pay interest on the amounts so received by them, which questions were reserved for future decisions and action by the court; and said receiver was ordered to retain and loan out on good security, subject to the future order of the court, the two-ninths of the sums received by him under the decree, to await the action of the court upon the question arising upon the petition of A. A. Chapman's heirs, and directing the receiver to pay the residue of said sums so received by him to the parties entitled to the same under said decree of September 5, 1895. The moneys received for rents and royalties prior to September 5, 1895, could not be distributed by the decree of January 27, 1899, because the commissioner had not then reported, and the amounts proper to be allowed to the defendant trustees for expenses, charges for front lands, etc., had not been ascertained and determined, but the basis was fixed by the decree upon which the trustees should be held to account for the waste committed by them to be the amount of royalties actually received by the trustees belonging to the plaintiffs; and why should a different principle apply to waste committed prior to September, 1895, to that committed subsequently? In the decision of January 24, 1900 (35 S. E. 15), it is said: "As to the disposition of the moneys from royalties paid prior to September 5, 1895, or the mode of partition of the land, these subjects, not being before us, remain for the action of the circuit court, and we express no opinion thereon further than as the legal principles above given may apply to them."

The moneys here referred to belong to the parties, as between the plaintiffs and defendant trustees, in the same proportion and in the same way as the moneys distributed by the decree of January 27, 1899, except

as to such amounts as might be charged against the portion belonging to the plaintiffs in favor of the defendants to be ascertained by the commissioner in taking the account ordered for frontage charges and the expenses of management, although it is claimed by defendants in their brief that, "after September 5, 1895, mining operations were carried on with full knowledge of the co-tenancy, and of the rights of each co-tenant to receive his share of the royalties. The situation before September 5, 1895, was different, and the true measure of the damages for the waste committed presents a more difficult question." This might be true if the trustees had been actually conducting the mines and producing the coal themselves, bearing and paying all the expenses incident thereto, as well as assuming all the risks of the trade. It might have been difficult to so settle with them as to find what they had received as net profits. But these difficulties do not confront us, for the reason that the tenants who were deriving the benefits did not themselves operate the mines, or take any of the risks of pay and expenses, but simply sold the coal, and received the pay therefor at a stipulated price, paid to them in cash, quarterly and promptly; the lessees making all the necessary expenditures in the way of equipments for successfully operating the mines and shipping the coal. Judge Brannon, in this case, at page 14, 35 S. E., in referring to the decree of September 5, 1895, says: "It does not actually decree the money at once to the Chapmans and Torbett, but it says, by way of recital,—if you can call it recital,—'And the heirs of Henley Chapman and William H. Allen being entitled to four-tenths, Sarah E. Torbett to one-twentieth, of all royalties hereafter accruing,' and it directed the lessees to pay into bank, etc. * * * The decree may not be said to establish beyond recall the right of the Chapmans and Torbett to the money, but it can be said that it repels any claim that it gave to the trustees that money irrevocably." But the decree of January 27, 1899, which the judge was then reviewing, did decree the money to Chapmans and Torbett, establishing it to be theirs beyond recall, and this decree was affirmed on appeal.

In *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, it is held that petroleum in place is part of the land (Syl., point 4): "It is waste in a tenant in common to take petroleum oil from the land, for which he is liable to his co-tenants to the extent of their right in the land." Jones was the owner in fee of three-tenths of the land under purchase at a judicial sale, when he supposed he was purchasing the whole title, but only got by his purchase three-tenths in fee, and but a life estate in the remaining seven-tenths, the remaindermen not being parties to the suit in which he purchased. Under his purchase Jones

took possession of the whole, excluding the remaindermen in his operations for oil on the lands. He was entitled to the occupancy and control of the whole for purposes of residence, cultivation, or other ordinary use not injuring the inheritance, to the exclusion of everybody; but he had no right, as life tenant, to extract the oil or coal, which was a part of the land itself, no oil wells being bored thereon when he purchased, or mines opened. Neither had he a right, as the owner in fee of the three-tenths, to bore for oil, "any more than a stranger, because the act, whether done by a co-tenant or stranger, is a wrong. For this purpose he was a stranger, so far as the wrongful character of the act is concerned." "Therefore we term his act 'waste,' not technically trespass as done by a stranger. Waste is an injury to the freeholder by one rightfully in possession. This marks the distinction between waste and trespass." 1 White & T. Lead. Cas. Eq. 1011. But the nature of the act is a tort in both cases; the same in both. Of course, a stranger would be liable for trespass; or, if he converts the oil from realty to personalty, the injured co-tenant may waive the trespass, and go for the value of the oil, or for the money for which the trespasser sold it. Judge Brannon, in *Williamson v. Jones*. And in this case in the decision of January 24, 1900 (Cecil v. Clark, 35 S. E. 11), after holding that section 14, c. 100, Code, does not apply to waste by joint tenants or tenants in common, in discussing the purposes of the said section and section 2, c. 92, Code, under which latter section the defendant trustees are liable to their co-tenants the plaintiffs, the same judge says: "But, when one takes coal, his co-tenant has title to the very coal after its severance from the land, and the taking tenant can be sued in trespass; or, if he sells, his co-tenant can waive the tort, and sue for the money had and received, because the one has received money from the sale of property belonging to the other. * * * His act was a wrong, a waste, in violation of the right of his co-tenant; and this co-tenant can follow up the property, and base his demand on its wrongful taking and conversion." This position held in this particular case is utterly inconsistent with the contention of the defendant trustees "that their liability to plaintiffs can be discharged by paying a few dollars per acre for the land from which they took the coal. It has been held that the coal taken belonged to the plaintiffs after its severance, and that the plaintiffs could waive the tort, and sue for the money had and received for the coal sold. The defendants have received 10 cents per ton from the lessees for the coal, and the plaintiffs waived the tort, and asked the court to require their share of the proceeds to be paid to them. The decrees entered in these causes having fully settled and established the principle upon which the measure of damages to be recovered by the

plaintiffs for the waste committed by the defendant trustees was ascertained, I deem it unnecessary to discuss the propositions and authorities so ably presented by counsel for the trustees on the question of the measure of damages. Under the circumstances of this case the basis fixed is correct and just; the plaintiffs having waived the tort and sued for the money had and received. It is a well-settled rule that one is entitled to interest on money from the time it should be paid to him. In *White v. Martin*, 1 Port. (Ala.) 215, 26 Am. Dec. 365, it is held, "The measure of damages in trover is the value of the property, and interest from the time of conversion." *Hepburn v. Sewell*, 9 Am. Dec. 512; *Sanders v. Vance*, 18 Am. Dec. 167; *Baker v. Wheeler*, 24 Am. Dec. 66.

The plaintiffs A. A. Chapman's heirs filed four cross errors, three of which refer to the measure of damages for the waste adopted by the court, and one claims that the court erred in allowing anything to the defendants for frontage charges. Of course, the first mentioned are hereinbefore disposed of, and none of them seem to be seriously insisted upon. The frontage charges are equitable and just. The second assignment alleges that the court erred in refusing to permit the cross bill tendered by the trustees to be filed. To the filing of this bill the plaintiffs filed the following objections in writing: "(1) Because all the alleged matters contained in the first ten paragraphs of said paper are matters which, if they exist, should and could have been proven before the commissioner whilst the cause was pending before him, being matters which bear upon the amount to be recovered against said trustees for and on account of the coal mined for plaintiffs' share of the land in controversy. (2) Because the matters alleged in said paper would not change the result arrived at by the commissioner even if they were true, the true measure of recovery being the same whether the said trustees are held to account for rents and royalties or to pay damages for waste. (3) Because the matters contained in the remaining paragraphs of said paper present no ground for relief in favor of said trustees for the following reasons: (a) The said trustees are not entitled to any such right of subrogation to the judgment of *Manlius Chapman* against A. A. Chapman, as is claimed in said paper; (b) the said trustees, even if they are creditors of A. A. Chapman, deceased, by subrogation, as claimed, have no right to ask that the sale of A. A. Chapman's interest be set aside upon the alleged grounds set forth in said paper. (4) Because said paper comes too late, and the court will not delay the cause for anything contained in it. (5) Because none of the matters alleged in said papers constitute any ground for relief in this cause, and for other reasons apparent on the face of said paper." As stated by the appellees in their brief, "All

the matters, with the exception of the attack made upon the bona fides of the sale to W. H. H. Allen of A. A. Chapman's one-tenth interest, had already been put in the record of these cases, and upon the former appeals had been strenuously presented one way and another, but unsuccessfully, as reasons why the plaintiff should not have the relief prayed for; and there was no reason, as held by the circuit court, why the case should be further delayed on account thereof. Reference to the briefs of the defendants' counsel upon the former appeals will fully show this fact." The principal questions being raised by defendants in their exceptions to the commissioner's report, and this assignment receiving no special attention in the brief of appellants, it seems to have been abandoned as a distinct proposition, the said cross bill being treated as an affidavit in support of the defendants' exceptions to the report of commissioner. The third and fourth, as well as the fifth and sixth, assignments all have reference, directly or indirectly, to proof on the measure of damages, and the principle upon which it should be ascertained. The defendants complain of the basis upon which deductions were made in their favor against the royalties due the plaintiffs for "frontage charges"; that the basis adopted for the allowance is inadequate and unfair; "that the court allowed interest upon the cost price of the front lands as a fair return for their use, although the record shows that these front lands were absolutely essential for the successful mining of the lands in question." They claim "there is no reason or stability in such a rule" as that fixed by the commissioner and court, and say there is evidence in the record to the effect that a cent and one-half a ton would be a fair price for a right of way across these front lands to take the coal from the lands in controversy, and that this testimony was disregarded by the circuit court when it adopted the "uncertain basis" of interest on the cost price of the front lands. The evidence referred to is of necessity very uncertain; more a guess, than otherwise, as to what should be allowed. Mr. Clark, the vice president and treasurer of the Flat Top Coal-Land Association, estimating the value to the Elkhorn Coal & Coke Company of the operation of this part of the improvements of this company, which is located on the Carter tract, says: "I suppose a fair figure would be about half a cent a ton for the coal mined. * * * That is as close as I could estimate it. It is rather difficult to put a valuation in that way." In the case of the other two tracts of the "Ward and Belcher tract," upon which all the improvements, tipples, tracts, coke ovens, houses, stores of the Shamokin Coal & Coke Company were located, the witness estimated, if the basis of compensation was a certain percentage of the royalty, at between one and two cents per ton of coal shipped over and through

such improvements,—certainly not less than one, and that it might be as high as two, cents per ton. Witness further said: "Of course, it is a matter of negotiation. You have got to pay whatever the owner of the front land demands." So, after all, it seems to be largely a question of conscience with the owner of lands in front of coal lands the use of which is absolutely essential to give the owner of the coal an outlet for the production of his mines as to what he will demand for such use. Such front lands may be of absolutely no value in themselves to the owner, barren of coal, timber, or any other thing of value, and wholly unfit for cultivation, and yet, because of their location in front of valuable coal deposits, which cannot be removed without their use, they become of great value to the owner. The relation occupied by the defendant trustees of co-tenants with the plaintiffs, and purchasing the front lands as a part of their preparations for wrongfully removing the coal from their joint lands, hardly places them in the position that a third party would occupy as independent owner of said front lands, who would have a right to dictate the terms on which the same could be used by the owners of the coal in the rear lands for the removal thereof. These front lands were necessary to enable the owners of these coal lands—the plaintiffs and defendants—to operate and remove the coal; and the defendants, who were claiming all the coal, purchased the land for the purpose of operating the mines of which they were the owners of but eleven-twentieths. The lands were purchased alone for the purpose of facilitating the removal and shipping of the coal, and should be treated as a part of the expenses in providing right of way and conveniences for getting out the coal; and it would appear that legal interest on the sum so invested would be a fair compensation to be paid by the co-tenants who were attempted to be excluded by those who went into possession and committed the waste, as long as they chose to hold the legal title solely in themselves, and not to treat it as common property by permitting the plaintiffs to share in the purchase thereof in equitable proportions.

The seventh and eighth assignments—that the court erred in refusing defendants' subrogation to the rights of the representatives and heirs of Manilius Chapman in respect to the judgment of Manilius Chapman against A. A. Chapman set up in the cause of Bartlett & Company against said A. A. Chapman, in which the interest of said A. A. Chapman in the land in controversy was purchased by W. H. H. Allen, and in referring defendants' subrogation to the rights of Manilius Chapman in respect to the balance of \$2,044.22 and interest thereon by the hotchpot settlement of the estate of Henley Chapman before Commissioner Broderick. Manilius Chapman filed his petition in the creditors' suit of George Bartlett & Co. against

A. A. Chapman, pending in the district court of the United States for the district of West Virginia, setting up his judgment against A. A. Chapman as a lien upon the interest of said A. A. Chapman in the lands in controversy here, being the one undivided one-tenth. On the 31st of May, 1890, a decree was entered for the sale thereof to satisfy the said judgment of Manilius. On the 15th of November, 1894, it was duly sold for the sum of \$2,800, W. H. H. Allen being the purchaser. On the 4th of December, 1894, the same was, by decree of said court, confirmed, and a deed directed to be made to the purchaser retaining vendor's lien to secure the payment of the residue of the purchase money, being \$1,400, the one-half thereof; the cash payment having been, under direction of said court, after payment of the costs of the petitions and of sale, applied to the said judgment of Manilius by payment to his administrator. Allen afterwards paid the deferred payment of \$1,400 and interest, and received his deed for the interest so purchased, and the residue of the purchase money applied on the judgment of Manilius Chapman by payment to his administrator after payment of a small balance on a prior judgment against said A. A. Chapman. So that the interest of A. A. Chapman in this land was sold, and the proceeds, as far as proper, applied to the payment of the judgment set up against it by Manilius Chapman. David E. Johnston, to whom Manilius had conveyed by special warranty his interest in this tract of land, claiming it to be the one undivided half of said tract, in his answer filed in the cause claimed subrogation to the rights of Manilius Chapman as new matter and asking affirmative relief, which he failed to receive. This defense, being overruled in former decree, which had been affirmed on appeal, concludes not only Johnston, but the defendant trustees, who are in privity with him, not only as to every matter which was offered and received to sustain or defeat the claim, but also any other admissible matter which might have been used for that purpose. And the adjudication is a bar or estoppel against the same as a defense. *Wandling v. Straw*, 25 W. Va. 692 (Syl., point 4); *Poole v. Dilworth*, 28 W. Va. 583; *Camden v. Werninger*, 7 W. Va. 528; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 800; *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. 285; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948. In *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16 (Syl., point 1): "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto, and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formerly put in issue in a former suit, but it is sufficient that the

status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata." In the case at bar the defendant trustees had filed their very elaborate answer to the bill, and also an answer to the supplemental bill, but set up no such defense as is now sought to be made after their vendor, David E. Johnston, has failed in the same defense; and they have no better claim than he under whom they claim. The judgment of Manilius Chapman was a general lien upon all the real estate of A. A. Chapman, and was not a special lien on the tract or interest of A. A. Chapman here in controversy, and a proceeding was had to enforce that judgment against this land. No steps were taken to sequester the rents and profits, and apply the same to the said judgment or the debts of said A. A. Chapman, and any part of the realty—such as the coal or timber—which was severed from the land immediately on being severed became the property of the heirs, in whom the title to the realty was vested. In *Williamson v. Jones*, 43 W. Va., at page 569, page 414, 27 S. E., and page 699, 38 L. R. A., it is said: "Of course, when that which is a part of the realty is unlawfully severed, it belongs to him who has the first vested estate of inheritance at the date of severance, as he owns it. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410; *Fearne*, Rem. 341; *Whitfield v. Bewit*, 2 P. Wms. 240; 1 *Lomax*, Dig. 56. The owner of the severed chattel can alone seize it, or bring trover for its conversion as it came from the inheritance, or claim the thing itself by replevin or detinue, or bring trespass de bonis asportatis for damage for the taking of it, or assumpsit for money had and received from it. Nor does it matter whether the timber is cut by a stranger or by the tenant (for life) himself, since the tenant cannot convey any interest in it when severed. 1 *Washb. Real Prop.* 119; 1 *Lomax*, Dig. 59; *Freem. Ch.* §§ 297-302. For the same reason the co-tenant doing waste neither owns nor can sell what is not his." "If at the time of the improper working there is any person in being entitled, defeasibly or indefeasibly, to an estate of inheritance, the property in the severed chattels, or the amount to be accounted for, will belong absolutely and immediately to such person, or, if more than one, to the first of such persons." *McSwinney, Mines*, p. 99, c. 3, § 2b; 1 *Lomax*, Dig. 56, 57; *Pigot v. Bullock*, 1 *Ves. Jr.* 479; *Birch-Wolf v. Birch*, L. R. 9 *Eq.* 683; *Hogg, Pl. & Forms* (2d Ed.) § 83. Manilius Chapman conveyed to Johnston with covenants of special warranty, by which Johnston took only such interest or estate as was vested in Manilius Chapman at the time of conveyance, and an ouster by any other title would not give Johnston a cause of action against Chapman on his warranty. Only an eviction by some one claiming un-

der said Chapman would constitute a breach of his covenant, and it is not pretended that this has occurred. *Western Mining & Manufacturing Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406. Appellants contend that this is a partition suit, and that, "if we modify our supposed case, and insert the heirs of A. A. Chapman as plaintiffs instead of A. A. Chapman (still considering, however, that Manilius is alive, and the defendant), the right of Manilius to deduct the amount of his judgment is not affected. The heirs succeeded to the land of their father, A. A. Chapman, but took it subject to the lien of the judgment, and in this partition suit they are under the same liability to pay and satisfy this judgment as their father would have been." How far the damages for waste secured by the heirs of A. A. Chapman would be liable to Manilius Chapman on account of this judgment is a question not before the court, and is immaterial. As between Manilius and the defendant trustees, they have all the right, title, and interest of Manilius Chapman in the tract of land which came to them through E. W. Clark and wife. They must look to their vendor. If they have not all they bought, they cannot complain of the misrepresentations of Manilius Chapman to his vendee, David E. Johnston. "The vendee of land cannot claim in a foreclosure suit a deduction from the mortgage money on the ground that his vendor, who was not the mortgagor, misstated the number of acres of the land conveyed, and that the vendor of such vendor, who was the mortgagee and complainant, when he sold such lands, made a similar misstatement." *Davis v. Clark*, 33 N. J. Eq. 579; *Shamless v. Miller*, 15 La. Ann. 713; *Powell v. Hayes*, 31 La. Ann. 789. Counsel for W. H. H. Allen, purchaser of the one-fourth interest of A. A. Chapman's heirs, intimate, but do not insist, that he is entitled to the damages for waste done upon said interest prior to the date of his purchase of said interest. When he purchased, he took the land as it was. That part of it which had been severed prior to the date of sale became personalty the moment it was severed, and was the property of the heirs of A. A. Chapman. I see no error in the decree, and it is affirmed.

(49 W. Va. 494)

RHOADES v. CHESAPEAKE & O. RY. CO.
(Supreme Court of Appeals of West Virginia.
June 18, 1901.)

INJURY TO EMPLOYE—DAMAGES—RELEASE—
CONSTRUCTION—FUTURE EMPLOYMENT—
DISCHARGE—EVIDENCE—DAMAGES.

1. If a person having received permanent injury in the service of his employer, and claiming the injury was caused by the negligence of the latter, in consideration of an agreement on the part of the employer to give him work so long as he gives satisfaction to the foreman or superintendent under whom he works releases his claim for damages for said injury, and is then given employment in pursuance of the

agreement at wages agreed upon between them, there is no lack of certainty or mutuality in the agreement, for all its terms are settled, and by releasing his claim for damages the employé has paid in advance for the option to do such work for his employer as he is able to do, and he cannot be discharged without cause.

2. If, in such case, the servant be discharged without cause, he may treat the contract as absolutely broken by the master, and in an action thereon recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, less any sum he might have earned already, or might thereafter earn in other service, as well as the amount of any loss the defendant sustained by the loss of his services without the master's fault.

3. In the trial of such case the burden is upon the defendant to show that the discharge was for good cause, and a verdict for the plaintiff should not be set aside unless it is clearly wrong.

4. If two writings of different dates, made between the same parties, and relating to the same subject-matter, are not different from each other in legal effect, though different in terms, and the later in date is, among other things, a receipt for a sum of money, mentioned in the other and to be paid, and therefore a voucher, passed between the parties in performance of the first agreement, such first agreement is not discharged by the execution of the latter, and resort may be had to both instruments in ascertaining the rights and liabilities of the parties.

5. An instruction stating the law applicable to one theory of the case, and substantially covering all the facts upon which the correctness of such theory depends, is proper if there is any evidence in the case tending to prove such facts, although it ignores other facts put in issue as part of another and different theory, which, if true, leads to a different conclusion and result, if another instruction has been given in the case covering such conflicting theory. (Syllabus by the Court.)

Appeal from circuit court, Kanawha county; F. A. Guthrie, Judge.

Action by G. W. Rhoades against the Chesapeake & Ohio Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Simms & Enslow, for plaintiff in error. E. W. Wilson, for defendant in error.

POFFENBARGER, J. On or about November 7, 1896, G. W. Rhoades, then employed as a section hand by the Chesapeake & Ohio Railway Company, received an injury, while assisting in replacing on the track a derailed freight car on the Cabin Creek Branch of said railroad, which necessitated the amputation of one of his legs on the 27th day of December following. Soon after he was discharged from the hospital, negotiations for a settlement with him were commenced by the claim agent of the railway company, which resulted in the preparation by said agent, and signing by Rhoades, of the following instrument: "Coalburg, W. Va., April 27th, 1897. I hereby agree to accept \$600.00 in full settlement, satisfaction, and discharge of all claims arising from or growing out of personal injuries received by me on or about Nov. 7th, 1896, while working as a laborer at wreck at Dry

Branch on Cabin Creek in the service of C. & O. Ry., said amount to be paid without delay by voucher through agent at Charleston, W. Va. In addition I am to be given a job as watchman or in other service which I can perform. It being understood that I stand in same relation to the company as any other employé, injured or not injured, and will be removed only for cause, and will have a steady job so long as I give satisfaction to the foreman or supt. under whom I work. [Signed] G. W. Rhoades." It was left in the possession of Rhoades, and the agent said he would talk with the superintendent upon his return to Huntington, and, if he agreed to the terms of the proposed settlement, a voucher would be sent to Charleston, and the amount paid. He found the adjustment satisfactory to the superintendent, who directed him to prepare a voucher for the amount. Not having a copy of the writing upon which he and Rhoades had agreed, and wishing to embody its terms in the voucher, the agent relied upon his memory in the preparation of the voucher, which he claims Rhoades signed May 1, 1897, and which is as follows:

"Chesapeake and Ohio Railway Company.
139,634. Claim No. 2,997.

"To George W. Rhoades, Dr. Address,
Charleston, W. Va.

1897.

April 26th. For amount agreed upon in full settlement, satisfaction, and discharge of all claims or cause of action arising from or growing out of personal injuries received by me on or about Nov. 7th, 1896, while on duty as laborer at Dry Branch, at Drainment, of train 113 on Cabin Creek Branch..... \$600.00

O. K.	Charge to	Amount.	Certified.	Approved.
Hun. Div.		\$600.00.	J. W. Winget,	
C. T. 52.			Claim Agent.	

"Received, Charleston, W. Va., May 1st, 1897, of the Chesapeake and Ohio Railway Company, the sum of \$600.00, in full compromise, satisfaction, and discharge of all my claims or causes of action, and particularly of all claims or causes of action arising out of the personal injuries received by me Nov. 7th, 1896, as per above voucher. In addition to this I am to be given an opportunity to work for the company under like conditions and circumstances as any other employé, injured or not injured, so long as I give satisfaction to the foreman or superintendent under whom I work. George W. Rhoades. [Seal.] J. W. Winget, L. H. Moseman, Witnesses."

The \$600 was paid at the Charleston office of the company on or about May 1, 1897, and on that occasion Winget, the claim agent, called upon Rhoades for a copy of the writing of April 27, 1897. It being produced, and a copy taken on the company's letter press, the agent took said copy w^o of him. It was attached to and returned with the other papers. Rhoades swears he issued the voucher of May 1st, but that the

and Moseman, the subscribing witnesses, testify that he did. On June 1, 1897, Rhoades went to work for the company in pursuance of their agreement, and for about nine months thereafter was kept busy at tamping ties, grassing the track, tightening bolts, and watching at a cut near the town of Milton. Then, the company not requiring a watchman at said cut any longer, he was sent to Hinton, to tend the switches in the yard. He refused to do this work on the ground that he could not perform it, owing to the distance between the switches being so great that he could not travel in the limited time permitted. He was then brought back to Milton, where he worked a while longer, grassing the track and tightening bolts. In the month of July, 1898, he was discharged. He claims he was unable to do the work required of him at that time. As to the character of this work, Clifford, the foreman, says: "Spencer [supervisor of track] told me and I told him [Rhoades] that he would have to tighten up bolts, and raise low joints; for me to give him a beat. I gave him about a mile and a half of bolts to tighten up and about a quarter of a mile of grassing to do. Well, he done that piece of grassing all right, and worked some at the bolts, and I asked him to go to the east end,—the east end of the section,—and he refused." That was about three miles from where he had been working. Clifford further describes the work as follows: "It is putting in bolts, tightening up bolts, and, where ties are churning at the ends, picking away from the end and letting the water out, throwing up gravel, grassing, and such work as a watchman generally does." Spencer's statement relating to the dismissal of Rhoades is as follows: "There was a few joints in the cut near where Mr. Rhoades lives. * * * I don't suppose they were further from his door than from here across the street. I wanted him to go there, and help the watchman take them up, because I didn't want to take a gang over there. Well, the foreman came to me, and told me that he said he wouldn't do it. Mr. Rhoades met me the next morning at Milton, and says to me, 'What is it that you want me to do?' I says, 'Didn't the foreman tell you?' 'Yes,' he said, 'He told me that he wanted me to carry ties and put in ties.' Says I, 'Mr. Rhoades, I don't think that he told you that. What is it?' 'Well, he wanted me to help raise the lower joints.' 'That is it exactly. I can't get a gang over there now, and then something else will turn up.' He says, 'I am not going to do it.' I says, 'Are you going to quit?' He says, 'No, I am not going to quit.' He says, 'If you want me to quit, discharge me.' I says, 'I will discharge you in 15 seconds,' and I did it right there." Rhoades says that after he was given the beat he grassed the track, and tightened part of the bolts, and then they stopped him, and wanted him to work on the section,—“tamp ties, put in ties, and do

general repairing.” Soon after he was discharged, Rhoades brought an action of assumpsit in the circuit court of Kanawha county against the company, upon the agreement of April 27th, laying his damages at \$10,000. A demurrer, interposed by the defendant, being overruled, a plea of non assumpsit was entered, and issue was joined thereon, and a trial was had, resulting in a verdict of \$1,000 for the plaintiff. A motion to set aside the verdict and grant a new trial was made and overruled, and an exception taken to this, as well as several other rulings of the court, and judgment was rendered on the verdict.

The overruling of the demurrer is made the basis of the first assignment of error. Under this head it is argued that the paper dated April 27, 1897, is not a contract of employment, but at most a mere agreement to make such a contract in the future, because it leaves for future determination the wages to be paid, the kind of work to be performed, and the term or period of employment. It is also said that the declaration is founded wholly upon that paper, and does not go beyond it; but it is found that in the declaration the substance of the agreement is alleged, and, further, that afterwards the “defendant ratified and confirmed said agreement, and paid to the plaintiff the said sum of \$600, and gave to the plaintiff a job as watchman on its said railway, said job commencing, to wit, about December 1, 1897, at the price of \$1 per day as wages as such watchman, and continuing plaintiff as such watchman from the date last aforesaid until, to wit, the 11th day of July, 1898.” The declaration thus makes out a complete contract, certain and definite in all respects. It also alleges a breach of this contract, and so establishes a cause of action. It is contended, however, that under such a contract, the plaintiff below having the right to stop work when he pleased, the railway company could discharge him. This view of the contract declared upon is not in harmony with the law as expounded in the text-books and decided cases. In *Beach, Cont. § 457*, it is said: “Where an employé, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages said to have been caused by the employer's negligence, the agreement is not void because lacking mutuality. By releasing his claim, the employé has paid in advance for an optional contract, and he has the right to have it remain optional.” In *Smith v. Railroad Co.*, 60 Minn. 330, 62 N. W. 392, Collins, J., says: “The consideration for the defendant's agreement to employ was paid by the release of the plaintiff's claim for damages quite as much and as effectually as if the plaintiff had actually paid cash. By releasing his claim for damages, the plaintiff paid in advance for the privilege or option of working for the defendant.” This is cited

in support of the text in Beach. It is true, the same author says, at section 75, cited for defendant: "A memorandum reciting the terms of a contract of employment, which are, however, 'subject to the conditions and regulations of a contract which is to be substituted for the memorandum,' imposes no legal obligation." But this in no way conflicts with what is said in section 457, and its utter inapplicability to the case stated in the declaration, as well as to the terms of the paper dated April 27th, is clearly apparent. Section 75 evidently relates to an agreement to give employment, not made upon a valuable consideration, but in which there are simply concurrent promises, the one being the consideration for the other, and the terms and conditions of these promises not complete. The paper declared upon here shows upon its face a consideration valuable in law. On the side of the employé it is an executed contract, not of the service contemplated, but as to the opportunity to serve and receive wages therefor. By his release he has paid for this option. Moreover, this paper contains no qualifying or limiting clause, such as is found in the case put in said section 75. It is true that the case of *Railroad Co. v. Pierce*, 26 C. C. A. 632, 81 Fed. 814, cited for defendant, sustains its position, but that case went up to the supreme court of the United States, and was there reversed. See 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591. The facts in the case, and the law there declared, are stated in the syllabus as follows: "An agreement in writing between a mining company and a machinist stated that while in its employ he was seriously hurt, under circumstances which he claimed, and it denied, made it liable to him in damages; that six months after the injury, both parties being desirous of settling his claim for damages, the company agreed to pay him regular wages, and to furnish him with certain supplies while he was disabled, and carried out that agreement for six months, at the end of which, after he had resumed work, it was agreed that the company should give him such work as he could do, and pay him wages as before his injury, and this agreement was kept by both parties for a year; and then, in lieu of the previous agreements, a new agreement was made that his wages 'from this date' should be a certain sum monthly, and he should receive certain supplies, and he on his part released the company from all liability for his injury, and agreed that this should be a full settlement of all his claims against the company. Held, that the last agreement was not terminable at the end of any month at the pleasure of the company, but bound it to pay him the wages stipulated, and to furnish him the supplies agreed, so long as his disability to do full work continued; and that, if the company discharged him from its service without cause, he was entitled to elect to treat the

contract as absolutely and finally broken by the company, and, in an action against it upon the contract, to introduce evidence of his age, health, and expectancy of life, and, if his disability was permanent, to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, deducting, however, any sum that he might have earned already or might thereafter earn, as well as the amount of any loss that the defendant sustained by the loss of his services without its fault." In delivering the opinion of the court, Mr. Justice Gray said: "An intention of the parties that, while the plaintiff absolutely released the defendant from that claim, the defendant might, at its own will and pleasure, cease to perform all the obligations which were the consideration of that release, finds no support in the terms of the contract, and is too unlikely to be presumed." Of the same case the supreme court of Alabama said: "The contract is sufficiently definite as to time, and bound the defendant to its performance so long as the plaintiff should be disabled by reason of the injuries he received, which, under the averment that he was permanently injured, will be for life." 110 Ala. 533, 19 South. 22. And Mr. Justice Gray said: "As we concur in that opinion, it is unnecessary to consider how far it should be considered as binding upon us in this case." The same principles are announced in *Railroad Co. v. Staub*, 7 Lea, 397, *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289, and *Railroad Co. v. Scott* (Tex. Sup.) 10 S. W. 99. But in the last case the doctrine is qualified to this extent: "When, by the terms of such compromise, the company binds itself to employ the plaintiff, and it is optional with the latter to serve, there is no mutuality of contract until the plaintiff exercises the right to fix the period for which he will serve, and, until he has done so, there is no breach for which he can maintain an action."

At the instance of the plaintiff below, and over the objection of the defendant, the following instruction was given: "The court instructs the jury that if they believe from the evidence that the parties to this action compromised their difference as set forth in plaintiff's declaration, and that the writing of April 27, 1897, marked 'Exhibit No. 6,' was signed by the plaintiff, Rhoades, after being prepared and written by defendant's agent, and that said writing embodied the actual terms of such compromise, and was accepted and acted upon by defendant, then the defendant is bound by the provisions of said compromise." To the giving of said instruction the defendant excepted. At the request of the defendant, the following instructions were given: (1) "If the jury find from the evidence that the writing of May 1, 1897, marked 'Exhibit G. W. R.,' purport-

ing to be signed by Geo. W. Rhoades, was in fact signed by him, and the stipulations and conditions therein contained were different from the propositions made in writing by him on April 27, 1897, 'Exhibit No. 6,' the jury should take the writing of May 1, 1897, as embodying the terms upon which the parties finally agreed to compromise; and if the jury further believe from the evidence that the defendant had given the plaintiff work, as it had agreed to do, and the plaintiff failed to work to the satisfaction of his foreman or superintendent, as provided in said agreement, then the defendant had the right to discharge the plaintiff, and it would not be liable for any damages in this suit."

(2) "The court instructs the jury that if they find from the evidence that at the time the plaintiff entered into the employment of the defendant after his injury he made no fixed or specified time or period which he agreed to work for the defendant, then he had the right to cease working for the defendant at any time, and the defendant had the right to cease employing him at any time." (3) "The court instructs the jury that if they find from the evidence that the defendant gave to the plaintiff such work as he could do and had done, and the plaintiff refused to do such work so given him, then the defendant had the right to discharge him from its service, and you should find for the defendant." It is contended that it was error to give plaintiff's instruction: (1) Because by the paper dated May 1, 1897, the writing of April 27, 1897, was discharged, and no longer formed the contract between the parties, the two papers being different and inconsistent, and the former under seal; (2) because it ignored the transaction of May 1st, and thus violates the rule requiring instructions to cover all essential elements of the case, to the end that the jury may not be misled; and (3) because it is inconsistent with defendant's instruction No. 1, based upon the writing of May 1st. If two agreements of different dates, made between the same parties, and covering the same subject-matter, are inconsistent, the one earlier in date is impliedly discharged by the other. *Clark, Cont. 611. In Renard v. Sampson, 12 N. Y. 561, the rule is stated as follows: "A written contract executed between parties, not in performance of a distinct and separate provision of prior negotiations and agreements between them, but covering in its terms or legal effect the whole subject-matter thereof, extinguishes and supersedes all such prior negotiations and agreements."* In *Paul v. Meservey, 58 Me. 419, the law is stated thus: "One contract is rescinded by another between the same parties when the latter is inconsistent with, and renders impossible the performance of, the former."* It is claimed that these two contracts or writings are different, because the first states that Rhoades "is to be given a job as watchman or other service" which he can do, and

there is to be no discharge without "cause," while in the second he is to be given "an opportunity to work" so long as he gives "satisfaction." The two writings are different in terms as to the matter of employment, but are they different in legal effect? Will not the allegations of the declaration, except as to the date of the instrument mentioned in it, apply to either of the two writings? If so, may not the latter be considered a ratification or confirmation of the former, and, being a receipt for the cash payment, may it not be treated as made in performance of the first, rather than a new contract to take the place of it? In each case, for a valuable consideration, the defendant is bound to give the plaintiff employment, for the latter only releases his claim in consideration of the sum of \$600, and, "in addition" thereto, the option to work for the company. The first says he shall not be discharged without cause, and shall have a steady job so long as he gives satisfaction to the foreman or superintendent under whom he works. The second is silent as to cause for discharge, but repeats the language, "so long as I give satisfaction to the foreman or superintendent under whom I work." If, by the second agreement, the company is bound to give plaintiff an opportunity to work, he could not be discharged without cause, although it is not so expressly stated in the contract. In no valid contract of employment can the master discharge the servant without cause before the expiration of the period of service contracted for. This is too elementary to require any citation of authority. As both agreements bind the company to give the plaintiff employment, and declare that promise to be part of the consideration for the release, the omission of the words, "will be removed only for cause," from the second, is wholly unimportant, insignificant, and immaterial, and does not make it legally different from the other. By the terms of the first writing, the plaintiff was to have "a job as watchman, or in other service which I can perform." The second is silent as to the kind of work contemplated. Does this make them different in effect? In the construction of a contract the court must bear in mind the situation of the parties, the subject-matter of the contract, and the intention and purposes of the parties in making it, and should carry that intention into effect so far as the rules of language and the rules of law will permit. 2 Pars. Cont. (7th Ed.) 631. All parts of the contract will be so construed as to give force and validity to all of them, and to all the language used, where that is possible. *Id.* 636. Comparatively unimportant parts or provisions, which may be severed from the contract without impairing its effect or changing its character, will be suppressed or subordinated, if in that way, and only in that way, the contract can be sustained and enforced. *Id.* 637. To so construe this second paper as to make it the

duty of the plaintiff to do any and all kinds of railroad work would put upon it a construction at variance with the law, and so utterly ridiculous and absurd that it cannot be supposed for a moment that such was the intention of either of the parties. In every case of a contract of employment where the parties know each other, and the purposes of each other, at the time of entering into it, as they did here, and the terms of the contract are not to the contrary, the servant only engages to perform such service as he "can perform." If a person engage to do service which he cannot perform, his incompetence is cause for discharge. If a person make a binding contract to give employment, which he fails to furnish for any reason not attributable to the fault of the employé or an act of God, such failure is a breach of the contract, and an action lies. In this second writing the kind of service not being mentioned, while in the first it is, it cannot be said that there is any contradiction between the writings as to the kind of service. But, if the second contract stood alone, this man was known, at the time of his employment, not to be qualified for the duties of a brakeman, fireman, engineer, conductor, or other position requiring special knowledge, training, experience, and skill. It was well understood between the parties that the company had other positions, the duties of which the plaintiff could perform, although he had but one leg. It could not have been in the contemplation of either of the parties that he would be required to do any work that such a man could not perform. No provision of the contract requires such a construction, and to so construe it would wholly destroy its value to the plaintiff, and defeat the intentions of the parties. It is not reconcilable with their situation, the subject-matter of the contract, or their purpose, object, and intention, apparent upon the face of the contract itself, as well as from the conditions under which the contract was entered into. So, in legal effect, the two papers are alike. There was but one contract to which both relate, neither nor both of which contains it all, for the actual employment took place after the execution of both, and resort may be had to both for its terms as far as they go. Freed from all erroneous conceptions of the case, the instruction given for the plaintiff tells the jury substantially that the defendant is bound by that contract, and the first instruction given for the defendant, that the plaintiff was also bound by it, and, if he had failed to work to the satisfaction of his foreman or superintendent, as provided in the agreement, the defendant had the right to discharge him. But upon the defendant's theory that the two papers are separate and distinct and inconsistent, and the first, therefore, discharged by the execution of the second, the other two criticisms upon the instruction given for the plaintiff

must be disregarded, for the reason that the execution of the writing of May 1st was in issue, and to be determined by the jury. This writing was not mentioned in any of the pleadings of the case, but came into the case as evidence under the plea of non assumption. The plaintiff denied on oath that he had signed it. Two witnesses testified that he did sign it in their presence. This made it necessary for the jury to say which of the two writings constituted the contract between the parties. Section 40, c. 125, Code, reading, "Where any declaration or other pleading alleges that any person made, indorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied, by an affidavit with the plea which puts it in issue," does not apply to writings so brought into the case. At common law the adverse party had the right to require precise proof of all signatures and documents making part of the claim of the party producing them, but this has been greatly modified in some states by rules of court, and in others by statute. 2 Greenl. Ev. § 16. In Virginia an act was passed February 5, 1828, dispensing with proof of the handwriting, "if the declaration alleges that they were signed by any person," unless an affidavit be filed disputing its genuineness. In 1850, after this statute was construed by the court in the case of Kelley v. Paul, 3 Grat. 191, the legislature passed the act as now found in said section 40, applying the rule to any writing alleged in any pleading to have been made, etc. The instruction for plaintiff is not open to the other objection that it ignores the transaction of May 1, 1897, upon the principles announced in the cases of McCreery's Adm'r v. Railroad Co., 43 W. Va. 110, 27 S. E. 327, and Price v. Railway Co., 46 W. Va. 538, 33 S. E. 255, because an instruction for the defendant was given, covering said transaction as a part of its theory of the coal. So, upon the plan of the defense, the case presented, and the evidence related to, two theories, one upon the hypothesis that the contract was embodied in the writing of April 27th, and the other upon the hypothesis that the writing of May 1st formed the contract. In such case, inconsistency in the instructions, if, indeed, there be any because of the conflict, is no objection, and does not violate the rule referred to in the brief. Each of them is general, covering the whole case upon one of its theories. Each party is entitled to an instruction upon his theory of the case, if there is any evidence to sustain it. The conflict thus presented is of the issue itself, the very bone of contention in the case, and is not an inconsistency in the instructions. The instructions thus presenting the contradictory theories and declaring the law upon each of them, it is for the jury to determine what the facts are, and thus apply the law as announced in one of the instructions, and

reject that contained in the one conflicting with it as inapplicable to the case, in arriving at a verdict. The language of defendant's first instruction shows that the application to the case of the principles of law embodied in it was dependent upon the finding of the jury as to whether Rhoades signed the writing of May 1st, for it says: "If the jury find from the evidence that the writing of May 1, 1897, marked," etc., "was in fact signed by" Rhoades, etc., "the jury should take the writing of May 1, 1897, as embodying the terms," etc. So the conclusion is that the assignment of error predicated upon the giving of said instruction is not well taken.

The last assignment of error is grounded upon the refusal of the court to set aside the verdict, and allow a new trial, it being insisted under this head that the work the plaintiff refused to do was such work as he could have done, and not so laborious as some of the work he had already done; that as, under the contract, the defendant might discharge the plaintiff when he ceased to "give satisfaction to the foreman or superintendent under whom" he worked, and he had complained all the time of the work assigned him, he was rightfully discharged under that clause of the contract; that it is uncontradicted that the plaintiff refused to do work assigned him; and that, if the recovery might be for the probable life of the plaintiff, there was no evidence of his habits and expectation of life, and, therefore, no evidence upon which the damages allowed could have been assessed. The refusal to do the work assigned at the time of the discharge is admitted, but the plaintiff claims it was of such character that he was not bound to do it. It may not have been harder than some other work he had done, but that is not the test. The issue was whether it was beyond his ability to perform without undue exertion. Upon this question the jury had before them the nature of the work, the crippled condition of the plaintiff, all the facts and circumstances of his discharge, and the law of the case, dependent upon the facts, and it was their province to say what the facts were, and thus determine whether there was cause for the discharge. The evidence is conflicting as to what was required of him when he refused to perform it. On this point Clifford and Spencer are not in accord, and both of them differ from Rhoades. Then as to what work the plaintiff was able to do was a matter for the jury, and he was before them, and they saw his condition as well as the demeanor of himself and the other witnesses. In addition to this, it must be remembered that the burden was upon the defendant to show that the discharge was for good cause. 14 Am. & Eng. Enc. Law, 797. His complaining from time to time about the kind of work assigned him is unimportant, if even relevant, for the reason that the work he did do was sat-

isfactory to the foreman and supervisor of track.

The principles governing the assessment of damages and the measure of damages in cases of this kind have been given. Railroad Co. v. Pierce, supra. They are very similar to those applying in cases of damages for injuries to the person in which the amount is dependent upon loss of capacity for labor. In these cases the standard mortality tables are sometimes admitted as evidence on the question of the expectation of life. 5 Am. & Eng. Enc. Law, 41, 42, note. But it is not always done, nor has it been held necessary. Here the age and physical condition of the plaintiff were proved, and no reason is perceived why plaintiff's expectation of life should not have been left to the jury in this case, as is so often done in others involving the same question, without more evidence bearing upon it than was before the jury. There being no error in the judgment, it is affirmed.

(99 Va. 537)

HUDSON v. MAX MEADOWS LAND & IMPROVEMENT CO.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

CONTRACTS—PART PERFORMANCE—SPECIFIC PERFORMANCE—IMPOSSIBILITY OF PERFORMANCE.

1. Where the acts of part performance relied on to take an alleged parol agreement to convey lands out of the operation of the statute of frauds are not positive and substantial, equity will not decree specific performance of the contract.

2. Where defendant contracted to convey land by an unincumbered title, which condition plaintiff has not waived, and the land is so incumbered with other property that it is impossible for defendant to comply with the condition, specific performance should not be decreed.

Appeal from circuit court, Wythe county.

Action by J. R. Hudson against the Max Meadows Land & Improvement Company. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

J. H. Fulton, for appellant. W. B. Kegley, for appellee.

HARRISON, J. This is a suit for the specific execution of an alleged parol contract for the sale and exchange of real estate.

The allegations of the original bill are fully set out in the opinion of this court, found in 97 Va. 341, 33 S. E. 586. The case was then before us upon an appeal from a decree dismissing the bill upon demurrer. That decree was reversed, the court holding that the bill stated a case which entitled the plaintiff to a reference to ascertain the condition of the title, in order that the court might determine whether or not there was a contract between the parties which a court

of equity would enforce. Since the cause was remanded to the circuit court, depositions have been taken for the plaintiff and defendant, a report upon the title made, and numerous liens audited against the property in question. To this report the plaintiff filed exceptions, and also asked leave to file an amended and supplemental bill. Upon the hearing, the circuit court, being of opinion that the complainant was not entitled to a specific execution of the alleged contract, declined to allow the amended and supplemental bill to be filed, and, without passing upon the exceptions to the commissioner's report, dismissed the original bill, but without prejudice to the complainant's right to institute such action as he might be advised to bring in a court of law.

We are of opinion that there is no error in this decree. The acts of part performance relied on to take the alleged parol agreement out of the operation of the statute of frauds are not shown to be of that positive and substantial character which is required to bring this class of cases within the well-recognized principles of equity jurisdiction. Fry, Spec. Perf. § 599; Pom. Spec. Perf. §§ 109, 110.

There is, however, a further and more insuperable difficulty in the way of the relief sought in this case. One of the terms of the alleged agreement was that the defendant company should make a clear, unincumbered title to the land exchanged by it. The complainant has not only never waived this condition, but insists upon its performance. The record shows that there are numerous liens, aggregating many thousand dollars, resting upon the several parcels of land belonging to the defendant company, including the tract involved in this controversy. It further shows that the liens resting upon the land in question, as to which there is no exception, amount to more than the alleged purchase price.

The record further shows that, to prosecute the inquiry as to whether the defendant company can be put in a position to make a clear and unincumbered title, its affairs, together with those of other corporations, would have to be wound up, mortgages and deeds of trust foreclosed, and controversies and settlements brought into this case having no connection whatever with the original subject-matter of controversy. Nor does the record disclose any assurance that the conclusion of this multiform and protracted litigation would find the defendant any better able to comply with the terms of its contract than it now appears to be.

The inability of the defendant to perform the alleged parol agreement when called upon by the court to do so prevents a decree for its specific performance. *Jones v. Tunis* (Va.) 37 S. E. 841.

The decree appealed from is affirmed. Affirmed.

KEITH, P., absent.

(99 Va. 564)

BOND v. GODSEY.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

CURTESY—ASCERTAINMENT OF TENANT'S INTEREST—RIGHT TO MINERALS—TIMBER.

1. A tenant by curtesy, agreeing to take a gross sum in the proceeds of the sale of realty, in lieu of a life estate therein, is entitled to the value of his deceased wife's interest in the realty, with a deduction for the value of the coal therein, where the land was chiefly valuable for the coal, and the mines had not been opened, as a life tenant has no interest in, or right to open and work, unopened mines.

2. In ascertaining the value of the interest of a tenant by the curtesy in realty, the value of the timber on the land should not be deducted, where the value of the land is increased by the cutting of such timber.

Appeal from circuit court, Wise county.

Petition by one Bond, as guardian of the minor children of Julia Mann, against J. L. Godsey, for partition. From a decree in favor of defendant, petitioner appeals. Reversed.

W. H. Bond, for appellant. Geo. M. Edmonds, for appellee.

KEITH, P. Julia A. Mann died seised of a certain parcel of land in Wise county, only a small part of which was arable, and the chief value of which consisted in the forests which covered the greater part of it, and the coal beneath its surface, in which no mine had been opened. She left four children, one of whom after the death of her mother married J. L. Godsey, had issue born alive, and both the mother and infant have since died. The other three children of Julia Mann are infants under the age of 21 years, and this bill was brought to partition the land among them, and to ascertain the interest of Godsey as tenant by the curtesy.

Godsey filed his answer, in which he expresses his willingness to take a gross sum in the proceeds of the sale of the realty in lieu of a life estate therein. The real estate was sold for \$2,917.60, and the cause was referred to a commissioner to "ascertain whether defendant, Godsey, is entitled to curtesy in said land, and, if so, to what sum in lieu of curtesy he is entitled." The commissioner reported, upon the evidence before him, that Godsey had fulfilled all conditions necessary to his title as tenant by the curtesy. He reported that the land has little value except for its woods and minerals, and that, inasmuch as the mines have not been opened and the life tenant would have no right in the coal, he proceeded to estimate the commuted value of Godsey's interest in the one-half of the one-fourth of the proceeds of sale, that being the share to which his deceased wife would have been entitled; and he reports that, basing his estimate upon that sum, Godsey would be entitled to the gross sum of \$283.54.

To this report Godsey excepted, claiming

that the commutation should have been based upon the entire value of his wife's one-fourth interest in the subject, without any deduction on account of coal.

The guardian for the infants excepted upon the ground that the commissioner should have deducted from the gross purchase price not only one-half, as representing the value of the coal, but one-half of the remaining half, as the value of the wood and timber upon the surface.

The court sustained the exception of Godsey, and entered a decree in his favor for the sum of \$567.08, less his share of the costs. An appeal was allowed from this decree, and the two exceptions mentioned present the only issue which we are called upon to consider.

It is settled law that a life tenant has no interest in, and no right to open and work, unopened mines. He may open new pits or shafts for working an old vein of coal, he may sink new shafts into the same veins, he may penetrate through a seam or open and dig into a new seam which underlies the first, and take coal to any extent from the mine already opened, but he may not open mines. He is guilty of waste if he does, and equity will enjoin him from its commission. These propositions are so well established as to scarcely need citation of authority in their support. See *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, where the cases upon the subject are exhaustively considered and discussed. *Clavering v. Clavering*, 2 P. Wms. 388; 1 Washb. Real Prop. (4th Ed.) 144; *Findlay v. Smith*, 6 Munf. 134, 8 Am. Dec. 733; *Crouch v. Puryear*, 1 Rand. 258, 10 Am. Dec. 528; *Macaulay's Ex'r v. Dismal Swamp*, 2 Rob. 507; *Carr v. Carr*, 4 Dev. & B. 179; *Conner v. Shephard*, 15 Mass. 164; *Westmoreland Coal Co.'s Appeal*, 85 Pa. 344; *Marshall v. Mellon*, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816.

In *Rog. Mines* (2d Ed.) p. 258, it is said that, "where a tenant for life has committed waste by opening mines, the produce of the mines belong to the remainder-man, and the tenant for life is not even entitled to the interest of the produce."

It is not claimed in this case that the mine had ever been opened, but the land, in this respect, it is conceded, remains in a state of nature.

As the life tenant is not permitted to open mines, and as the presence of coal beneath the surface contributes in large measure to the value of the fee-simple estate, it might reasonably be assumed that the tenant for life, who consents to commute his interest and receive a sum in gross in lieu of that life estate, would only be entitled to a sum fixed by ascertaining the present value of that portion or proportion of the entire subject which he would have been permitted to enjoy; and the authorities, so far as accessible to us, seem to establish this position.

In 2 Scrib. Dower (2d Ed.) it is said:

"There is a material difference in value between the estate of a tenant who is, and that of one who is not, liable to impeachment for waste. A tenant for life, subject to impeachment for waste, cannot sell the timber growing on the lands, nor take the produce of mines unopened, both of which are the property of the person entitled to the inheritance. Where the entire estate is sold, the purchase money is increased by that which belongs to the inheritance, either as the price of the standing timber which the tenant for life could not cut, or as the price of the remainder or reversion, from which the tenant for life could have derived no profit; and therefore it would seem to be clearly improper to award to him the interest upon any portions of the purchase money which represent those prices."

We are of opinion, therefore, that the value of the coal as fixed by the commissioner's report should have been deducted.

The doctrine of the English courts which prohibits the life tenant to cut wood or timber, except for firewood, fencing, and such uses as come under the denomination of "estovers," has been subject to important modifications in this country, growing out of the different conditions existing in England, where the land has been cleared, the due proportion between wood land and cleared land fixed by long experience, and where the diminution of the proportion of wood land to arable land might be deemed an injury to the heir or remainder-man, and a comparatively new and undeveloped country, such as ours, where increasing the area of cleared land, so far from being deemed a wrong to the heir or remainder-man, is often a benefit to him. Therefore the law of waste, as administered in England, is subject to many changes and modifications with us, to adapt it to the wholly different circumstances and conditions by which we are surrounded. See *Findlay v. Smith*, 6 Munf. 134, 8 Am. Dec. 733; *Macaulay's Ex'r v. Dismal Swamp*, 2 Rob. 530.

Applying these principles to the case before us, we are indisposed to sustain the position of the appellant with respect to the value of the wood upon the land, especially in view of the fact that the commissioner, who examined the witnesses and made an intelligent report in the case, was of opinion that the value of the timber should not be deducted in ascertaining the interest of the life tenant, and upon this point his report was approved by the judge of the circuit court. It does not clearly appear from the record what is relative value of the timber, and the surrounding circumstances and conditions are not sufficiently disclosed to enable us to say with confidence that in this respect there is error in the decree. We are therefore of opinion to overrule this assignment of error, and, proceeding to enter such decree as the circuit court should have entered, we ascertain the commuted value of

the life tenant to be as established by the commissioner's report.

Reversed.

(99 Va. 583)

OPPENHEIM et al. v. MYERS et al.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

FRAUDULENT CONVEYANCES—HOMESTEAD—ESTOPPEL—HEAD OF FAMILY—MARRIED WOMAN—WIDOW—SECURITY.

1. Where plaintiffs, while insolvent, executed a voluntary conveyance to shield their property from their creditors, they are not estopped from claiming the property as homestead after such conveyance is set aside.

2. Where the owner of a house is a married woman, whose husband, though living in another country, occasionally visits her, and sends her money, and all their children are of age, she is not entitled to hold the house as a homestead, under Code, § 3630, providing that the homestead of a householder or head of a family shall be exempt.

3. A widow with two infant children, wholly dependent on her for support, is the head of a family, and entitled to homestead exemption.

4. In an action by defendants, as creditors, to set aside a voluntary conveyance by plaintiff, the conveyance was set aside. Afterwards plaintiff's husband died, and she petitioned to have the property set apart as her homestead. *Held*, that the petition should be granted, under Code, § 3642, providing that the homestead may be set apart at any time before it is subjected by sale, notwithstanding section 2460, providing that the creditor causing such a conveyance to be set aside shall have a lien on the property from the commencement of the action.

5. Const. art. 11, § 3, provides that nothing in such article relating to homestead exemption shall be construed to interfere with the sale of the property by virtue of any mortgage, pledge, or other security. *Held*, that the term "other security" refers to voluntary security of a nature similar to those specified, and does not include a judgment or other lien secured by a creditor by legal proceedings.

Appeal from circuit court, Bedford county.

Petition by W. J. Oppenheim and another against one Myers and others to set apart a homestead. From a judgment against petitioners, they appeal. Reversed.

J. Lawrence Campbell and G. J. Holbrook, for appellants. Graham Claytor, for appellees.

WHITTLE, J. This is an appeal from a decree of the circuit court of Bedford county. The controversy involves the right of Letitia A. Satterwhite, a married woman, and W. J. Oppenheim, a widow, to have set apart to each her respective interest in a house and lot as a homestead exemption. In the year 1890 these parties engaged as partners in the retail liquor business. The firm became indebted to insolvency, and subsequently, by separate deeds, Mrs. Satterwhite, who owned a one-third undivided interest, and Mrs. Oppenheim, who owned the remaining two-thirds interest, in the house and lot, conveyed it to the husband of Mrs. Oppenheim as trustee for the benefit of the infant

children of himself and wife and upon other trusts.

A bill was filed by social creditors to set aside these conveyances as voluntary, and made with intent to hinder, delay, and defraud the creditors, and to subject the property to sale.

The court set aside the deeds, and thereupon the grantors claimed their interests in the house and lot as homestead exemptions. Oppenheim and wife first preferred a joint claim to her interest as a homestead, and subsequently, the husband having died, the widow filed a petition asking that her interest be set apart to her as a homestead exemption.

The question of their right to a homestead exemption was referred to a commissioner, who reported adversely to the claim of Mrs. Satterwhite, and favorably to that of Mrs. Oppenheim. Exceptions were taken to the report by Mrs. Satterwhite and by creditors.

The court decided that neither claimant was entitled to an exemption, and decreed a sale of the property, and from that decree this appeal was taken.

The action of the lower court in setting aside these deeds as fraudulent is fully sustained by the evidence. They were shown to be voluntary, and made at a time when the grantors were insolvent, for the evident purpose of shielding the property from the demands of creditors.

The deeds having been set aside, the grantors, if otherwise entitled, were not estopped from claiming an exemption in the property. Whatever view might have been taken of this proposition originally, it is too firmly established now by repeated decisions of this court to be called in question. *Shipe v. Repass*, 28 Grat. 716; *Boynton v. McNeal*, 31 Grat. 456; *Marshall v. Sear's Ex'r*, 79 Va. 49; *Hatcher v. Crews' Adm'r*, 83 Va. 731, 5 S. E. 221; *Mahoney v. James*, 94 Va. 176, 26 S. E. 384.

The constitutional provision for homestead exemptions is embodied in article 11. It is not self-executing, but section 5 declares that "the general assembly shall at its first session prescribe in what manner and on what conditions the householder and head of the family shall thereafter set apart and hold for himself and family a homestead out of any property thereby exempted. * * * But the section is not to be construed as authorizing the general assembly to defeat or impair the benefits intended to be conferred by the provisions of the article."

The statute passed in obedience to that section is found in chapter 178 of the Code. The constitution, as has been seen, declares that "every householder or head of a family" shall be entitled to claim the exemption, while the statute (section 3630) provides that "every householder" residing in this state shall be entitled to claim the exemption. The terms "householder" and "head of family" are interchangeable. Section 3657, as amended by Acts 1887-88, p. 423, declares: "The word 'householder' used in this chapter shall

be equivalent to the expression 'householder or head of a family.' In this connection they are convertible terms, and employed as explanatory the one of the other. Each signifies "one who provides for a family," "one who keeps house with his family," "a master or mistress of a dwelling house." Bouv. Law Dict. tit. "Head of a Family," and "Householder."

The Century Dictionary gives as the primary meaning of the word "householder": "The master or chief of a family; one upon whom rests the duty of supporting or governing the members of a family or household." Cent. Dict. "Householder."

In the case of Calhoun v. Williams, 32 Grat. 18, 34 Am. Rep. 759, the term was held to signify one who occupies such a relationship towards persons living with him as to entitle them to a legal or moral right to look to him for support.

The relation of dependence and support, coupled with a legal or moral obligation to support the dependent, constitutes the one upon whom the burden is cast the head of a family, and entitles such person to the benefit of the exemption.

That case also decides that, where there is no family, there can be no homestead.

Considering, first, the right of Mrs. Satterwhite to a homestead exemption, it appears that she is a married woman, residing in Virginia, and her husband in Mexico; that he has been accustomed to visit her at intervals of two or three years, and occasionally made small remittances of money; that they have six children, all of whom are of age, most of whom are married, and none of whom is dependent upon her for support. Without pretending to decide that a married woman can under no circumstances claim a homestead exemption, it is apparent, in the light of the definitions, tests, and authority given above, that Mrs. Satterwhite is not a householder, or head of a family, in contemplation of the constitution and statutes passed in pursuance of it.

There is no error, therefore, in the decree of the circuit court which denied her the right to claim a homestead exemption.

Mrs. Oppenheim, on the other hand, at the time she filed her last petition, was a widow, with two infant children, who lived with and were wholly dependent upon her for support. That these conditions constitute her a householder or head of a family, both within the letter and spirit of the constitution and section 3630 of the Code, is perfectly clear.

It is contended, however, on behalf of appellees, that, inasmuch as this suit was brought under section 2460 of the Code, as amended, it gave creditors a lien on the interest of Mrs. Oppenheim in the property in controversy from the date of the filing of the bill; that the lien given by that section attached to the property before the death of Mrs. Oppenheim's husband, and therefore before she became a householder or head of

a family; that this lien was a "security," within the meaning of section 3 of article 11 of the constitution, and paramount to the claim of homestead. The case of Kennerly v. Swartz, 83 Va. 704, 3 S. E. 348, is relied on to sustain this contention.

That case does decide that a judgment recovered against a debtor, who afterwards became a householder or head of a family, constituted such a security as is superior to the right of the judgment debtor to a homestead exemption in land which he owned at the date of the recovery of the judgment. In the opinion no reference is made to the case of White v. Owen, 30 Grat. 43, in which the court went into an elaborate analysis of article 11 of the constitution, and decided that the phraseology "other security" occurring in that article "means, of course, security of a like character; that is, such as is created by his [the debtor's] own act." While White v. Owen was decided by a divided court, the judges were agreed as to the correctness of that construction.

The court, in reaching its conclusion, applied the rule ejusdem generis, and adopted an interpretation in consonance with the humane object which the framers of the constitution evidently had in mind when they declared, in section 7, that "the provisions of this article shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out."

This constitutional provision has also received a legislative construction, which is at variance with the interpretation placed upon section 3 by Kennerly v. Swartz, and which would be thwarted in many instances by an adherence to the rule of construction laid down in that case.

Section 3642 of the Code provides that "the real or personal estate, which a householder, his widow, or minor children are entitled to hold as exempt, may be set apart at any time before the same is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process."

It is proper that this legislative declaration should be read into contracts made and obligations assumed since its enactment. In the light of it, it is apparent that the proper construction of section 3, art. 11, was reached in the case of White v. Owen.

This court sanctions and approves that interpretation as the true effect and meaning of the phrase "other security" in section 3, and disapproves and overrules the conclusion reached in the later case of Kennerly v. Swartz.

It follows from these views that the circuit court erred in denying to Mrs. Oppenheim the homestead exemption claimed by her, and for that error the decree appealed from must be reversed, and the cause remanded to the circuit court for further proceedings to be had therein in conformity with this opinion.

Reversed.

(99 Va. 553)

SCOTT et al. v. PORTER.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

EXECUTORS AND ADMINISTRATORS — FINAL SETTLEMENT — ACTION TO SURCHARGE — PROOF—BURDEN—QUESTIONS FOR JURY.

1. Defendant, in his final settlement as executor of his father's estate, was allowed credit for the loss of the use of certain slaves, in accordance with a purported agreement between defendant and his father, which provided that he should care for his parents during their lifetime, and that, in case defendant should lose the use of any of the slaves, he should receive credit therefor against the estate. *Held*, that in a suit by the other heirs to surcharge the settlement the burden was on the defendant to establish the agreement, and his compliance therewith.

2. The questions whether the agreement was genuine, and whether defendant had performed the obligations imposed on him therein, must be submitted to a jury.

Appeal from circuit court, Smyth county.

Bill by one Scott and others against James T. Porter to surcharge and falsify the settlement of defendant as executor of the estate of William Porter, deceased. From a decree in favor of defendant, plaintiffs appeal. Reversed.

James H. Gilmore and H. N. Bell, for appellants. White & Buchanan and G. H. Fudge, for appellee.

HARRISON, J. In the year 1867 William Porter died, and in March of that year his son, the appellee, James T. Porter, qualified as his executor. A number of ex parte settlements were made by the executor of his accounts before the proper commissioner; the first being in 1868, and the last in 1895. When this last settlement was made, the executor laid before the commissioner the following paper, purporting to be a covenant executed by his father, the testator, in 1861, and claimed credit for the loss of the services of the slaves mentioned therein:

"Know all men by these presents, that I, William Porter, of Rye Valley, Smyth county, and state of Virginia, doth this day covenant and agree with my son, James T. Porter, and grant him the right and privilege to live in the house with I and my wife, and to use and occupy it, and also the land I willed my beloved wife, Mary Porter, during her life, excepting only said life interest as security for her support in case anything should happen to our said son which would render him unable to support us. I also grant him the use of the five slaves I willed to her for life, to govern and use for himself; and he shall be legally entitled to all of the profits arising from both lands and negroes, and if either one or all of the slaves, namely, Henrietta, King, Joseph, Wilson, and Susan, should become disabled, die, or escape servitude from any cause whatsoever, then, and in that event, my son is to have pay out of my estate at the rate of fifty dollars apiece a year for such lost serv-

ice as long as we both live, and after the death of one of them he is to be paid at the rate of twenty-five dollars a year apiece as long as that one lives if any of them should be lost or their services lost to him, to be paid out of my estate at the final settlement of the same after both of our deaths: provided, however, that our said son, James T. Porter, doth comply with his promise to us, or cause said promise to be complied with inviolate, to wit: For the privileges and the use of the said slaves and all the premises as above written our said son, for and in consideration of the same, doth promise and agree to keep, board, and take care of us during the remainder of our natural lives; to furnish us a comfortable room and necessary servants and comforts of life, to wit, wood, water, well-cooked and wholesome diet, comfortable clothing both for ourselves and the said five slaves; and to pay the taxes on both land and negro, as well as on all of our personal property, and the doctor bills for the negro. We are to furnish our own beds and bedclothing, pay our own doctor's bills, and for tobacco and medicines. He, our said son, James T. Porter, also promises and agrees to loan or furnish us money whenever we call on him, but not to exceed an average of forty dollars a year. We only ask this of him so that we may feel free, and have some pocket change to give to whom we choose. This money he is to take our receipt for, and it is to be paid to him at the final settlement of my estate, with six per cent. interest from the date of said receipts. Now, if my said son, James T. Porter, fails to comply with his promises as heretofore written, then, and in that event, my covenant as heretofore written is broken, and this writing void; otherwise, it shall remain in full force and virtue.

"Witness my hand and seal this the 25th day of March, 1861. William Porter. [Seal.]

"Teste: James A. Scott."

The commissioner allowed the claim, and gave the executor credit for \$458 as the value of the services of the slaves during the joint lives of William Porter and his wife, and \$3,375 as the value of such services during the life of Mrs. Porter, the survivor; the result of this settlement being to bring the estate in debt to the executor in the sum of \$2,012.35 as of March 1, 1895.

This suit was brought by the appellants, grandchildren of the testator, to surcharge and falsify this settlement. The bill denies the right of the executor to credit for any sum by virtue of this alleged covenant, and charges that William Porter never signed or delivered any such paper to the appellee, or to any one for him.

The genuineness of this covenant, and the right of the executor to the credits based thereon, constitute the subject of this controversy.

The pleadings having put these questions directly in issue, there can be no doubt that,

ordinarily, the burden of proof to sustain them was upon the appellee, James T. Porter. It is contended, however, that, inasmuch as the bill was filed to surcharge and falsify an executorial account, which had been confirmed by the court, and to strike therefrom certain items allowed by the commissioner, the account should be treated as *prima facie* correct and conclusive as to all matters contained therein, and that the burden is upon the complainants to show that the controverted items are incorrect.

These controverted claims, arising from the covenant in question, constitute independent liabilities in favor of the executor against his father's estate, and with respect thereto he occupies a position antagonistic to the estate, and cannot represent it.

In no case where an executor holds an interest adverse to the estate he represents that does not grow out of its due administration,—such as costs of administration and the like,—and no opportunity has been given to those to be affected thereby to resist the same, will the law permit the executor to prefer and have allowed such claim in an *ex parte* settlement, and, when its validity is assailed in a proper proceeding, shield himself behind the principle that the settlement is *prima facie* correct, and thus shift the burden of establishing the claim by proper proof, and impose upon his cestu*us* que trustent the burden of showing that the demand is invalid, and should not be allowed.

Under such circumstances the executor stands in the position that he would if the settlement had not been made, and must establish his demand by proper proof. A contrary principle would place heirs and devisees at the mercy of executors and administrators. *Leavell v. Smith's Ex'r* (Va.) 38 S. E. 202. See, also, *Conrad's Adm'r v. Fuller*, 98 Va. 16, 34 S. E. 893.

We are further of opinion that in the case at bar, when the executor has met the issue, and established the genuineness of the covenant in question, then the burden is further upon him to show that he has performed the obligations imposed upon him by the covenant, and the amount he is entitled to recover by virtue thereof. The evidence in this case is very meager and unsatisfactory, resulting, it may be, from the erroneous view held by the lower court that the burden was upon the appellants to show the invalidity of the claims allowed the executor.

We are therefore of opinion that it would not be just to the parties concerned for the court to attempt to determine issues of such gravity without giving the parties an opportunity to make out their case with a correct understanding as to where the burden of proof rests.

We are further of opinion that the issues made by the pleadings in this case should be determined by a jury. The decree complained of must, therefore, be reversed, and the cause remanded, with direction to the cir-

cuit court to order an issue out of chancery to determine—First, the genuineness of the alleged covenant; and, second, whether or not the appellee has performed the obligations imposed upon him by such covenant, and the amount that he is entitled to recover by virtue thereof. And in the trial of these issues James T. Porter, the appellee, shall occupy the position of plaintiff, and the appellants that of defendants.

Reversed.

BUCHANAN, J., absent.

(99 Va. 602)

PULLIAM et al. v. TOMPKINS.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

JUDICIAL SALES—PAYMENT TO COMMISSIONER—LIABILITIES OF PURCHASER.

Defendants purchased land at a sale by special commissioners pursuant to an advertised notice, to which was appended a certificate of the clerk of court that they had given the proper bond. One of the commissioners was subsequently appointed receiver to collect the proceeds of sales, rents, etc., on giving a specified bond. Defendants, without notice of such appointment, paid the price to such receiver, who failed to account therefor, or to give the receiver's bond. *Held*, under Acts 1883-84, p. 213, providing that when any special commissioner authorized to sell land shall publish with the notice of sale a certificate of the clerk of court that he has given the bond required, a purchaser shall be relieved from all liability for the purchase money paid to such commissioner, unless another person has been appointed to receive the same, of which the purchaser has due notice, defendants were not affected by the receiver's failure, since they paid to him as a commissioner who made the sale.

Appeal from circuit court, Montgomery county.

Action by one Tompkins, receiver, etc., against D. B. Pulliam and others. From a judgment for plaintiff, defendants appeal. Reversed.

Scott & Staples and W. W. Moffett, for appellants. M. H. Tompkins, for appellee.

HARRISON, J. In the case of Ellen T. Northcross against William H. Davis' heirs, pending in the circuit court of Montgomery county, a decree was entered at the May term, 1884, appointing George G. Junkin and James C. Taylor commissioners to sell certain real estate, providing that they, or either of them, should, before proceeding to act thereunder, execute a bond in the penalty of \$500, conditioned as the law directs. In pursuance of this decree the commissioners executed jointly the bond required, and advertised the several parcels of land to be sold at public auction August 23, 1884. Appended to the advertisement was the following certificate: "I, Charles I. Wade, clerk of Montgomery circuit, do certify that G. G. Junkin and James C. Taylor, the special commissioners appointed to make sale of lands under a

decree in suit of *E. T. Northcross v. Wm. H. Davis' Heirs*, have executed the bond required of them by the decree. Given under my hand this 14th day of July, 1884. [Signed] Charles I. Wade, Clerk."

In accordance with the advertisement, the lands were sold on the day named, and at the November term, 1884, the sales were confirmed without exception, and George G. Junkin was appointed special receiver, with bond in the penalty of \$10,000, and charged with the duty of collecting all rent and sale bonds due in the case from purchasers or tenants. Among the sales thus made and confirmed was 70% acres to John W. Barnett at \$15 per acre, who made his cash payment, and executed his bonds for three deferred installments at one, two, and three years. At the May term, 1887, a decree was entered recognizing D. B. Pulliam as substituted purchaser for the 70% acres, and directing George G. Junkin, as commissioner of the court, to unite with John W. Barnett and wife in a deed to D. B. Pulliam. In pursuance of this decree, the commissioner and Barnett and wife conveyed the land to Pulliam, reserving a vendor's lien for unpaid purchase money. The entire purchase price was paid by Barnett and Pulliam, the cash payment to Junkin and Taylor, and the deferred installments to Junkin.

It appears that Junkin never executed the \$10,000 bond required of him as receiver by the decree of November, 1884, and that no notice of that decree was ever given to either Barnett or Pulliam. A settlement of the account of Junkin, receiver, shows him to be in arrears to the fund in the sum of \$1,065.95 as of November 16, 1888. Junkin having since died, this proceeding was instituted by the appellee, Tompkins, as substituted receiver, alleging that the several purchasers at the sale made August 23, 1884, had paid their purchase money to Junkin without authority, and were bound to make good this default. As a result of this litigation, a decree was rendered at the May term, 1897, against John W. Barnett for \$449.80, with interest from November 16, 1888, as the portion of the Junkin default for which he should account; and in default of its payment a sale was directed to be made of the 70% acres bought by Barnett, and subsequently sold and conveyed to the appellant D. B. Pulliam.

The contention of the appellants is that the payments made to Junkin on account of the purchase price of the 70% acres were valid payments, and discharged those making them and the land from further liability therefor.

The correctness of this contention depends upon the proper construction of the act of February 25, 1884 (Acts 1883-84, p. 213). This act took effect from its passage, while the decree of sale in question was not entered until the following May. This statute is free from ambiguity, and its terms are

too clear to leave room for doubt as to its meaning. Its object is shown by the title—"An act to provide for the protection of purchasers at, and other persons interested in judicial sales." The first section provides that no special commissioner appointed by a court to make sale of land shall execute the decree until he shall have given bond in such penalty as the court shall fix, with security to be approved by the court or clerk thereof. It further provides that no such commissioner shall advertise the sale of land without first obtaining from such clerk a certificate that the bond required by law or by the decree has been executed, and appending such certificate, or a copy thereof, to the advertisement. The second section provides that, when such certificate has been published with an advertisement of sale, any person purchasing such land in pursuance of such advertisement shall be relieved from all liability for the purchase money, or any part thereof, which he may pay to any special commissioner, as to whom proper certificate shall have been appended to such advertisement. It is provided in section 5 that the commissioner or commissioners appointed to make the sale shall receive and collect all the purchase money, unless by decree of court some other person is appointed to collect the same, in which event the clerk is required to issue notice of such appointment to the purchaser, to be served as other notices are served, provided that, if any payment is made to a special commissioner making the sale before the purchaser has notice of the appointment of another person, such special commissioner and his sureties shall be responsible for the money so paid, and the purchaser shall not be responsible therefor.

It appears from the record before us that the bond directed by the decree of sale was given, that the required certificate was obtained from the clerk, that a copy of the certificate was appended to and published with the advertisement, that the land in question was purchased in pursuance of that advertisement, that the purchase price was paid to one of the special commissioners who had made the sale, and that no notice of another person having been appointed to collect the purchase money was ever issued or served upon the purchaser. Under these circumstances it is clear that the purchaser of the 70% acres was, in the language of the statute, relieved from all liability; otherwise, the law, which was intended for his protection, would be converted into a trap for his destruction.

For these reasons the decrees appealed from must be reversed and set aside in so far as they affect the rights of the appellants in and to the land in question, and the cause remanded for further proceedings not in conflict with this opinion.

Reversed.

(99 Va. 590)

COOK v. DAUGHERTY.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY.

Under Code, § 8455, forbidding an appeal where the amount of the controversy, if merely pecuniary, is less than \$500, the supreme court has no jurisdiction of an appeal in an action to subject defendant's property to sale to collect a judgment of less than \$500, where the bill was dismissed on the ground that the property was exempt as a homestead.

Appeal from circuit court, Smyth county.

Action by one Cook against one Daugherty. From a decree dismissing the bill, plaintiff appeals. Appeal dismissed.

James H. Gilmore, for appellant. H. N. Bell, for appellee.

WHITTLE, J. This was a suit in equity in the circuit court of Smyth county, brought by the appellant against the appellee, to subject real estate to the satisfaction of a judgment for less than \$500.

The property was claimed as a homestead exemption, and from a decree denying its liability to plaintiff's judgment and dismissing the bill an appeal was allowed by one of the judges of this court.

While the jurisdiction of this court is defined by article 6, § 2, of the constitution, the provision does not proprio vigore confer jurisdiction; but the court exercises its jurisdiction, with the constitutional limitation, by virtue of statutory enactment made in pursuance of the provisions of that article.

Price v. Smith, 93 Va. 14, 24 S. E. 474; Association v. Ashby, 93 Va. 667, 25 S. E. 893.

The court is confronted at the threshold of the inquiry by a question of jurisdiction.

Section 3455 of the Code (amended, Acts 1887-88, p. 17) forbids an appeal in any case in which the controversy is for a matter less in value or amount than \$500, exclusive of costs, unless there be drawn in question a freehold or franchise, or the title or bounds of land, or some matter not merely pecuniary. In the case of Fertilizing Co. v. Nelson, 6 Va. Law J. 102, it was held that the court was without jurisdiction, inasmuch as none of the executions sought to be enforced amounted to \$500, and that "the property levied on did not constitute the matter in controversy."

The case of Smith v. Rosenheim, 79 Va. 540, is identical in principle with the case in judgment. It was there decided that "the test of jurisdiction in this court to sustain an appeal from a decree of the court below enforcing on land the lien of a judgment is the amount or value of the judgment. If such amount or value fall below \$500, this court has no jurisdiction to review such decree."

"As respects jurisdiction, the case is not altered by the fact that in the progress of the cause in the court below a claim of

homestead in the land was asserted by the defendant."

And so, in Thompson v. Adams, 82 Va. 672, where several judgment creditors, with judgments each below \$500, united in a suit to subject the lands of their common debtor, it was held that the fact that the bill sought to set aside an alleged fraudulent conveyance of land of greater value than \$500 did not give this court jurisdiction; and this principle has been repeatedly enunciated by this court. Umbarger v. Watts, 25 Grat. 167; Fink v. Denny, 75 Va. 663; Hawkins v. Gresham, 85 Va. 34, 6 S. E. 472; Pitts v. Spotts, 86 Va. 71, 9 S. E. 501; Railroad Co. v. Reid, 87 Va. 119, 12 S. E. 222; Patteson v. McKinney, 88 Va. 751, 14 S. E. 379; Showalter v. Rupe (Va.) 27 S. E. 840; Gilman v. Ryan, 95 Va. 494, 28 S. E. 875.

If jurisdiction is invoked on the ground that the litigation draws in question a freehold or franchise, or the title or bounds of land, or some matter not merely pecuniary, these jurisdictional matters must be directly the subject of controversy, and not merely incidentally and collaterally involved.

Thus, in Florance v. Morien, 98 Va. 26, 34 S. E. 890, the court held: "The right to subject land to the lien thereon for taxes is not a controversy concerning the title to the land, and, if a decree for such taxes amounts to less than \$500, no appeal lies therefrom to this court."

And in Cash v. Humphreys, 98 Va. 477, 36 S. E. 517, it was said: "In a suit to subject lands to the payment of the lien of a judgment, where the defendant appeals, the jurisdiction of this court is regulated by the amount decreed against him on the land. The 'title or boundary of land' is not involved, although the appeal be taken by one who is not the judgment debtor, and the controversy is over the liability of the land to the lien of the judgment."

As has been well said: "The conclusion of the whole matter is that the true test of jurisdiction is whether the matter in controversy is or is not of less value than \$500, and, in a suit to subject property to the payment of a debt, the amount of the debt, and not the value of the property sought to be subjected, determines the question of jurisdiction." 2 Barb. Ch. Prac. (2d Ed.) p. 1212.

The matter in controversy here being less in amount than \$500, the appeal must be dismissed for want of jurisdiction.

Dismissed.

(99 Va. 577)

LANGFORD et al. v. TAYLOR.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

SPECIFIC PERFORMANCE—INJUNCTION—ADEQUATE REMEDY AT LAW—INABILITY OF COURT TO ENFORCE CONTRACT.

1. A suit to compel the specific performance of a contract of sale of certain whisky stored in a United States warehouse, and to enjoin

defendant from taking possession thereof,—the bill alleging the insolvency of the defendant,—was brought pending an action of detinue by the same complainant to recover possession of the whisky. Code, § 2907, provides that, on the plaintiff in detinue making affidavit that there is good reason to believe that the defendant is insolvent, the clerk of the court shall issue an order to the proper officer to seize the property mentioned in such affidavit. *Held*, that complainant had an adequate remedy at law.

2. The specific performance of a contract of sale of whisky stored in a United States warehouse will not be decreed, since the court cannot enforce its decree for the transfer of the property.

Appeal from circuit court, Scott county.

Suit by one Taylor against E. L. Langford & Bro. From a decree in favor of complainant, defendants appeal. Reversed.

R. R. Kane and S. H. Bond, for appellants.

CARDWELL, J. This is an appeal from a decree of the circuit court of Scott county compelling specific performance of a contract for the sale of 12 barrels of whisky in a United States government warehouse, held subject to the payment of the internal revenue tax due the government thereon.

The bill had for its object—First, to enjoin and restrain the defendant from taking possession of the whisky until the final determination of an action of detinue pending on the law side of the court, instituted to recover the possession of the whisky in question; and, second, to compel the defendants to specifically perform the alleged contract, by delivering the whisky to the plaintiff.

The averments of the bill as to the contract are, substantially, that the defendants in February, 1898, had 12 barrels of corn whisky, containing 480 gallons, in the government warehouse in Scott county, upon which there was a deficiency tax amounting to \$180 in excess of the \$1.10 per gallon, the internal revenue tax thereon, and the defendants agreed with the plaintiff that, if he would pay the deficiency tax on the whisky, they (the defendants) would transfer to him all the right, title, claim, and interest they had therein, and the possession thereof, subject to the tax of \$1.10 per gallon due the government, which the plaintiff was to pay as the whisky was withdrawn from the warehouse, and the plaintiff was to be allowed to withdraw it in the defendants' name. It is further averred that the plaintiff complied with his part of the contract, by paying to one of the defendants \$170, and to the United States deputy revenue collector \$3.25, being the amount of the deficiency tax on the whisky, less \$10 paid by the defendants, but the defendants refused to allow plaintiff to withdraw the whisky from the warehouse, and were threatening to pay the tax thereon and to withdraw and make sale of it themselves. It is also averred that the defendants are insolvent, etc.

The defendants demurred and answered, denying specifically each and every allega-

tion of the bill. No replication to the answer seems to have been filed, and the plaintiff's own deposition alone was taken to support his bill.

His statement of the contract is: "Well, I was to pay Mr. Langford one hundred and seventy dollars. He said he had 485 gallons of corn whisky in the warehouse, * * * which he said was levied on by W. B. Kilbourn, deputy revenue collector, and he wanted me to furnish the money to pay off this deficiency tax, and, in addition to the above sum of money, I was to pay the government \$1.10 revenue per gallon when stamped out; and I was to have all of said liquor for the above-named sum of money, and to have the privilege of stamping it out in the name of E. L. Langford & Bro. [defendants]." He then states that some time after this he called on them for the whisky, or sent a messenger twice, and they refused to let him have it. He was asked: "Have they, or either of them, or any person for them, paid you back the sum of \$170, or any part thereof, or in any way changed their contract with you?" To which he replied: "No, sir." This is all of his evidence from which it can be even inferred that he had paid anything in pursuance of the alleged contract.

Upon the hearing of the cause the court overruled the demurrer, perpetuated the temporary injunction theretofore awarded the plaintiff, and decreed that he was entitled to all of the rights and title of the defendants to the whisky in question, and entitled to the possession thereof, subject to such right as the government of the United States may exercise over it, and that, to obtain the possession of the same, a writ of possession is ordered to be awarded the plaintiff, directed to the sheriff of Scott county for execution. From this decree the defendants obtained an appeal to this court.

The controversy here is as to personal property having no pretium affectionis. The answer denies all the grounds of equity set up in the bill, and no ground for equitable interference is supported by proof. Where this is the case, the plaintiff should be left to his remedy at law. To entitle a complainant to specific performance of a contract, his bill must not only allege an irreparable injury, but must set up a state of circumstances which, if true, show that the injury would be irreparable. *Moore v. Steelman*, 80 Va. 340; *Goolsby v. St. John*, 25 Grat. 151.

In this case appellee had brought his action of detinue to recover possession of the whisky in controversy, and section 2907 of the Code provides that upon the plaintiff in such an action, his agent, etc., making affidavit that there is good reason to believe that the defendant is insolvent, so that any recovery against him for the alternate value of the property and for damages and costs would probably prove unavailing, or that the property for the recovery of which the action was brought would be sold, removed, etc., so that

It would not be forthcoming to answer the final judgment of the court respecting the same, and that when such affidavit states the kind, quality, and value of the property claimed by the plaintiff, and that the affiant verily believes that the plaintiff is entitled to recover the same, the clerk of the court in which the action is pending, upon the plaintiff or some one for him executing a bond, with sufficient surety, etc., payable to the defendant, conditioned as prescribed by the statute, shall issue an order or other process, directed to the sheriff or other proper officer, commanding him to seize and take into his possession the property mentioned in such affidavit, and it shall be the duty of the officer to whom such order or process is directed and delivered to forthwith proceed to execute the same.

In determining whether appellee's remedy was complete and adequate at law, the statute referred to is to be considered; and, this done, it is clear that it was. Moreover, if his alleged contract were clearly and definitely proved, the inability of appellants to perform their undertaking at all, when called upon by the court to do so, was sufficient to prevent a decree against them for its specific performance; and this is true even if they had rendered themselves unable to perform it. *Jones v. Tunis*, 99 Va. —, 37 S. E. 841; *Pom. Spec. Perf.* §§ 893, 894.

A court of equity will not interfere in specific performance where the court would be unable to enforce its own judgment. *Fry, Spec. Perf.* § 27.

Conceding that the sheriff of Scott county would have the right, under the decree of the court, to enter the warehouse of the United States government, seize the whisky claimed by appellee, and deliver it to him, upon the tax thereon due the government being paid, he neither avers nor proves his readiness and ability to pay this tax.

We are of opinion that appellee's remedy is complete and adequate at law, and that, if this was not the case, his alleged contract is such that a court of equity cannot perform.

The decree appealed from will therefore be reversed and annulled, and this court will enter such decree as the circuit court should have entered, dismissing appellee's bill, with costs to appellants.

Reversed.

(99 Va. 569)

VAUGHT et ux. v. MEADOR.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

FOREIGN JUDGMENT—ENFORCEMENT—EQUITABLE RELIEF.

Plaintiff, a nonresident, filed a bill, and set up a judgment for \$441 obtained against defendant and wife in West Virginia, where defendants resided, and sought to subject the interest of defendant's wife in her father's estate in this state to the satisfaction of the debt. Defendants answered that the judgment was obtained on a note executed by them, but

that after the judgment was obtained, and before the present suit was instituted, the trustee in a deed securing the note fraudulently sold the mortgaged property without advertising it, and bid it in for plaintiff at \$100, and that plaintiff subsequently sold it for \$800, and prayed that the answer be treated as a cross bill, and that plaintiff be compelled to account for the value of the land sold under the deed of trust. *Held*, that the answer constituted a valid defense.

Appeal from circuit court, Giles county.

Bill by R. G. Meador against Rufus F. Vaught and others. From a decree in favor of complainant, defendants Vaught appeal. Reversed.

S. W. Williams, for appellants. W. J. Henson, for appellee.

CARDWELL, J. January 27, 1892, Rufus F. Vaught and Elizabeth H. Vaught, his wife, residents of the county of Mercer, W. Va., executed a deed to one J. W. Hale, trustee, of the same county and state, conveying to him a tract of 162½ acres of land situated in said county, "in trust to secure payment of a note executed January 25, 1892, by Rufus F. Vaught, payable one day after date, with interest from date, to the order of Meador and Pack, for the sum of three hundred and 21/100 dollars." On the 23d of March, 1897, Meador obtained, before a justice of the peace in the county of Mercer, a judgment against Rufus F. Vaught and Elizabeth H. Vaught, his wife, for the sum of \$300 principal, and \$141 interest; the whole amount aggregating \$441, to bear interest from the date of the judgment. The summons of the justice upon which the judgment was rendered shows that the action was "for the recovery of money due by note," and the proof in this record leaves no room to doubt that the note was none other than the note of Rufus F. Vaught secured by the deed of trust above referred to, but it does not appear whether the land embraced in the deed of trust was that of Rufus F. Vaught or his wife.

To the 1st April rules, 1897, of the circuit court of Giles county, R. G. Meador brought suit by way of foreign attachment in equity against Rufus F. Vaught, Elizabeth H. Vaught, and others, and in his bill sets out the above-mentioned judgment, and avers the nonresidence of Rufus F. and Elizabeth Vaught; that the latter was a married woman at the time of the rendition of the judgment; that she was a daughter of one John A. Cook, who had a short while before died intestate, leaving valuable real estate in the county of Giles, which descended to his heirs at law, and also some personal estate; and that the plaintiff has the right to come into a court of equity and have Elizabeth Vaught's interest in the realty and the personality of which her father died seised and possessed attached and subjected to the payment of his debt.

Elizabeth Vaught appeared at the May term of the court, 1897, and filed her special

plea of coverture, to the filing of which the plaintiff objected; and the court, without passing on the exception, made its decree, directing certain accounts to be taken.

At the May term, 1899, of the court, the plaintiff confessed the truth of the plea of coverture; and Rufus F. and Elizabeth Vaught filed their joint demurrer and answer to the bill, in which answer the plaintiff filed exceptions in writing, which were sustained by the court, and the greater part of the answer stricken out, whereupon Rufus F. and Elizabeth Vaught filed their joint amended answer, which was also stricken out on written exceptions thereto.

By that part of the original answer which was stricken out the defense sought to be made was that the plaintiff's judgment had been paid and fully satisfied. The answer averred that after the judgment was rendered, and before this suit was brought, the trustee in the deed of trust which had been given by the respondents on the Mercer county land to secure the debt for which the judgment was given had executed a deed purporting to convey the land to the plaintiff; that the recitals in the deed that the land had been sold as required by law and purchased by the plaintiff were false and untrue; that the land was not advertised nor sold as required by law, nor as required by the trust deed; that the trustee acted at the pretended sale as the bidder for the plaintiff, and bid off the land for him at \$100, which was such a ruinous and outrageous sacrifice of it as would shock the moral sense of a chancellor; that the land at the time of the pretended sale was worth at least \$1,000, and plaintiff had thereafter sold it at the price of \$800, and institutes this suit, supported by affidavit, claiming the whole of his debt, not even giving credit for the \$100. The respondents sought to set up this fraud as a defense, and to have the plaintiff account for the full value of their land so obtained by him, and the same set off against his alleged debt, and, to this end, asked that their answer be treated as a cross bill.

By their amended answer, respondents sought to present the issue of payment and satisfaction.

The accounts directed having been duly taken and filed in the cause, the circuit court, at its May term, 1900, made a decree subjecting to the satisfaction of plaintiff's debt Elizabeth Vaught's interest in the estate of her father.

From this decree Vaught and wife appealed to this court.

It seems beyond controversy that the validity of the contract upon which a judgment is rendered by a court of competent jurisdiction in a foreign state is established by the judgment, and the judgment must be given the same credit and effect in this state, in which it is sought to be enforced, as it had in the state where rendered. 2 Black, Judgm.

§ 925; Clarke's *Adm'r v. Day*, 2 Leigh, 172; Dicey, *Conf. Laws*, 435, and authorities there cited.

It is proven in this case that when the judgment in question was rendered a justice of the peace, under the constitution and laws of West Virginia, had jurisdiction in a civil action based upon a note, the principal of which is not over \$300, and to render a judgment thereon for the principal and its accumulated interest when the principal and interest aggregated more than \$300, but the judgment should show what portion thereof was the principal of the note, and what portion was accumulated interest thereon.

The doctrine has been so often repeated in the decisions of this and other courts that it is now regarded as a well-established rule that, when a court of equity acquires jurisdiction of a cause for any purpose, it will retain it, and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplish that end. *Coke Co. v. Browning* (just decided) 39 S. E. 153, and authorities there cited.

The defenses sought to be set up by that part of appellants' answer stricken out by the circuit court grew substantially out of the same transaction with the debts sued on in this cause, and it is no answer to these defenses to say that appellee here (plaintiff below) was a nonresident. He had submitted himself to the jurisdiction of the court, and it was clearly within its power to impose upon him such terms as were just and equitable, if the averments of the answer were sustained by the proof adduced to support them.

While the court's decree in such a case would not operate to transfer title to land in West Virginia, it would, with respect to all matters and things properly adjudicated and determined by the court, be binding upon the consciences of the parties thereto; and when the decree finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense in the courts of the state where the land is situated; and it is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud. It has also been held that a court of equity, having jurisdiction of the parties, has the power to compel the defendant to release and discharge an apparent cloud upon the title to land situated in another state. On the same principle, if a title or power affecting lands in another state was obtained by duress or fraud, a personal decree may be had, upon proper averments, vacating such title or power. Or if such lands have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he

can be compelled to account, either in law or equity, as the nature of the accounts or the character of the relief may require. 2 Black. Judgm. § 872, and authorities there cited.

In *Poindexter v. Burwell*, 82 Va. 507, it was held that a court of equity can act upon the person, if he be within its jurisdiction, and compel him to convey the land situated in another state, or otherwise comply with its decree.

In *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36, the doctrine was upheld that while real estate is exclusively subject to the laws and jurisdiction of the courts of the state in which it is located, and courts of equity in one state cannot decree the sale of lands of a person under disability lying in another state, in cases of fraud, trust, or contract, courts of equity having jurisdiction over the parties may administer full relief without regard to the nature or situation of the property, and may compel the conveyance of property which lies beyond its jurisdiction, provided it can enforce its decree by the exercise of its powers over the persons before it. It is, says the opinion, no violation of the sovereignty of one state for a court of equity of another state to compel a party before it to do an act which, if done voluntarily anywhere, would not be such violation.

Pomeroy, in discussing the jurisdiction of courts of equity in cases of fraud, says: "It is impossible, especially in the United States, to formulate any universal rule concerning the extent or the exercise of the equitable jurisdiction in matters of fraud, since the decisions of different courts and in different states are directly at variance with respect to its existence and extent, and since its exercise must depend, to a great extent, upon the circumstances of particular cases, and even upon the temperaments and opinions of individual judges. The jurisdiction, where it exists, may be exercised by granting reliefs which are wholly pecuniary, and therefore legal. In conferring these reliefs which are purely equitable, and therefore exclusive, the power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar. * * * 2 Pom. Eq. Jur. § 910.

In a recital in the same section of instances in which these equitable reliefs will be afforded, the learned author says that a party obtaining property by his fraud will be regarded, with respect to the property which he has so acquired, as a trustee for the party defrauded.

If the averments of appellants' answer, asked to be treated as a cross bill, be true (and they must be so treated in considering objections to the answer), to deny the relief they ask would, in effect, allow appellee, by the grossest fraud, to acquire \$800 from the sale of appellants' land in Mercer county, W. Va., on which he held a deed of trust to secure the very debt upon which is based

the judgment he asserts in this cause, and give appellants no credit whatever therefor.

If it be found that appellee has by his fraud obtained property as to which he is to be regarded as a trustee for appellants, they should be restored to the positions they occupied before the fraud was committed, or the value of the property should be set off against the judgment he sues on; and, if there be a residue thereof, a decree in favor of appellants against appellee for such residue should be given.

We are of opinion, therefore, that the circuit court erred in sustaining the exceptions to appellants' answer, and its decree appealed from will be reversed and annulled, and the cause remanded to be further proceeded with in accordance with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

(99 Va. 696)

STEINMAN v. VICARS.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

EQUITY JURISDICTION—REMOVAL OF CLOUD ON TITLE—POSSESSION OF PLAINTIFF—EJECTMENT—JUDICIAL SALES—UNDERLYING MINERALS.

1. The holder of the legal title, in actual possession of the surface of land underlain by undeveloped minerals,—no mines having been opened,—has a sufficient possession to enable him to sue to remove a cloud on his title, consisting of a deed purporting to convey the underlying minerals.

2. Code, § 2726, originally provided that, where premises were actually occupied, ejectment was confined to such occupant, but, where vacant, the action might be maintained against one merely claiming title. Acts 1896-98, p. 514, amending such section, permits a plaintiff, where premises are occupied, in his discretion, to join as defendants any persons claiming any interest therein adversely to the plaintiff. Held not to enable a person in possession of land to maintain ejectment against one claiming adversely to him.

3. Code, c. 2, § 5, subsec. 10, declares land to include lands, tenements, and hereditaments, and all rights thereto and interest therein, other than a chattel interest. A person owning land in its entirety contracted to sell it, giving a title bond therefor. The purchaser having defaulted, on the vendor's death his administrator prayed a specific performance, and the land was sold under a decree to satisfy the unpaid purchase money. A subpurchaser alleged his purchase of the underlying minerals, and prayed that the sale be set aside, and the land be first offered for sale with the minerals reserved, which should not be sold unless a sale of the surface failed to produce an amount sufficient to discharge the lien. No action was taken on this petition, and the sale was confirmed, and a conveyance made of the tract without reservation, and a final decree pronounced, from which no appeal was taken. Held, that the purchaser took title to the whole of the land, including the underlying minerals.

Appeal from circuit court, Wise county.

Suit to remove a cloud on title by one Vicars against one Steinman. From a de-

cree in favor of plaintiff, defendant appeals. Affirmed.

R. T. Irvine, for appellant. Fulton & McDowell, for appellee.

WHITTLE, J. The appeal in this cause is from a decree of the circuit court of Wise county in a suit in equity instituted by the appellee, Vicars, against the appellant, Steinman, to remove a cloud cast upon Vicars' title to 158 acres of land by a deed from Skeen conveying to Steinman the coal and minerals underlying the land.

The record discloses the following facts: In the year 1874, Dale Carter contracted to sell 356 acres of land situated in Wise county, Va., to Skeen, at the price of \$1 per acre, and executed a title bond therefor.

Skeen having failed to pay the purchase price, and Dale Carter having died, in the year 1882 his administrators filed a bill in the circuit court of that county against the heirs at law and widow of Dale Carter, Skeen, and subpurchasers from him, including Steinman, praying for a specific performance of the contract of sale. Accordingly the court decreed a sale of the whole land to satisfy the unpaid purchase money, and the 158-acre tract, the subject of this litigation, was purchased by Counts.

At this stage of the proceedings, Steinman filed a petition in the cause in which he set forth his purchase of the coal and minerals from Skeen, the sale of the land to satisfy the vendor's lien due to Carter's estate, and prayed that the sale be set aside, that the land be first offered for sale with the coal and minerals reserved, and that the coal and minerals be not sold unless a sale of the surface failed to produce a sufficient amount to discharge the lien. Subsequently to the filing of this petition, upon which no direct action was taken, Counts paid the purchase money, and the 158 acres were conveyed to him by decree of the court, and a final decree was pronounced in the cause, from which no appeal was taken.

The land was afterwards sold at the suit of lien creditors of Counts, and purchased by E. C. Greear and J. L. Greear, who sold and conveyed the same to Vicars. It appears that Counts, the Greears, and Vicars took actual possession of the land under their respective purchases, which possession has been continuous and uninterrupted to the present time.

In his answer to Vicars' bill, Steinman set up his purchase and conveyance of the coal and minerals from Skeen; that he had been regularly assessed with and had paid taxes thereon from the date of his purchase hitherto. He avers that Vicars never had possession of the coal and minerals, that they were not sold in the suit of Carter's administrator against Skeen and others, and that the deed to Counts passed no title in them to him.

The cause was finally heard at the Sep-

tember term, 1900, the relief prayed for was granted, and from that decree this appeal was taken.

The first error assigned is that the trial court erred in not dismissing plaintiff's bill, being without jurisdiction in the premises. The theory upon which this contention rests is that the matter in controversy was the coal and minerals underlying the land, and that complainant's actual possession of the surface gave constructive possession merely of the coal and minerals; that, to be in a position to invoke the aid of a court of equity in such case, the plaintiff must have the legal title and be in actual possession of the interest in land from which it is sought to remove the cloud. In other words, that he must have either mined the coal and minerals, or done some act of an equivalent nature.

The jurisdiction of courts of equity to entertain suits to quiet possession and remove clouds from a title to real estate is firmly established in this state.

But the right to invoke this equitable jurisdiction only accrues where the holder of the legal title to the land is in possession. Being in possession, he cannot maintain an action of ejectment, and, not having a full, adequate, and complete remedy at law, must resort to the equitable forum for relief. *Iron Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020; *Kane v. Iron Co.*, 97 Va. 329, 33 S. E. 627.

It was suggested that the purpose and effect of the amendment to section 2726 of the Code (Acts 1895-96, p. 514) was to enlarge the scope of the action of ejectment, so as to enable a person in possession of land to maintain ejectment against one "claiming title thereto or claiming any interest therein, adversely to the plaintiff."

Prior to the amendment, section 2726 of the Code read: "The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership therein or claiming title thereto, or some interest therein, at the commencement of the suit."

The amendment reads: "The person actually occupying the premises and any person claiming title thereto or claiming any interest therein adversely to the plaintiff, may also, at the discretion of the plaintiff, be named defendants in the declaration. If there be no person actually occupying the premises adversely to the plaintiff, then the action must be against some person exercising ownership thereon or claiming title thereto or some interest therein at the commencement of the suit."

Under the previous statute, where the premises were actually occupied, the action was confined to such occupant, and only in cases where the premises were vacant could the action be maintained against one merely claiming title thereto.

The effect of the amendment is to permit

a plaintiff, in cases where the premises are occupied, in his discretion, to join as defendants with the occupant any persons claiming title thereto or claiming any interest therein adversely to the plaintiff.

The land being vacant, by the former statute and the amendment the action lies against one merely claiming adversely to the plaintiff. The land being occupied, by the amendment one merely claiming adversely to the plaintiff may be joined as a defendant along with the occupant.

There is nothing in the amendment to warrant the construction that it was intended to confer upon a plaintiff in possession a right to maintain ejectment.

Such a construction would be a perversion of the primal object of the action of ejectment, which is to try the possessory title to corporeal hereditaments and to recover the possession thereof. But, if the statute was susceptible of such a construction, it could not affect the jurisdiction of the equity courts; the maxim being that equity, having once had jurisdiction of a subject-matter because there was no remedy at law, or because the remedy at law was inadequate, does not lose such jurisdiction merely from the fact that courts of law afterwards give the same or similar relief.

"The student must observe, however, in applying this criterion of equity jurisdiction, that in modern times the court of law frequently afforded a remedy which at earlier periods they were accustomed to deny, and that sometimes the legislature had conferred on the law courts in certain cases the same remedial faculty which belongs to courts of equity. But in neither case, in general, does equity relinquish the cognizance which once it has gained; and therefore not in a few instances * * * we find concurrent jurisdiction established between the two tribunals." 4 Minor, Inst. (3d Ed.) p. 1333; 1 Story, Eq. Jur. § 80.

In the case of *Kelly v. Manufacturing Co.*, 98 Va. 405, 36 S. E. 511, this court said: "Where courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words."

The mines in this cause had never been opened, and therefore there could be no actual possession of the coal and minerals, in the sense of physical contact. Actual possession of the surface of the land underlain by the undeveloped minerals was the only possession of which the subject was, in its then condition, capable, and it is a sufficient possession to enable the owner of the surface to invoke the jurisdiction of a court of equity. He could no more bring ejectment for the undeveloped underlying minerals

than for the surface of which he was actually possessed.

The second assignment of error is that in the case of Dale Carter's administrator against Skeen and others the court only sold the surface of the 158 acres to Counts, and that the Greears and Vicars by their purchases took nothing more; that the bill should therefore have been dismissed on the merits.

Dale Carter owned the land in its entirety. It was incumbered by a lien for the purchase money, which constituted a paramount charge on the whole.

The bill prayed for a sale of the land. The land was sold, the sale confirmed, the purchase money paid, and a conveyance ordered and made of the entire 158 acres, without restriction or reservation.

By the Virginia statute, land is declared to include "lands, tenements and hereditaments and all rights thereto and interest therein other than a chattel interest therein." Code, c. 2, § 5, subsec. 10. See, also, Id. § 2443.

As has been remarked, the gravamen of Steinman's petition in that cause was that the land, including the coal and minerals, had been sold; and the prayer was that the sale be set aside, and the property offered again for sale, with the coal and minerals reserved, and that the land, with the coal and minerals, be not sold in its entirety unless a sale of the surface should prove insufficient to discharge the vendor's lien. The court did not grant the relief prayed for, but confirmed the sale, as already made, and, through its commissioner, passed the title to Counts.

It is apparent, without the allegations of the petition, that the whole subject was sold; but, if the matter had been in doubt, this solemn admission of record by Steinman that the coal and minerals had been sold would have removed any uncertainty that might have found lodgment in the mind of an examiner of the title.

The decree appealed from is plainly right, and must be affirmed.

Affirmed.

(99 Va. 558)

BUNTING v. COCHRAN.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

BILLS AND NOTES—ACTION—PLEADINGS—ANSWER—INSOLVENCY—EVIDENCE—SUFFICIENCY—SET-OFF—UNLIQUIDATED DAMAGES—APPEAL—JURISDICTION.

1. An answer to a cross bill in an action on a note that "respondent is advised, on [defendant's] own statement, he has no substantial defense against the note," and "now, having fully answered, and here denying all the allegations in said cross bill not herein before admitted or denied, respondent prays to be hence dismissed," etc., is sufficient to put in issue every allegation in such bill which it does not admit to be true.

2. Defendant testified that plaintiff drew a certain salary per month, which he understood

plaintiff practically spent, and that the latter had no other revenue that he knew of. It was shown that plaintiff owned several shares of stock, which defendant proved to be very valuable; but it did not appear that he had ever failed to pay his debts, or that his checks had ever been dishonored. *Held*, that the evidence did not sustain an allegation that plaintiff was insolvent.

3. In an action on a note by an assignee thereof, defendant answered, admitting the amount due, and alleged that he had been induced to sell certain shares of stock by plaintiff at a price greatly below its value, and that the sale had been brought about by a conspiracy between plaintiff and confederates, with the object of defrauding him, and that he had suffered a loss, estimated to be at least a certain sum, which he asked to have set off against plaintiff's claim. *Held*, that such set-off would not be allowed, since it was for unliquidated damages, while the claim was liquidated.

4. Where decree rendered is less than the amount necessary to confer appellate jurisdiction on the supreme court, such court will have jurisdiction where the amount of a set-off allowed and that of the decree together equal the jurisdictional amount.

Appeal from circuit court, Wise county.

Bill by Joseph L. Kelley, as trustee of Joseph Bunting, Jr., against C. C. Cochran. From a decree in favor of defendant, Bunting appeals. Reversed.

Bullitt & Kelly and D. D. Hull, Jr., for appellant. R. T. Irvine, for appellee.

KEITH, P. Joseph L. Kelly, trustee, filed his bill in the circuit court of Wise county, in which he shows that in 1898 C. C. Cochran and wife executed their note payable in 30 days to William S. Stuart for \$435, and secured its payment by deed of trust of even date conveying to Kelly the Big Stone Gap Telephone Exchange, and all lines, franchises, and appliances connected therewith; that by several successive assignments this note was passed to Joseph Bunting, Jr., the holder thereof; that there has been no payment made upon it, except the sum of \$120, and a release of the interest thereon from the 7th of February, 1898, to August of the same year. The bill further shows that in October, 1897, one Rufus A. Ayers instituted an attachment in equity against Cochran upon two negotiable notes for the sum of \$171, and obtained a personal decree against Cochran for that amount, and an order to the sheriff of Wise county directing a sale of the property mentioned in the deed of trust. In accordance with the provision of the trust deed, he had been called upon by Bunting, the holder of the note, to sell the trust property, and, under the circumstances, he is advised that "a sale ought not to be had separately, either under said decree or under said deed of trust, but that the two sales so provided for as aforesaid should be provided for at one and the same time." He therefore asked the court to take jurisdiction over the subject, enjoin the sheriff from selling under the decree in the attachment suit, and decree such a sale as will protect the interests of those having liens upon the property.

Cochran filed his answer, and admits the balance due upon the note, and then enters into a statement of a transaction between himself and Bunting, in no respect connected with or growing out of the execution of the note, by which he alleges that he was induced by Bunting to sell certain shares of stock in a corporation which he and Bunting had been instrumental in organizing; that after the sale of the stock he ascertained that Bunting had become its purchaser at a price greatly below its actual value; that the sale had been brought about by a conspiracy between Bunting and certain confederates, the object of which was to defraud Cochran, and as a result of which the shares of stock were sacrificed, and he had suffered a loss which he estimates to be at least the sum of \$560. He asks that this sum be set off against the balance which he admits is due upon the note originally executed by him to W. S. Stuart, and now held in due course of business by Bunting, and that he be given a decree for the excess of the set-off over and above the admitted demand. He avers that Bunting is insolvent, and prays that his answer may be treated as a cross bill.

Bunting answered this cross bill, denying all the allegations of fraud specifically, and concludes his answer as follows: "Respondent is advised that, upon said Cochran's own statement, he has no substantial defense against the note sued on; but, because his allegations are so utterly at variance with the facts, and out of abundance of caution, your respondent has deemed it expedient and proper to answer thus at length.

"And now, having fully answered, and here denying all the allegations in said cross bill not hereinbefore admitted or denied, respondent prays to be hence dismissed, with his costs in this behalf expended."

The answer of Cochran originally filed, which he prays may be taken as a cross bill, does not waive an answer under oath, and Cochran asked for and obtained leave of the court to amend by inserting the waiver, which the court permitted to be done. In the meantime, however, the answer of Bunting had been filed under oath, and we are asked to decide whether or not it was proper to permit the amendment under the circumstances.

In the view of the case which we take, it is unnecessary to decide this question, and we therefore express no opinion with respect to it. We do think, however, that the answer of Bunting was sufficient to put in issue every allegation of the bill which it does not admit to be true.

It may be conceded that the cross bill states a case upon which Cochran would be entitled to recover damages in a proper action, and that the allegation of Bunting's insolvency would give a court of equity jurisdiction to hear and determine a controversy which otherwise could be entertained with

propriety only in a court of law; but the answer denies that Bunting was insolvent, and the proof fails to establish the fact. It is true that Cochran, in his deposition, states in answer to a question as to the financial condition of J. Bunting, Jr.: "I consider him insolvent. He draws a salary from \$100 to \$125 a month from the Norfolk & Western Railroad, and I have always understood that he practically spent it each month, and he had no other revenue that I know of." This is obviously mere matter of opinion. No fact is stated upon which that opinion is predicated. There is no evidence in this record of any debt which Bunting has failed to pay in due course of business. It is shown that he is the owner of more than 150 shares of stock, which Cochran himself proves are very valuable. He was associated with Cochran in extensive business enterprises, and there is proof in the record of transactions of considerable magnitude in which he seems to have been the business manager, and there is no proof that his checks have ever been dishonored, or that he has failed to meet his obligations when due.

The allegation of insolvency being thus disposed of, leaves a court of equity without jurisdiction to entertain a suit for unliquidated damages.

In 1 Bart. Law Prac. (2d Ed.) p. 510, it is said: "The set-off must be of the same general character as the claim. An unliquidated demand cannot be set-off against a liquidated claim, nor can a debt due be the subject of set-off against an unliquidated demand. In the language of the authorities upon the subject of an unliquidated set-off, 'it must be capable of being liquidated or ascertained with precision at the time of pleading.'"

"Set-off is allowed only when there is on each side a debt, and not when the claim of either party is for unliquidated damages." 5 Rob. Prac. p. 964.

"The general rule is incontrovertible, both at law and in equity, that unliquidated damages cannot be pleaded by way of set-off unless there is some understanding between the parties, express or implied, under which the defense can be let in, or some special case made, such as the insolvency, nonresidence, etc." 7 Wait, Act. & Def. p. 481; Guano Co. v. Appling, 33 W. Va. 470, 10 S. E. 809.

That a recovery by Cochran upon the case stated in his cross bill would be for unliquidated damages is, we think, beyond doubt. If a sufficient cause of action is stated, it has every characteristic of an action for deceit.

It does not come within the doctrine of recoupment, as distinguished from set-off.

"The right to recoupment arises when the basis of the plaintiff's action is a contract by the defendant, who may, if he chooses, recoup any damages which may have resulted to him by breach of another portion of

the same contract, or of a contract made at the same time, and constituting a part and parcel of the same transaction, whether contained all in one writing or in two separate writings, or one in a writing and the other parol, provided, however, they are all one transaction." Logie v. Black, 24 W. Va. 19, and authorities there cited, in which the opinion was delivered by Judge Green, was concurred in by his associates, and may be safely accepted as a correct statement of the law.

We are of opinion that the circuit court erred in allowing the set-off, and for this error its decree must be reversed, and the cause remanded, with instructions to proceed to a final decree in accordance with this opinion; Cochran, however, not to be prejudiced in his right to bring his action at law to recover the damages which we have disallowed.

Appellee challenges the jurisdiction of this court upon the ground that less than \$500 is involved. In this, we think, he is manifestly mistaken. It is true that Bunting can satisfy the decree by the payment of a less sum than \$500, but it is also true that he is aggrieved by the full amount of the set-off established against him; and Cochran will not be permitted, by conceding a demand which he is unable to dispute, to deprive his debtor of the right to appeal from an erroneous claim upon his part sufficient in amount to give jurisdiction to this court.

Reversed.

HARRISON, J., absent.

(99 Va. 606)

BANKERS' LOAN & INVESTMENT CO. v. BLAIR.

(Supreme Court of Appeals of Virginia. July 4, 1901.)

JUDGMENT—LIEN—RECORD—NOTICE—ESTATE BY CURTESY.

1. On August 20, 1890, S. conveyed a house and lot to D., but the deed was lost and never recorded. Subsequently, at the request of D., S. executed a new deed, dated August 20, 1890, conveying the property to D.'s wife, which was recorded October 19, 1891. *Held*, that a judgment obtained against S. subsequent to October 19, 1891, did not constitute a lien on the property.

2. Plaintiff obtained a judgment against Mrs. T. Frank S., which was indexed in the name of Mrs. T. Frank S. on July 31, 1891, and in 1897 was indexed in the judgment lien docket as against May M. S. *Held*, that in the absence of evidence that a purchaser of the property of May M. S. by a deed recorded October 19, 1891, had actual knowledge of the judgment, or knew that Mrs. T. Frank S. and May M. S. were the same person, the docketing and indexing of the judgment were not constructive notice to such purchaser that the judgment constituted a lien on the property of May M. S.

3. Where property which constituted a wife's separate estate was conveyed by a deed in which the husband united, a judgment against him did not constitute a lien on the husband's estate by curtesy in such property, since dur-

ing the wife's life the husband had no interest in the property to which the judgment could attach.

Appeal from corporation court of Roanoke.

Action by Gertrude Blair against the Bankers' Loan & Investment Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Cocke & Glasgow, for appellant. A. A. Phlegar, for appellee.

BUCHANAN, J. On August 20, 1890, Dr. B. D. Downey purchased of Mrs. May M. Simmons a house and lot in the city of Roanoke, gave his notes for the deferred purchase price, and, to secure their payment, executed a deed of trust upon the same property, which the deed of trust recited had been conveyed to him by Mrs. Simmons. The conveyance to Dr. Downey was not recorded, and was either lost or destroyed.

In 1891, Mrs. Simmons executed a deed, dated August 20, 1890, to Dr. Downey's wife, for the same property, who assumed to pay the notes executed by her husband. This deed was admitted to record October 19, 1891. Being pressed for the payment of these notes by the Fidelity Loan & Trust Company, the holder thereof, Mrs. Downey secured a loan from the appellant, the Bankers' Loan & Investment Company; and, to secure its payment, executed a deed of trust on the property,—her husband uniting with her,—which was admitted to record November 6, 1891. The proceeds of the loan, to the extent of the indebtedness due the Fidelity Loan & Trust Company, were paid to it, and the purchase-money notes held by that company were taken up, uncanceled, and held by the Bankers' Loan & Investment Company for its protection.

A short time thereafter certain judgment creditors of Dr. Downey filed their bill to subject the house and lot to the payment of their judgments, in which they alleged that the property had been conveyed to Dr. Downey by Mrs. Simmons prior to her conveyance to Mrs. Downey, and that her deed was void and in fraud of their rights.

The case came to this court, and it was held that the Bankers' Loan & Investment Company was substituted to the rights of the holders of the purchase-money notes executed by Dr. Downey, and had priority over his judgment creditors seeking to subject the land. See *Investment Co. v. Hornish*, 94 Va. 608, 27 S. E. 459.

After the cause was remanded for further proceedings, Miss Gertrude Blair, by petition, which was treated as her answer and cross bill, became a party to the suit. In her cross bill she alleged that she was owner, by assignment, of two judgments,—one rendered at the July term, 1891, of the hustings court of the city of Roanoke against T. Frank Simmons, Mrs. T. Frank Simmons, and five other persons; that it

was docketed the 31st day of the same month, and indexed in the name of Mrs. T. Frank Simmons; that on July 17, 1897, it was indexed in the name of May M. Simmons; that Mrs. Simmons sometimes signed her name as May F. Simmons and sometimes Mrs. T. Frank Simmons, and of this fact the defendants to the cross bill had notice; that the other judgment was rendered against May M. Simmons and T. Frank Simmons at the June term, 1892, of the same court, and docketed in their names July 21st of that year; that by deed dated August 20, 1890, Mrs. Simmons, who was the owner of the house and lot hereinbefore mentioned, sold and conveyed the same to Dr. B. D. Downey, who never recorded his deed; that by another deed, dated the same day, but really executed in September, 1891, Mrs. Simmons conveyed the same property (her husband uniting in the deed) to Mrs. Mollie J. Downey, the wife of Dr. Downey, who had full notice of the prior conveyance to her husband; that this conveyance was not recorded until after the first-named judgment had been docketed; that by deed dated October 1, 1891, and recorded the 6th of that month, Mrs. Downey and her husband had conveyed the house and lot to Silas W. Burt, trustee, to secure a debt of \$7,000 to the Bankers' Loan & Investment Company,—and then detailed the proceedings had in the suit brought by the creditors of Dr. Downey, which have already been sufficiently set out in this opinion. She further alleged that Mrs. Simmons had departed this life, and claimed that the judgments were prior liens upon the house and lot, or, if not liens upon the whole property, they were liens at least to the extent of the husband's (T. Frank Simmons') curtesy therein, and prayed that her liens should be respected and protected, and the property sold for her benefit.

The ground upon which Miss Blair claims that her judgments are liens upon the house and lot, and have priority over the deed of trust securing the appellant, is that provision of section 2465 of the Code which declares that a deed conveying real estate shall be void, as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county or corporation where the property embraced in the deed is situated.

Under that section of the Code the unrecorded deed to Dr. Downey was void as to the creditors of Mrs. Simmons, and as to them the title remained in Mrs. Simmons as fully as if the deed had never been executed. This being so, if Mrs. Simmons had executed a new deed to Dr. Downey, and he had recorded it, there can be no question that from the time it was recorded it would have invested him with title to the property, as against the creditors of Mrs. Simmons, and that they could not have subjected it to judgments obtained against her subse-

quent to its recordation. Instead, however, of obtaining a new conveyance from Mrs. Simmons, or of setting up the lost deed and recording the same, Dr. Downey induced Mrs. Simmons (as must be inferred from the evidence in the cause) to convey the property to his wife, who assumed to pay the purchase price due from him, borrowed the money from the appellant with which to pay it, and, to secure the loan, executed the deed of trust upon the property, in which her husband united.

The conveyance to Mrs. Downey and the deed of trust executed to her and her husband operated, when recorded, to invest the trustee with title to the property, as against the creditors of Mrs. Simmons, as fully and as completely as if Mrs. Simmons had executed the new deed to Dr. Downey, and he had executed the deed of trust to secure the money borrowed to pay the purchase price due from him. As against the creditors of Mrs. Simmons, the unrecorded deed was a mere nullity. As to them, it had no existence, in contemplation of law, and their rights must be determined as if it had never been executed. They cannot treat the deed as a nullity for some purposes, and as valid for others. The fact that it may be valid between the parties and as to subsequent purchasers does not affect them. It neither adds to nor detracts from their rights. That is a question for those parties, not for the creditors of Mrs. Simmons. This being true, unless the subsequent recorded deed to Mrs. Downey was made to hinder, delay, and defraud the creditors of Mrs. Simmons (and this is not claimed), they have no right to subject the property to judgments obtained or docketed against their debtor after the subsequent deed was put on record. Any other construction of the registry act upon the question under consideration would not only protect the creditors from any injury resulting from a failure to record the deed, but would give them greater rights than they would have had if the deed had not been executed, and would enable them to subject the property to the payment of judgments obtained or docketed against their debtor after the record showed that she had no interest whatever in the property.

One of the judgments asserted by Miss Blair was obtained after the conveyance to Mrs. Downey and the deed of trust securing appellant had been recorded. The other was rendered against T. Frank Simmons, Mrs. T. Frank Simmons, and five others, and duly docketed and indexed in the names of the defendants as they appeared in the judgment, prior to the execution and recordation of the conveyances to Mrs. Downey and the trustee.

In July, 1897, the last-named judgment was indexed in the judgment lien docket in the name of "May M. Simmons, who is claimed to be Mrs. T. Frank Simmons." It is not shown that Mrs. Downey, or the par-

ties who claim under her, had actual notice of that judgment when they purchased, or that Mrs. T. Frank Simmons and May M. Simmons were the same person. Docketing and indexing that judgment in the name of Mrs. T. Frank Simmons was not constructive notice that it was a lien upon the house and lot standing upon the record in the name of May M. Simmons. The trustee in the deed of trust and the appellant were chargeable with notice of the fact that the assignor of the appellee, Miss Blair, held a judgment against Mrs. T. Frank Simmons, and of the amount, terms, and character thereof; but they were not chargeable with notice that May M. Simmons, the grantor of Mrs. Downey, and Mrs. T. Frank Simmons, named in the judgment, and in whose name it was docketed, were the same person. The judgment did not disclose that fact, nor did it suggest any fact that would have led up to that fact. Code Va. § 3561; *In re Ridgway's Appeal*, 15 Pa. 177; *Johnson v. Hess*, 25 N. E. 445. See Pom. Eq. Jur. §§ 654, 655. Indeed, counsel for appellant did not, either in his brief or oral argument, seem to place much reliance upon that contention.

The cross bill claims that the judgments are at least liens upon the husband's (T. Frank Simmons') estate by the curtesy in the property. The property was the wife's separate statutory estate. During her life he had no interest in it upon which the lien of the judgments could attach, and, she having aliened the property by a conveyance in which he united, his right by the curtesy was defeated. *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Campbell v. McBee*, 92 Va. 63, 22 S. E. 807.

We are of opinion, therefore, that the judgments asserted by Miss Blair are not liens upon the house and lot mentioned, and that the corporation court erred in so decreeing. The decree appealed from must be reversed, and this court will enter a decree dismissing Miss Blair's cross bill, and remanding the cause for further proceedings.

Reversed.

(61 S. C. 110)

MILFORD v. AIKEN.

(Supreme Court of South Carolina. July 13, 1901.)

CHATTEL MORTGAGE—PROBATING.

Under 17 St. at Large, p. 1053, § 8, providing that a chattel mortgage, where amount secured is not more than \$100, shall be entered on index book, and section 4, repealing acts inconsistent with such act, a chattel mortgage for less than \$100 need not be probated before indexing.

Appeal from common pleas circuit court of Greenwood county; Benet, Judge.

Action by Joseph H. Milford against David Aiken for conversion. From an order affirming a judgment of a magistrate, plaintiff appeals. Affirmed.

Graydon & Giles, for appellant. Caldwell & Park, for respondent.

POPE, J. This was an action for \$50 damages, brought in magistrate's court, resulting from the alleged wrongful and unlawful taking by the defendant of the plaintiff's cow, and unlawfully converting the same to defendant's own use. A judgment was rendered in the magistrate's court for the defendant. An appeal was then taken by the plaintiff to the court of common pleas for Greenwood county, and was heard by his honor, Judge Benet. After a full hearing in the latter court, the circuit judge dismissed the appeal. It now comes before this court on appeal, and, while there are several exceptions presented, the only question really involved by them is this: Can a mortgage of chattels for a sum less than \$100, which is duly indexed in the clerk's office, according to the requirements of the act of 1882 (see 17 St. at Large, pp. 1053, 1054), and without any other record thereof in said clerk's office, be held to impute notice of such chattel mortgage to the public, and by which notice the said public is bound? We will consider this question.

The object of a registration law is to provide a ready means to the public of learning the status of property, real or personal, so far as claims to the same may be in persons other than the owner. These registration laws are purely the creation of the statute law, and therefore are subject to such variety as to form, methods, etc., as to the legislative mind may seem best. For instance, for a long time mortgages of real and personal property were recorded in the same book; but after a while the demands of trade became so great that the state legislature directed that these mortgages of real and personal property, respectively, should be made in separate books, with a separate index to each. And as to personal property, in answer to the same demands of the trade, what is known as agricultural liens (which is nothing more than a mortgage) were required to be placed in a separate book for registration, and the form of such registration was made very simple, and the cost of recording was greatly reduced. Up to the year 1882, the form of mortgages of personal property and the cost of recording the same were kept alongside of that attending mortgages of real estate, and, as before remarked, in the same book. But in that year the legislature passed an act with this title: "An act for the recording of chattel mortgages and mortgages of real estate in separate sets of books, and to provide for the separate indexing of the same." 17 St. at Large, p. 1053. Sections 1 and 2 of this act directed the clerks and registers of mesne conveyances of the several counties of this state to record chattel mortgages in a separate set of books, with a separate index thereto, and mortgages on

real estate in a separate set of books, with separate indexes thereto. But in section 3 this language is used: "It shall be a sufficient record of any chattel mortgage where the amount secured is not more than \$100 to enter upon an index book to be kept for that purpose by register of mesne conveyance, the names of mortgagor and mortgagee, the amount and character of the debt secured, a brief description of the chattels pledged, the date of said mortgage and of the maturity of said debt, and the date of presentation of such mortgage for record; and the fee to be charged by the register of mesne conveyance shall be the same as now provided by law for the indexing of liens on crops for agricultural purposes." And section 4 of said act uses these words: "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

It is contended by the appellant in the case at bar that while he admits the foregoing act, so far as the indexing of all chattel mortgages under \$100 is concerned, still it was the duty of the register of mesne conveyance, as a preliminary prerequisite to such indexing of the chattel mortgage, to secure the debt of \$65 to the respondent (defendant), to require that an affidavit of the witness to such chattel mortgage should have been made. The respondent admits that under the act of 1880 it would have been necessary to have such witness make such affidavit, which the register of mesne conveyance would have been required to record along with all the terms of said chattel mortgage; but the act of 1882, heretofore set out in this opinion, has repealed so much of said act of 1880 as would require such record in the case of chattel mortgages intended to secure a debt of less than \$100. The act of 1880, referred to (section 17, St. at Large, p. 319), provides, among other things, "that before any deed or instrument of writing can be recorded in the proper office within this state, the execution thereof shall first be proved by the affidavit in writing of a subscribing witness taken before some officer within this state competent to administer an oath." This court, in the case of McGowan v. Reid, 27 S. C. 264, 3 S. E. 337, held: "We know of no law which requires a chattel mortgage to be attested by subscribing witnesses, one or more, in order to make it valid between the parties." But this does not reach this question, for here it is a third party who is affected. The nearest to a decision of this question is the case of Murphey v. Valk, 30 S. C. 269, 9 S. E. 101, where there was a mechanic's lien, and no witness, and therefore no affidavit of a subscribing witness presented to the register of mesne conveyance before such mechanic's lien was recorded by him. On that point, in the case just cited, the court held: "But if we are mistaken in this [when the court was dis-

crossing some part of the act itself known as the "mechanic's act"), and there is real conflict between the acts as to the proofs necessary for recording a mechanic's lien, we suppose that there can be no doubt that the amendment of the mechanic's act (Laws 1884), being subsequent to the registry law (Laws 1876) [the act was passed in the year 1880, and the section of General Statutes setting out this law was section 768], repealed any provisions in that law which was inconsistent with it. The second section of the amendment declares 'that all acts and parts of acts inconsistent with this act are hereby repealed.' The special provisions of this act as to the measure of recording a mechanic's lien is the law that must govern, and, as we think this has been the unvarying practice heretofore in all such cases, we cannot say the judge below committed error in holding that the lien was legally recorded." To our minds, it is clear that the act of 1882, which we have hereinbefore quoted, made an innovation upon the registry laws, so far as chattel mortgages to secure debts less than \$100 was concerned, by simply declaring the index then provided a full record of the same. It is well to remember that the index therein provided was not simply the names of the mortgagor and the mortgagee, but that it set out specifically all that it should contain, and in these matters so provided no affidavit of a subscribing witness is mentioned. Such being our views we cannot sustain appellant's contention. It is the judgment of this court that the judgment of the circuit court be affirmed.

(61 S. C. 44)

HUNTER et al. v. SENN et al.

(Supreme Court of South Carolina. June 29, 1901.)

DISPENSARY ELECTION—TOWN COUNCIL—DISQUALIFICATION—REGISTRATION OF VOTERS—BALLOTS—DECLARATION OF RESULT—CONSTITUTIONAL LAW—CORPORATE LIMITS—EXTENSION—ELECTION.

1. Members of a town council, electors of the town, who petitioned for an election on the question of "Dispensary" or "No Dispensary," are not, because thereof, disqualified to determine whether one-fourth of the qualified electors of the town signed the petition, as required by 22 St. at Large, p. 129, § 7.

2. Where the municipal registrar furnishes the managers of a municipal election with a list of registered voters, and no elector is allowed to vote without producing his municipal registration certificate, it is a substantial compliance with 22 St. at Large, p. 47, § 29, requiring such registrar to turn over to the managers his books of registration before an election.

3. The size and form of ballots used in municipal elections on question of "Dispensary" or "No Dispensary" are not prescribed by law.

4. 22 St. at Large, p. 129, § 7, providing that, if a majority of the ballots cast be found and "declared" for the dispensary, then one may be established, is sufficiently complied with where managers and the intendant and wardens of the town council in writing certify to the result of the balloting.

5. Const. 1895, art. 2, § 12, provides that the general assembly shall provide for the registration of all voters before each election in municipalities, and also provides for the terms and requirements of such registration. 22 St. at Large, pp. 45, 46, § 24, provides, as a requirement in addition to that of the constitution, that registration in municipalities must be had only for regular, as contradistinguished from special, elections, in order that the voters may vote on any questions submitted at a special election. *Held*, that where, at a special election, every voter had in his possession a certificate of registration issued to him by the county board of registration, and they otherwise complied with constitutional requirements, an objection that the provisions of the statute under which the election was held were unconstitutional in not providing for registration at the special election did not affect the validity of the election.

6. 22 St. at Large, pp. 459, 460, relating to extension of corporate limits, provide for a petition to be submitted and for an election by the qualified electors. *Held*, that the validity of the extension of the town under such act cannot be affected, two years thereafter, in another proceeding, because the petition of such freeholders to the council cannot be found.

7. It is the duty of the town council, under 22 St. at Large, pp. 459, 460, to appoint managers to hold an election in a territory proposed to be annexed to a town.

8. Under 22 St. at Large, pp. 459, 460, providing that in the territory to be annexed qualified electors should vote, where an election was held and the managers determine such fact in favor of those voting at the election, and no appeal was taken therefrom, it is too late, at a subsequent dispensary election in the town and the annexed district, to question the validity of such election.

Petition for injunction by Joseph H. Hunter and others against Jacob Senn and others, members of the county board of control for Newberry county, under the dispensary law. Petition dismissed.

The report of Ellis G. Graydon, special referee, on the issues of fact, is as follows:

"To the Supreme Court of the State of South Carolina: An order of this court having been made in the above-stated case on the 7th day of January, 1901, whereby it was directed 'that all the facts raised herein be referred to the undersigned, as special referee, for his report thereon, that he return with his report all the testimony taken by him, that he state his impressions as to the facts, and that he report as soon as practicable,' I respectfully report: That I have taken all the testimony offered by both sides to this controversy at sundry references held by me, the testimony held irrelevant or incompetent by me being found on pages 40, 41, 72, 79, 82, and 84 of the testimony, and marked 'Excluded sheets A, B, C, D, E, and F,' and 'Excluded Exhibit G.' The testimony which is herewith filed was taken by James D. Campbell, Esq., the efficient stenographer of the Seventh judicial circuit, and is full and accurate. The following appear to me to be the issues involved in this case, some being issues of fact and others questions of law, to wit:

"(1) That it was never determined by the town council of Prosperity that the peti-

for an election on the question of 'Dispensary' or 'No Dispensary' was signed by one-fourth of the qualified voters of said town. (2) That the intendant and two of the wardens of the said town were signers of the said petition. (3) That the petitioners herein and others protested against any action by the intendant and the two wardens, who signed the petition for said election upon the said petition, for the reason that they were interested parties and had no right to pass on the validity of the petition. (4) That the said protestants further objected that the two remaining members of the town council could not pass upon the sufficiency of the petition, because they did not constitute a quorum of the said town council. (5) That, notwithstanding said protest, the said town council attempted to pass an ordinance ordering said election. (6) That said ordinance was null and void for the foregoing reasons, and also for the following additional reasons, to wit: (a) That it was provided by said ordinance that 'only voters registered as hereinafter required shall be entitled to vote in said election,' whereas the act of 1896 provides that the registration made for each regular municipal election shall be used for all special elections held in the municipality until 90 days preceding the next regular election; (b) that said ordinance failed to appoint a supervisor of registration for said special election, but permitted said special registration to be made by one who was the regular supervisor of registration at the last regular election, but was not thereafter appointed by ordinance or by the intendant; (c) that said ordinance was fatally defective, in that it made no provision that the election ordered thereby should be conducted as other special elections. (7) That said election was not conducted as other special elections, for the following reasons: (a) No form of ballot was provided for or used, but voters were allowed to vote on any kind of a ballot, ranging from the margin of a newspaper to brown wrapping paper; (b) that the managers of the election allowed nonresidents and other persons not qualified to vote, and that the result of the election was thereby changed; (c) that the return was not canvassed by the said town council, nor the result of the election declared, nor did the said town council keep any record or minutes of the returns and results. (8) That the said petition for the election was not filed with the clerk of the town council, or placed where the public could inspect it, but was kept private. (9) That prior to the holding of the election on the question of annexing territory then outside of the corporate limits of the town of Prosperity, on August 3, 1899, no petition signed by a majority of the freeholders of the territory sought to be annexed was presented to the said town council praying that said election be held. (10) That the said town council attempted to appoint the managers of said election both for the town

and the territory sought to be annexed. (11) That one of the managers appointed for the said territory was not a qualified voter of the state. (12) That of the managers of said election appointed for said town only one served during the entire time the polls were open. (13) That one of said managers never served at all, and the others only a part of the time. (14) That after 12 o'clock one of the managers went to Laurens, leaving only one manager at the polls. (15) That this manager so left called in a person to assist him, who was not appointed a manager and was not sworn, and that these two counted the votes and made out the return. (16) That neither the return so made nor the return from the territory sought to be annexed was dated or sworn to. (17) That the returns of said election from the polls within the town were signed by only one of the managers appointed by the town council. (18) That no action was ever taken by the town council on the said returns. (19) That the result of said election was never declared or published, as required by law. (20) That said territory was not then, and has not since been, declared a part of said town. (21) That enough votes from this territory so sought to be annexed were allowed to be cast in the election on the question of 'Dispensary' or 'No Dispensary' to give a small majority in favor of the dispensary. (22) That the ordinance ordering the annexation election provided that the managers appointed thereby should make a sworn return of the votes cast at the two polls, and that no such return was made. (23) That the said annexation election was void, because the supervisor of registration did not furnish the managers with the registration book. (24) That the election on the question of 'Dispensary' or 'No Dispensary' was void, for the reason that the supervisor of registration did not furnish the managers with the registration book.

"It seems to me that this proceeding is an attack upon the legality and validity of the election held in the town of Prosperity on the 8th day of October, 1900, on the question of 'Dispensary' or 'No Dispensary.' Looked at from that point of view, I should hold, if I had the power, that it is not competent now to go behind the proceedings taken on the question of annexing territory formerly outside of the town of Prosperity; but it seems to me that I have no power under the order of reference to pass upon any question as to the relevancy of allegations of the petition and the issues raised thereby, and I therefore try to report on all questions of fact raised in the pleadings, leaving their relevancy and materiality to be passed on by the court. It seemed to me that the question raised as to the size and shape of the ballots is not material, as my attention has not been called to any statute regulating the size, shape, or color of ballots in municipal elections, general or special; but I have taken the testimony relating thereto, under my

conceptions as to my powers under the order of reference, and it is herewith submitted, with the ballots used at the election on the question of 'Dispensary' or 'No Dispensary.'

"The records and minutes of the town council of Prosperity seem never to have been very full and complete, and many of them were lost or mislaid, and could not be produced at the reference. Secondary evidence was received as to some of these lost documents, and as to others no evidence was offered at all. Taking up the two elections in chronological order, it seems that the cemetery used by the residents of the town of Prosperity was, up to the 3d of August, 1899, outside the limits of the town. The citizens of the town wanted to include it in the town, in order that the town council might have jurisdiction of it and take better care of it. In order to preserve the symmetry of the town, as it seems, it became necessary to take in other contiguous territory. Accordingly a petition was duly filed by a majority of the freeholders of said territory, praying that an election be held on the question of annexing said territory to the town of Prosperity. Managers were appointed, the election was held, and the managers counted the votes and certified the result to the town council of Prosperity, which declared that the territory was annexed to the town. Shortly afterwards the clerk of the town council, by direction of the intendant and wardens, filed with the secretary of state the proper certificate, accompanied by a plat made by the surveyor appointed to make the survey, that the said territory was annexed to the town of Prosperity, and the secretary of state forwarded to the town council a certificate that the proper papers had been filed in his office, and also published the same in his report for the year 1899 (page 31). No one at that time questioned the regularity and validity of that election, nor has it ever been questioned since, till the filing of this proceeding. There was no protest or contest filed with the managers of the election, or with the town council, nor was there any objection made by any one. From the little testimony I have before me as to that election, but more from the absence of evidence to the contrary, it seems to me that the allegations made by the petitioners as to the irregularity and invalidity of the annexation election are not supported by the testimony. Ever since the said annexation election was held, the citizens of the annexed territory have been recognized as citizens of the town of Prosperity, and have claimed and exercised without question all the rights and duties appertaining to them as citizens of said town, such as voting, making returns, and paying taxes on their property, and paying their commutation taxes or performing street duty.

"Coming down to the election on the question of 'Dispensary' or 'No Dispensary,' it seems that a petition was filed with the town

council some time during the month of August, praying that an election be held on that question, and the town council passed an ordinance providing for such election. Later it was remembered that an election had been held on that question within a year, and the town council rescinded the ordinance providing for an election on September 10, 1900. On or about the 4th of September, 1900, another petition was presented, praying the town council to order an election on the question of 'Dispensary' or 'No Dispensary.' This petition was presented to the town council at a meeting called for that purpose. A written protest was filed by the petitioners herein, Rev. Joseph W. Blanton and others, against any action on the said petition by Dr. George Y. Hunter, the intendant, and Messrs. A. H. Hawkins and W. W. Wheeler, two of the wardens, on the ground that they were signers of the petition and interested parties, and by the other two wardens on the ground that they did not constitute a quorum of the town council. This petition had 23 signatures to it. It was carefully scanned by the members of the town council and by Mr. A. M. Lester, the clerk, to see if it contained the names of one-fourth of the qualified voters of the town. The town council tried to ascertain who were qualified voters by counting all they thought entitled to registration. By this method they found from 90 to 93. They then instructed Mr. Lester, the clerk, to bring his registration book. He reported that he could not find it, but that there were 55 voters registered for the last regular town election, and from 70 to 75 registered for the last election on the question of 'Dispensary' or 'No Dispensary.' The town council then, with the assistance of Mr. Lester, carefully canvassed the names on the petition, struck off two names, those of Messrs. McCloud and Gus. Blease, and decided that the other 23 were qualified voters of the town, and that they constituted one-fourth of the qualified voters of the town. Their finding on this question was correct, allowing that these 23 were qualified voters (and no question seems to have been made that they were), if either method of computation be adopted, to wit, on the basis of 93 persons entitled to registration, or on what Mr. Lester stated to be the numbers registered for the two preceding elections. If the names of Messrs. Blease and McCloud should have been struck from the petition, then they should have been struck from the list of 93 also, and that would leave 91. A motion was then made by Mr. B. B. Schumpert, one of the wardens, but not a signer of the petition, that the town council order the election. This motion was put and carried unanimously. Messrs. S. L. Fellars, M. B. Bedenbaugh, and O. L. Schumpert were appointed managers, and Mr. Lester, the clerk, was instructed to prepare the ordinance from an old ordinance on the same subject that was then before

the town council; the names and dates being then and there changed. Mr. Lester performed this duty, and presented the ordinance to Dr. George Y. Hunter, the intendant, who signed it, and afterwards Mr. Lester signed it and attached the corporate seal of the town council to it. Notice of the election was published by the clerk by posting or publishing the ordinance, and the election was held on the 8th day of October. Mr. Lester opened his books of registration, and registered the voters for that election, and furnished the managers with a list of the registered voters. I assume that the list furnished was that of the special registration, but there is no evidence before me as to how many persons were allowed to vote at that election that were not registered for the regular town election held in the spring of 1900. No question seems to have been made as to the right of any one to vote, except the Rev. Mr. Alraiel, who at first declined to show his registration certificate and insisted on being allowed to vote without doing so. This the managers peremptorily declined to allow him to do, and he produced it and was permitted to vote. The managers required all to show their registration tickets before allowing them to vote, and allowed none but registered voters to vote. No protest or contest was filed either with the managers or with the town council. When the polls closed the managers announced the result, after counting the votes, made out a sworn return of the result, and filed it with the town council, which indorsed its approval of the return by causing the intendant, the wardens, and the clerk to sign the same. The town council afterwards communicated the result to the board of control of Newberry county. No question seems to be made in the petition that the proceedings of the county board of control of Newberry county and the state board of directors, after the said result was communicated to them, were regular.

"My impressions as to the facts alleged in the petition and denied by the answer or return of the respondents, and constituting the issues herein, are as follows:

"(1) That it was determined by the town council of Prosperity that the petition for an election on the question of 'Dispensary' or 'No Dispensary' was signed by one-fourth of the qualified voters of the said town. (2) That more than one-fourth of the qualified voters of the said town did sign the said petition. (3) That Dr. George Y. Hunter, intendant, and Messrs. A. H. Hawkins and W. W. Wheeler, two of the wardens, of said town, were signers of the said petition. (4) That the petitioners herein and others filed with the said town council a written protest against any action on the said petition by the intendant and the two wardens who signed the petition, on the ground that they were interested parties and were disqualified to pass on the same. (5) That the said

protestants further objected that the two remaining members could not pass upon the petition because they did not constitute a quorum of the town council. (6) That the said town council passed an ordinance ordering that an election be held in the said town of Prosperity on the 8th day of October, 1900, on the question of 'Dispensary' or 'No Dispensary.' (7) That the said ordinance provides that 'only voters registered as herein-after required shall be entitled to vote in said election.' (8) That the said ordinance provides that the registration of voters for said special election should be made by A. M. Lester, the supervisor of registration of the town of Prosperity, from the 4th day of September, 1900, to the 1st day of October, 1900, and that he should then file the registration book in the office of the clerk of said town council. (9) That no provision is made in the said ordinance that the said election should be conducted as other special elections. (10) That of the 77 ballots voted, 40 were for 'Dispensary' and 37 for 'No Dispensary.' Of the 40 ballots with 'Dispensary' written on them, 1 appears to be a part of an envelope that had been used, and 1 appears to be of cheap draughting paper, being of a light yellow color. Of the 37 ballots with 'No Dispensary' written on them, 1 appears to be a portion of the margin of a newspaper, 1 appears to be of cream-colored wrapping paper, and 1 seems to be a part of a cotton weigher's blank, from the fact that it has lines both across and up and down, and the word 'weigher' is printed on it. All the other ballots seem to be of white writing paper, but of different shapes and sizes. (11) That the managers of the election did not allow nonresidents and other persons not qualified to vote, but that all persons who voted were registered and entitled to be registered. No evidence was offered except as to one voter, Mr. Lester Bedenbaugh, and the evidence shows that he was a resident of the town at the time of the election, and had been for about two years, and that he had not left the town with the intention of remaining away and residing elsewhere. His family were at that time, and are now, living in said town, and he still makes his returns and pays his taxes therein. (12) That the return of the managers was approved by the town council, but that they kept no other minute or record of it than the return itself. (13) That no complaint of irregularity or illegality in the said election was made by any one, and that no protest or contest was filed either with the managers or with the said town council. (14) That the petition for said election was not formally filed with the clerk of the town council, but that it was before the council at its meeting to take action upon it, and was afterwards in the possession of the intendant, Dr. Hunter, open to the inspection of all who cared to see it. (15) That prior to the annexation election a petition signed by all the freeholders in the

territory sought to be annexed was presented to the said town council, praying that said election be held. (16) That the said town council appointed the managers of said election both for the town and the territory annexed. (17) That there is no evidence that one of the managers appointed for the said territory was not a qualified voter of the state. (18) That there is no evidence that only one of the managers of said election served during the entire time the polls were open. (19) That there is no evidence that one of the managers did not serve at all. (20) That all three of the managers of the town polls served until about 12 o'clock, or shortly thereafter. About that time, Mr. Schumpert, one of the managers, received a telegram calling him to Laurens. He went to see the intendant and some of the wardens, and obtained their consent to leave and put Mr. Counts in his place. He left Mr. Counts and the other two managers in charge of the polls. It does not appear whether Mr. Counts was sworn in or not, and it does not appear that he and the other two managers did not remain in charge of the polls until the votes were counted and the result declared. (21) That it does not appear from the evidence that the returns were not dated or sworn to. (22) That it does not appear that the returns of the said election were signed by only one of the managers appointed by the town council. (23) That the result of said election was declared and published; that the town council approved the return and certified the result, with the necessary papers, to the secretary of state; and that he certified and published that the said certificate and other papers had been filed in his office. (24) That said territory was then declared to be a part of said town. (25) That there is no evidence that enough votes from the annexed territory were allowed to be cast to give a small majority in favor of the dispensary. It is not shown how many voters from the annexed territory voted in the election on the question of 'Dispensary' or 'No Dispensary,' or how they voted. Mr. E. K. Bedenbaugh, a voter from the annexed territory, testified that he voted for the dispensary, and as his son, Mr. Lester Bedenbaugh, was a candidate for the position of dispenser, it may be fair to assume that he voted for it; but there is no evidence as to how many others from the annexed territory voted, or how they voted. (26) That there is no evidence that a sworn return of the annexation election was not made. (27) That there is no evidence that the registration book was not furnished to the managers of the annexation election, nor is there any evidence that any other persons than qualified voters were allowed to vote at said election. The evidence shows that the registration book was furnished. (28) That the supervisor of registration of the town did not furnish to the managers of the election upon the question of 'Dispensary' or 'No Dispen-

sary' the registration book, but furnished them a list of the voters registered by him for said election."

Johnstone & Welch, for petitioners. Cole L. Blease and Hunt, Hunt & Hunter, for respondents.

POPE, J. This is a proceeding in the original jurisdiction of this court, wherein the petitioners, as citizens of the town of Prosperity, in the county of Newberry and state of South Carolina, seek a perpetual injunction to issue out of this court, whereby the respondents, who compose the county board of control for Newberry county, in said state, under the dispensary law of this state, may be enjoined and restrained from proceeding any further in the location of a dispensary in the town of Prosperity, in said county and state, and the appointment of the dispenser therefor, under the election held, or attempted to be held, at Prosperity, in said state, upon the question of "Dispensary" or "No Dispensary," on the 8th day of October, 1900.

The grounds for such relief as set out in the petition herein are about as follows: (1) That the petitioners are freeholders and citizens of the town of Prosperity, in the county of Newberry, in the said state, which is a corporation under the laws of the state. (2) That the respondents are the members composing the board of control of the county of Newberry, holding such office under, and owing their official position to, the act of the general assembly of this state of South Carolina approved on the 24th day of December, 1892, and the amendments thereto, which said act and amendments are known as the "Dispensary Law." That among the various duties and powers of the said members of the said board of control is the appointment of dispensers and the location of dispensaries within the said county. (3) That by the said dispensary law it is provided, among other things: "That any county, town, or city wherein the sale of intoxicating liquors was prohibited by law prior to July 1, 1893, may secure the establishment of a dispensary within its borders in the following manner: Upon petition signed by one-fourth of the qualified voters of such county, town, or city wishing a dispensary therein being filed with the county supervisor, town or city council, respectively, they shall order an election submitting the question of 'Dispensary' or 'No Dispensary' to the qualified voters of such county, town, or city, which election shall be conducted as other special elections; and if a majority of the ballots cast be found and declared to be for dispensary, then a dispensary may be established in said county, town or city." (4) That by an act passed by the general assembly of this state, approved the 4th day of February, A. D. 1882, the sale of all intoxicating liquors in the town of Prosperity was prohibited within the limits of the said

town. "(5) That on the 4th day of September, 1900, the town council (consisting of George Y. Hunter, as intendant, A. H. Hawkins, W. W. Wheeler, S. S. Birge, and B. B. Schumpert, as wardens) of the said town of Prosperity was called together, and at said meeting a petition was presented by the said intendant, purporting to be signed by one-fourth of the qualified voters of said town, and asking for an election upon the question of 'Dispensary' or 'No Dispensary'; that it was never determined by said council whether or not there was one-fourth of the qualified voters of said town signers of said petition, but, on the contrary, this important essential was assumed and taken for granted by the said council, without ascertaining this fact as under the law they were bound to do, ere any action on said petition could be taken; that, besides this, there were three of the members of said council, viz. George Y. Hunter, intendant, and W. W. Wheeler and A. H. Hawkins, wardens, as signers of said petition; that at said meeting of the said council, the petitioners herein, together with Rev. J. W. Blanton, Rev. W. H. Alraiel, and Mr. W. P. B. Harmon, by a protest in writing signed by all of them, solemnly objected to the said George Y. Hunter, as intendant, and W. W. Wheeler and A. H. Hawkins, as wardens, taking any action upon the said petition, upon the ground that the said intendant and wardens were interested parties and could not pass judicially upon a matter to which they were parties; and they objected, further, to the remaining two members of said council considering the petition, upon the ground that they would not constitute a quorum, the other three being disqualified by interest and being parties themselves; that in spite of said protest and objection the said intendant and wardens acted upon their own petition, and attempted to grant the same by passing an ordinance calling said election; that said ordinance was null and void for the reasons heretofore given, and for the additional reasons: First. It was provided by said ordinance that 'only voters registered as hereinafter required shall be entitled to vote in said election,' whereas it is provided by section 24 of an act approved March 5, 1896, after providing for municipal registration 90 days before every regular election, further provided that 'such registration shall be used for all special elections in the municipality until 90 days preceding the next regular election.' Second. If such special registration was necessary, then said ordinance failed to appoint a supervisor thereof, while, on the contrary, the registration was permitted to be done by one who had been supervisor of registration at the last regular election, but who was appointed by ordinance, nor was he ever thereafter appointed either by the intendant, who alone under the said section of the act of 1896 could appoint such supervisor

of registration. Third. Said ordinance was further fatally defective, in that provision was made that said election should be conducted as other special elections. That said attempted election was not conducted as other special elections: First. In that no form of ballot was provided or used, but, on the contrary, every voter was allowed to use just any kind of a ballot, ranging from the margin of a newspaper to brown wrapping paper, and of all shapes and sizes. Second. In that the managers of said election allowed nonresidents and disqualified voters to vote in such numbers that a majority of the so-called ballots were in favor of the dispensary, which result would not have been if these nonresidents and disqualified voters had not been allowed to vote. Third. In that the purported return was never canvassed by the said council, nor was the result ever declared, nor was any record or minutes ever kept which show anything as to the returns and results. That on all other occasions when the question of the dispensary was up, the petition asking for an election was always filed with the clerk of the said council, but on this occasion this was not done, but, on the contrary, the same was kept private and was not placed where the public could see it and inspect it. (6) That the said respondents, taking the result of said attempted and illegal election as a decision of the question of 'Dispensary' or 'No Dispensary,' are now undertaking to locate a dispensary within the said town of Prosperity, and to appoint a dispenser therefor, all of which will fully appear by reference to the advertisement hereto annexed, marked 'Exhibit A,' and made a part of this petition, and the said respondents will locate said dispensary within said town and appoint a dispenser therefor, unless they are restrained. (7) That on the 3d day of August, 1899, an election, attempted to be ordered, by the said town council of the said town of Prosperity, S. C., was attempted to be held upon the question of increasing the corporate limits of the said town; that no petition of 'a majority of the freeholders of territory' sought and attempted to be annexed was ever 'submitted to said council,' nor, indeed, was any petition whatever 'submitted to said council, praying for an election to be ordered to see if such territory should be included in said town'; that at such said attempted election the said council attempted to appoint the managers both for the territory attempted to be annexed and for the said town, but one of the managers thus attempted to be appointed for the said territory was not a qualified voter of the state of South Carolina, and of the managers attempted as aforesaid to be appointed by the council for the said town, only one served during the entire time the polls were open, while one never served at all, and the others only a part of the time, and after 12 o'clock he left on the train for Laurens, S.

O., leaving only one manager at the polls; that the said manager left at the polls went of his own accord and called in some one to assist him; that the one so called was never attempted to be appointed, nor was he ever appointed, manager for the said election, nor was he ever sworn in as a manager; that the said manager and this person, afterwards as aforesaid called to his assistance, conducted the said election and counted the votes attempted to be cast at said election, and made out what purported or attempted to be a return, but the same was not even dated nor sworn to, nor was the return from the said territory dated or sworn to, and the return attempted as aforesaid to be made from the polls within the said town was only signed by one manager appointed as aforesaid by the said council; that, when these purported returns came before the said council, no action by the council thereon was ever taken or had, nor were any results of the said election ever declared or published, as required by law; that the said territory was not then, and has not been since then, declared 'part of said town'; that enough votes in this said territory, attempted as aforesaid to be annexed to the said town, were allowed to be cast in the said 'Dispensary' or 'No Dispensary' election to give a small majority in favor of the said dispensary; that by the ordinance which the said council enacted calling for said election it was provided that the managers appointed by said ordinance should make a sworn return of the votes cast at the two polls; that no such return was ever made or filed with said council; that if a special registration is necessary at special elections as was provided for in the case of the said dispensary election, then said ordinance was fatally defective, in that no provision was made for a special registration, and if it was necessary to have such special registration in the case of a special election upon the dispensary question, then it was necessary to have a special registration upon the question of annexing territory to the limits of said town, but if it was not necessary for an election held on 3d of August, 1899, upon the annexation question, to have a special registration, then it was not necessary in election held on the 8th of October, 1900, upon the dispensary question, to have a special registration, and in either event there has occurred a fatal defect, and the results are void and are vitiated thereby. (8) That both the said elections are void and vitiated for the further reason, section 29 of the said act approved March 5, 1896, was not complied with, for the supervisor of registration did not furnish the said managers with the book of registration for the said town, and the said managers, therefore, did not know who was a qualified voter or who was not a qualified voter. (9) That the foregoing facts are fully substantiated and shown by the annexed affidavit of A. M. Lester, as clerk of the town council, which said affidavit is marked 'Exhibit B,' and is made a part of this petition. Wherefore, the petitioner prays that the said respondents may be perpetually enjoined and restrained from proceeding any further with the location of the said dispensary at Prosperity, and the appointment of the dispenser therefor, under the said election upon the said question of 'Dispensary' or 'No Dispensary,' attempted to be held within the said town on the 8th of October, 1900; that they may have such other relief as may be right and equitable."

To this petition the respondents first demurred, and, the demurrer being overruled, then answered, wherein they admitted the first two paragraphs of the petition, and also that by the act of 1882 the town of Prosperity was declared a town wherein intoxicating liquors should not be sold; but the respondents vigorously denied all the remaining allegations of fact, and joined issue as to all conclusions of law. These issues of fact caused this court to pass an order wherein Ellis G. Graydon, Esq., was appointed special referee, and directed to hear the testimony and afterwards submit to this court his impressions as to such issues of facts. In April last the special referee submitted all the testimony, together with a very able report, and in his report he found all the facts against the petitioners. We direct that this report (but not the testimony) be included in the report of this case. We have very carefully examined this report and the testimony taken before the special referee, and from that examination we agree with the impressions made upon his mind thereby. We could content ourselves with simply adopting the findings of fact by the referee and applying the law thereto. But we have no doubt the petitioners would feel better satisfied to see from our opinion that we had gone carefully over each of their propositions in the light of the law and the testimony. Hence we do so, giving as a preface the legislative history of the town of Prosperity. The village of Frog Level was incorporated in December, 1851. See 12 St. at Large, p. 114. The village of Frog Level was incorporated as the town of Frog Level in March, 1872 (see 15 St. at Large, pp. 89, 90), with the same powers and privileges as the town of Manning (14 St. at Large, p. 674). The town of Frog Level became the town of Prosperity on February 22, 1873. See 15 St. at Large, p. 365. The sale of liquors was forbidden in town of Prosperity on February 3, 1882. See 17 St. at Large, p. 774. Its status as to the sale of liquors remained until 8th October, 1900. This seems to explain the zeal with which the petitioners in this proceeding have pressed their opposition to the sale of liquors in such town of Prosperity, even in a dispensary there to be located.

The objections urged by the petitioners

seem to divide themselves into two groups: (1) That the election held on the 8th October, 1900, was invalid, because the laws governing elections in municipalities of the state were violated; (2) that such election was rendered invalid because the territory which was annexed to the town of Prosperity in the year 1899 never legally became incorporated in said town, and therefore the participation of the legal voters residing within the annexed territory in the election held on 8th October, 1900, on the question of "Dispensary" or "No Dispensary," was illegal and rendered such election invalid. We will consider these matters in their order.

As to the first, it is proper to remark that an objection was taken that the ordinance passed by the town of Prosperity, in the month of September, 1900, providing for the election on 8th October, 1900, on the question of "Dispensary" or "No Dispensary," failed to have the seal of the town thereon. The sixth section of the act incorporating the town of Manning allowed such town to use a seal, and required that all ordinances passed by it shall have such seal affixed to them. See act as found in 14 St. at Large, p. 675. Hence, as the town of Prosperity was given the same powers as the town of Manning, the seal of the town of Prosperity should be affixed to any ordinance passed by the latter. An examination of the testimony shows that the ordinance in question of the town of Prosperity did have the seal of said town affixed thereto. Therefore, this objection must be overruled.

Again, it is urged that the requirements of section 7 of act in regard to dispensaries, found at page 129 of 22 St. at Large, were not complied with in conducting the election held on the 8th October, 1900, on the question of "Dispensary" or "No Dispensary." The language there employed is as follows: "Section 1. * * * Provided, however, that any county, town, or city wherein the sale of alcoholic liquors was prohibited by law prior to July 1, 1893, may secure the establishment of a dispensary within its borders in the following manner: Upon petition signed by one-fourth of the qualified voters of such county, town, or city wishing a dispensary therein being filed with the county supervisors or town or city council, respectively, they shall order an election submitting the question of 'Dispensary' or 'No Dispensary' to the qualified voters of such county, town, or city, which election shall be conducted as other special elections; and if a majority of the ballots shall be found and declared to be for a dispensary, then a dispensary may be established in said county, town, or city." And it is claimed by the petitioners that, inasmuch as certain citizens of said town of Prosperity protested to its town council that inasmuch as Dr. G. Y. Hunter, who was intendant, and A. H. Hawkins and W. W. Wheeler, who were wardens, of said town of Prosperity, had signed the

petition for the establishment of a dispensary in said town, being a majority of said town council, they were not competent to pass upon such petition to determine if one-fourth of the qualified voters of said town had signed said petition, and that, if said three did not act thereon, the remaining two were not a majority of the council and could not act as a legal council. It is sufficient to say that each one of these three gentlemen were property owners in said town, were registered voters of said town, and were not declared incompetent to discharge their official duties as involved in their membership of said town council; but from every standpoint there was a one-fourth of the qualified voters of said town who signed such petition, excluding the intendant and two wardens who had signed the petition. So this objection must be overruled.

Again, it is suggested that the book of registration was not turned over to the managers who conducted such special election. No doubt a part of section 29 of an act entitled "An act to provide for the registration of all electors in this state qualified to vote, in state, county, municipal, congressional, and presidential elections" (22 St. at Large, p. 47), does require the municipal supervisor of registration to turn over to the managers of special elections his books or book of registration before an election is held; but there is no provision in the section, or any other part of the act in question, which will render such election invalid because the supervisor did not discharge his duty. In effect, the supervisor (municipal) did do this when he filed a list of the qualified electors with such managers. However that may be, this same section (29) provides: "And no elector shall be allowed to vote in any municipal election whose name is not registered as herein provided, or who does not produce a municipal registration ticket at the polls." The managers at this special election swear that no person was allowed to vote at such election held on the 8th of October, 1900, unless he produced his municipal registration ticket. This upsets this objection.

Again, it is urged that the ballots cast were written upon the blank margin of a newspaper in a few instances, or on wrapping paper in other instances, or on white paper in other instances, but that all such tickets were irregular in size. No one rises up to say, even at this late day, that the wishes of the voter as to "Dispensary" or "No Dispensary" did not plainly appear from the writing put upon such tickets. There is no law which condemns the course pursued by the electors at this special municipal election. This objection is overruled.

Again, the petitioners claim that there was no declaration by the town council of the result of such election. It is true, the said section 7, p. 129, 22 St. at Large, does contain the words: "* * * And if a majority of the ballots cast be found and declared for

the dispensary, then a dispensary may be established. * * * But the overwhelming weight of the testimony here adduced shows that the managers and the intendant and wardens of the town council, in writing, certified to the result of the balloting. This is a declaration of the result. This objection is overruled.

And, again, it is contended by the petitioners that the registration of the qualified voters should not have been made immediately preceding the special election held on the 8th day of October, 1900, but that the registration made for the last general election in such town of Prosperity for the offices of intendant and wardens should have governed, and that this special registration renders the election void. There can be no question that the act governing registration of voters, even in special elections in the municipalities of this state at section 24, pp. 45, 46, 22 St. at Large, does provide: "Sec. 24. Ninety days before the holding of a regular election in any incorporated city or town in this state, after the general election of 1896, the mayor or intendant thereof shall appoint one discreet individual, who is a qualified elector of such municipality, as supervisor of registration for such city or town, whose duty it shall be to register all qualified electors within the limits of the incorporated city or town. The names of all qualified electors of such municipality shall be entered in a book of registration which, at least one week before the election and immediately after holding of the election, shall be filed in the office of the clerk or recorder of such city or town, and shall be a public record open to the inspection of any citizen at all times. Such registration shall be used for all special elections in the municipality until ninety days preceding the next regular election. * * * Immediately preceding any municipal election to be held in any incorporated city or town in this state, the supervisor or supervisors of registration (as the case may be) shall prepare for the use of the managers of election of each polling precinct in such city or town a registration book or books for each polling precinct in said city or town, containing the names of all electors entitled to vote in such polling precinct at said election." In section 26 of this act it is provided, as an indispensable prerequisite for registration in a municipality, that the applicant shall present a certificate of registration from the board or supervisor of registration of the county wherein the municipality is located, "and the production of such certificate, together with proof of his residence within the municipality for four months preceding such election, and the payment of all taxes assessed against him due and collectible for the previous fiscal year," shall entitle the applicant to registration. The act regulating registration is intended to carry into practical operation the provisions of the con-

stitution of 1895 regulating the same. A summary of the terms of the latter on the subject, so far as municipal registration of voters is concerned, is as follows: (1) A county board registration certificate of registration of the elector must be produced. (2) Residence for four months before the election in the town or city in which he desires to vote must exist. (3) The payment of all taxes due and collectible for the preceding fiscal year must appear to have been made by the applicant for registration. (4) "The general assembly shall provide for the registration of all voters before each election in municipalities" (see section 12, art. 2, Const. 1895). It would seem, therefore, from a comparison of the terms of the act regulating registration with those of the constitution just quoted, that the general assembly has, of its own motion and not in obedience to any mandate of the constitution, provided an additional requirement, viz. that registration of qualified voters in municipalities must be had only for what may be called regular, as contradistinguished from special, elections, in order for them to be allowed to vote on any question submitted at a special election. In the case at bar there is no contention as to the fact that every voter who offered to vote and did actually vote at this special election held on the 8th day of October, 1900, had in his possession a certificate of registration issued to him by the county board of registration; that he also had paid his taxes for the preceding fiscal year, and that he had resided in the town of Prosperity for more than four months preceding the said special election; and, also, that he bore a registration ticket issued by the supervisor of registration of the town of Prosperity. These things being true, this objection must be overruled.

We will next consider the second ground of exceptions, relating as they do to the alleged illegality of the votes cast by persons who resided in the territory annexed to the town of Prosperity as the result of the special election held on 3d of August in the year 1899. It is not denied that the town of Prosperity had the power, under the laws of this state, to annex the adjoining territory; but petitioners deny that such laws were complied with at the special elections therefor held 3d day of August, in the year 1899, in these particulars, to wit: (1) That no petition of the majority of the freeholders of the territory sought to be annexed was ever presented to the town council of Prosperity. (2) That no petition was submitted to such council, praying for an election to determine the question of such annexation. (3) That the town council of Prosperity appointed the managers to conduct such special election both in the territory proposed for annexation and also in the town of Prosperity, and that one of the managers of the territory proposed to be annexed was not a qualified voter of this state; and, further, that of

three managers of the election box in said town, one did not serve at all, one served only a part of the time in which said election was to be held, and one served the entire time; and that the last-named manager, of his own accord, called another citizen, who was not appointed for that purpose by the town council, to assist him in conducting such election, and that these two counted the votes and made the return of such election, which was not sworn to, nor was it dated; that the return of the managers of the box in the territory proposed to be annexed was not sworn to and dated. (4) That when the returns from the two said boxes came before the said town council of Prosperity, no action was taken by it thereon, and no declaration was made or published as required by law. (5) That said territory was not then, nor has it since been, declared a part of said town. (6) That at the special election held on the 8th October, 1900, on the question of "Dispensary" or "No Dispensary," enough votes from this territory attempted to be annexed were cast to give a small majority in favor of the said dispensary. (7) That no registration of voters for the special election held on the 3d August, 1899, was ordered or was made, and therefore, if no special registration was required for the special election on 3d August, 1899, then no special registration was required by law for the election held on the 8th October, 1900, on the question of "Dispensary" or "No Dispensary." Let us now consider these questions in their order. We remark just here that the legislation pertaining to the power of a town to extend its corporate limits may be found at pages 459, 460, 22 St. at Large. Section 1 of such act is as follows: "Section 1. Any town or city council shall have power to extend the corporate limits of said city or town in the following manner: A petition shall first be submitted to said council by a majority of the freeholders of the territory which it is proposed to annex, praying that an election be ordered to see if such territory shall be included in said town. The said town council shall order an election after not less than ten days public advertisement. At such election the qualified electors of the municipality shall vote at the usual voting precincts thereof, in a box provided for that purpose, and the qualified electors of the territory proposed to be annexed shall vote in a separate box to be provided for that purpose within the territory proposed to be annexed. If a majority of the votes cast by the qualified electors of the town and of the territory proposed to be annexed, each aggregated separately, shall be in favor of annexation, or if neither give a majority against annexation, then the council shall publish the result of said election, and declare the annexed territory a part of said town. * * * Any town increasing its territory shall file a notice with the secretary of state, describing its new boundaries."

The first and second questions presented cannot be sustained, because the facts established are incompatible with the action taken. The very statute just above quoted shows that these very requirements lay at the very threshold of the action to be taken by the town council of Prosperity, in order to annex this additional territory. That these papers are now lost or mislaid cannot, at this late day and in this proceeding, affect these matters. They are, therefore, overruled. As to the third ground, it may be said that, while the language of the statute in question does not in terms direct the said council to make the appointment of managers to hold the election in the territory proposed to be annexed, by implication such duty is laid upon the said town council, for it is to the said council the petition is to be presented. But even if this appointment of said managers was not lodged with said council, the voters of said annexed territory may be said to have adopted as their act these appointments made by the said council. Hence this objection is overruled. The facts as testified to show that the action of the managers in the town of Prosperity in conducting said election was entirely proper and regular. The fourth objection is negatived by the facts in testimony; for as a result of said elections the town council of Prosperity had the action taken by the voters sent to the secretary of state, and this action by it was a declaration of the result of said election, and these views dispose of the fifth ground of objection also. These objections are overruled. As to the sixth objection, it will be overruled because the voters in the territory annexed to the town of Prosperity, having been made a part of said municipality, had as much right to vote as any other qualified electors of said town. In overruling the seventh objection, we will say that the act under which the annexation was made did not require a special registration of the voters residing in the said annexed territory. They were to be "qualified electors." The managers determined this fact in favor of those persons voting at said election. No appeal was taken therefrom. It is now too late to raise such question, though we are bound to say that, if such objection or appeal had been taken, it ought to have been overruled, under the facts here produced.

It is therefore the judgment of this court that the petition be dismissed and the restraining orders heretofore made be vacated. Inasmuch as this court appointed Ellis G. Graydon, Esq., as special referee, to hear and report upon the testimony as to the facts in controversy between the petitioners and the respondents, and we have been advised that his compensation for such services may be in question, we leave this question open.

McIVER, C. J., says: I concur in the result, and I desire to add that I do not understand that the matter of compensation to E.

"J. Graydon, Esq., as special referee, is presented to this court in such a manner as justifies this court in taking any action, or saying anything in regard to that matter.

JONES, J., concurs in the result.

(60 S. C. 527)

STATE v. MEARES.

(Supreme Court of South Carolina. June 12, 1901.)

BASTARDY—EVIDENCE—CORROBORATION OF PROSECUTING WITNESS—ASSIGNMENT OF ERROR.

1. On a prosecution for bastardy, it was not error to exclude evidence of a conversation between the defendant and the prosecuting witness, had in the presence of the testifying witness, offered to show the conduct of the parties, and not to contradict witness or as part of the *res gestae*.

2. On a prosecution for bastardy, it was not error to refuse to charge that the testimony of the mother should be corroborated in some material particular before a verdict of guilty could be rendered.

3. Under Const. art. 5, § 8, requiring the supreme court to consider every point made and distinctly stated in the cause, an assignment of error quoting a part of the charge at length, and stating that the court charged on the facts, will not be considered on appeal, as the same was too general.

Jones, J., dissenting.

Appeal from general sessions circuit court, Spartanburg county; Buchanan, Judge.

J. C. Meares was convicted of being the father of a bastard child, and he appeals. Affirmed.

J. J. Burnett and Duncan & Sanders, for appellant. U. X. Gunter, Asst. Atty. Gen., for the State.

GARY, A. J. The defendant was indicted and convicted on the charge of bastardy. He appealed from the sentence of the court on numerous exceptions, which it will not be necessary to consider in detail, as all were waived except those raising the questions presented in the written argument of the appellant's attorneys.

The first question for consideration is whether his honor, the circuit judge, erred in refusing to allow Dr. Dean to testify to the conduct or conversation between the defendant and Cora Jenkins. The record shows that the following took place during the examination of Dr. Geo. R. Dean, a witness for the defendant: "Q. Who brought the girl to you? A. Prof. Meares brought her. Q. Whom did you first tell that she was in this condition? A. Mrs. Meares. Q. In the presence of Cora Jenkins, when Prof. Meares brought her up there, what did he say, and what did she say? Solicitor Sease: I object; there is no foundation. Mr. Sanders: It is as to the conduct of the parties, to show whether the man was guilty or not. Solicitor Sease: Conduct and what they said are different things. By the Court: My idea is that, if any charge was made against him,

his demeanor might be competent, and only the state could bring that out, and not the defense. You could not prove anything by what he did not say. If some person were to make a charge against him, and call upon him for an answer, he could fold his arms, and not say a word, and that could not be taken as evidence against him. I don't think, from either view of the matter, that the defense could bring that out." It will be observed that the evidence was offered for the purpose of showing the conduct of the parties, as tending to prove whether the defendant was guilty or not. The conduct of the parties could not be shown by proving what the defendant and Cora Jenkins said. The testimony was not offered for the purpose of contradicting Cora Jenkins, as the proper foundation had not been laid, nor was it part of the *res gestae*, nor explanatory of an act. We fail to see wherein the testimony was admissible.

The next question that will be considered is whether it was error to refuse to charge that in bastardy cases the testimony of the mother should be corroborated in some material particular before a verdict of guilty could be rendered. 29 Am. & Eng. Enc. Law, 834, thus states the rule: "In England, the mother of an illegitimate child must not only be a witness, but her testimony must be corroborated, before a man can be adjudged the putative father, or an order of affiliation can be made, and it is necessary that the corroboration be in some material particular. But this is a statutory rule, and, in the absence of such a statute, no corroboration is required in such cases as a rule of law." Even if Cora Jenkins could be regarded as *particeps criminis*, it would still be unnecessary that her testimony should be corroborated. In *State v. Prater*, 26 S. C. 207, 2 S. E. 112, the court says: "It is true that the proper practice is for the presiding judge to advise the jury not to convict upon the uncorroborated testimony of an accomplice, * * * but we know of no authority which requires that they should be directed to acquit unless the testimony of an accomplice is corroborated." Furthermore, there was testimony tending to corroborate the witness in a material particular.

The last question to be determined is that presented by the eighth exception, which assigns error as follows: "(8) In charging as follows: 'Well, now, you are to consider, not only what a witness says. When he goes on the stand, he is clothed with a presumption of innocence, which attends every witness, because it is the corollary from the presumption that every man is innocent. He is clothed with the presumption of honesty; not that they are always honest, but that being the condition of a great majority of mankind. The law presumes that when a man goes on the stand he is presumed to be telling the truth; not that he always does, as I charge you, but, that being the

presumption of a great majority of mankind, the law presumes or infers that he comes there upon the witness stand with a good character; therefore that he tells the truth. Now, oftentimes small divergences on insignificant matters, testified to by one witness and denied by another, is not only not an evidence of telling an untruth, but oftentimes is the strongest evidence that they have not combined or colluded or conspired together to come before the court and impose upon it a made-up story; but upon the main salient features of the case, that everybody would observe if they were there,—if they had a chance of observation or knowledge,—then, if they conflict, you may say: "Well, both of them cannot be so, and both statements be true. I will believe one and discard the statement of the other as unworthy of belief, because I cannot reconcile them upon the grounds of common honesty of each witness. Therefore I will throw aside one and believe the other, because, forsooth, it strikes me as more worthy of credit. It strikes me as being the truth as drawn from the inherent probabilities of facts as testified to by other witnesses,—facts corroborated and sustained by another person." Or, forsooth, you may say: "Neither one of them are worthy of belief, * * * and I will throw them both out of the discussion of the case. I will consider the other facts and circumstances without the testimony of those witnesses,"—it being respectfully submitted that in so charging his honor charged upon the facts, and advised the jury how to weigh and consider the testimony, contrary to the inhibitions and restrictions imposed upon circuit judges by section 26 of article 5 of the constitution." Section 8, art. 5, Id., is as follows: "When a judgment or decree is reversed or affirmed by the supreme court, every point made and distinctly stated in the cause, and fairly arising upon the record of the case, shall be considered and decided." As said by the court in *Garrett v. Weinberg*, 59 S. C. 162, 37 S. E. 51, 225: "It only requires a glance at the exception just mentioned to see that there has been a failure to comply with the provision of the constitution requiring the points made by the appellant to be distinctly stated before he is entitled to have them considered by the court." It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J. (dissenting). I am unable to concur with the majority in the conclusion reached in this case. I think the eighth exception should have been sustained. The portion of the charge complained of in that exception, as taken from the "case," is as follows: "Well, now, you are to consider, not only what a witness says. When he goes upon the stand he is clothed with a presumption of innocence, which attends every witness, because it is the corollary from the pre-

sumption that every man is innocent. He is clothed with the presumption of honesty; not that they are always honest, but that being the condition of a great majority of mankind. The law presumes that when a man goes on the stand he is presumed to be telling the truth; not that he always does, as I charge you, but, that being a presumption of the great majority of mankind, the law presumes or infers that he comes there upon the witness stand with a good character; therefore that he tells the truth. Now, oftentimes small divergences on insignificant matters, testified to by one witness and denied by another, is not only not an evidence of telling an untruth, but oftentimes is the strongest evidence that they have not combined or colluded or conspired together to come before the court and impose upon it a made-up story; but upon the main salient features of the case, that everybody would observe if they were there,—if they had the chance of observation or knowledge,—then, if they conflict, you may say: 'Well, both of these cannot be so, and both statements be true. I will believe one and discard the statement of the other as unworthy of belief, because I cannot reconcile them upon the grounds of the common honesty of each witness. Therefore I will throw aside one and believe the other, because, forsooth, it strikes me as more worthy of credit. It strikes me as being the truth as drawn from the inherent probabilities or facts as testified to by the other witnesses,—facts corroborated and sustained by another person.' Or, forsooth, you may say: 'Neither one of them are worthy of belief, and yet I am unable to say they are telling things untrue,—purposefully untrue,—and I will throw both out of the discussion of this case. I will consider the other facts and circumstances without the testimony of those witnesses.'" It is complained that in so charging the circuit judge charged upon the facts, and advised the jury how to weigh and consider the testimony, in violation of section 26 of article 5 of the constitution. This exception the majority of the court declines to consider, on the ground that it fails to distinctly state the point raised for consideration; in other words, that the exception is too general. It seems to me that this is carrying the rule requiring exceptions to be specific to an extreme length. The exception distinctly quotes the portion of the charge complained of, and specifically points out the rule or principle of law alleged to have been violated thereby. The charge complained of violates the constitution forbidding charging the jury "in respect to matters of fact." The jury were instructed that there is a presumption that every witness tells the truth. Such a charge was condemned in *State v. Taylor*, 57 S. C. 487, 488, 35 S. E. 729, as not only incorrect as matter of law, but as instructing the jury as to the force and weight of testimony. The effect of such a charge is to instruct the jury that

the statement of the prosecutrix that the defendant was the father of her bastard child was presumably true.

Furthermore, the charge was in respect to matters of fact in advising the jury that they might throw out of the discussion of the case the conflicting statements of witnesses on material matters, and consider the other facts and circumstances without the testimony of such witnesses, although the jury were unable to say that such witnesses were telling things purposely untrue. In the case of *State v. Mitchell*, 56 S. C. 531, 35 S. E. 210, a very similar charge was condemned as in violation of the constitutional inhibition.

For these reasons, I think the judgment of the circuit court should be reversed.

(61 S. C. 106)

STATE v. ROBISON.

(Supreme Court of South Carolina. July 13, 1901.)

CRIMINAL LAW—WITNESS—INDORSEMENT ON INDICTMENT—SALE OF LIQUOR—NUISANCE.

1. A witness for the state will not be excluded because his name does not appear on the back of the indictment.

2. Where the first count of an indictment alleges illegal sale of liquors, a witness may testify as to evidence supporting the second count charging defendant with maintaining a nuisance, though his name does not appear in the first count as one to whom liquor has been sold.

3. It is competent to prove that defendant had sold witness cider, which made him "foolish."

Appeal from general sessions circuit court of Spartanburg county; Benet, Judge.

W. H. Robison was convicted of maintaining a liquor nuisance, and appeals. Affirmed.

O. P. Sims, for appellant. Asst. Atty. Gen. U. X. Gunter, for the State.

POPE, J. The defendant was tried and convicted under an indictment, containing three counts, charging him with violations of what is known as the dispensary law of this state, and he has appealed after judgment upon the following grounds: "The circuit judge erred: (1) In allowing J. J. Bishop to testify on the part of the state, over the defendant's objection, that the said witness' name did not appear in the indictment, for the reason that it was incompetent and irrelevant to allow said witness to testify without his name appearing on the indictment, thereby advising the defendant fully as to the crime with which he was charged. (2) In allowing a witness Oliver Byers to testify on the part of the state that he had bought whisky from the defendant, over the objection of the defendant's attorney, upon the ground that the said witness' name did not appear in the indictment. (3) In allowing said witness Oliver Byers to testify, over defendant's objection, that he drank about one-half pint of cider, which witness claimed to have bought from the de-

fendant. (4) In charging the jury as follows: 'A man may have alcoholic liquors, whisky, brandy and the like, which he has legally purchased from the dispensary, or from some person outside of the state, and it will be unlawful for him to store and keep in possession, if he has them for an unlawful purpose, for it is not inconceivable, nor is it unusual, as our experience in court shows us, for people to purchase liquors from the dispensary, and then sell them unlawfully; but it is not unlawful for a citizen to keep in possession liquors lawfully purchased, and for a lawful purpose,—and by "lawful purpose" I mean their personal use or family use, or for purposes of hospitality, social purposes, or medicinal use, and the like,—and he may keep liquors in any quantity if he purchases them in a lawful way, either from a dispenser or from some person outside of the state, and he has a right in law to make a legal purchase outside of the state, and import liquors in the state for legal or lawful use, for personal use, or medicinally; and the dispensary law endeavors to protect the citizens in that right and provides that where a man does have in his possession, for lawful purposes, any quantity of liquor, he may apply to the state commissioner for badges, for tags or labels, which can be placed upon the vessel, barrel, or kegs, or jugs, or bottles that keep such liquor, showing that they are for personal use, lawful use, and not for unlawful purposes,'—for the reason that it is submitted the jury may have been misled from the above charge to believe that it was necessary, under the law, to have badges, labels, or tags placed upon any whisky that may have been purchased other than from the dispensary; respectfully submit the law does not require that any label shall be placed upon such liquors"

We will pass upon these points in their order:

First. In the first count of the indictment the defendant was charged with having sold intoxicating liquors to one F. M. Neighbors on the 12th day of May, 1900. There is no allegation that such liquor was sold to any other person or on any other day than to F. M. Neighbors, on the 12th day of May, 1900, so far as the first count is concerned. The court allowed J. J. Bishop and Oliver Byers to testify in the case, when their names did not appear to have been written on the back of the indictment as witnesses for the prosecution. The appellant excepts to this. We know of no law which prevents the prosecution using a witness whose name does not appear to be written on the back of an indictment. Section 40 of the Criminal Statutes of this state, in a capital case, requires the copy of an indictment to be delivered to the accused three days before his trial, but it is expressly provided in this section "that the names of the witnesses shall not be included." If this is true in capital cases, for

greater reason it is true in misdemeanors. But it may be that the appellant intended to insist that the name of this witness should have been made to appear in the body of the indictment. It was certainly not proper that the name of the witness J. J. Bishop should appear in the first count, for it was neither alleged nor attempted to be proved that J. J. Bishop had bought liquor from the defendant on the 12th May. Nor is there any ground for the claim of the appellant that Bishop's name should appear in the second count, which charged the defendant with keeping and maintaining a place where intoxicating liquors are sold, and where persons are permitted to resort for the purpose of drinking alcoholic liquors as a beverage, thereby maintaining a common nuisance. The witness J. J. Bishop did not testify even as to this count of the indictment, and no one testified that said Bishop bought any liquors from the defendant. So far as the third count is concerned, which charges the defendant with having unlawfully stored and kept in his possession certain alcoholic liquors, it sets out, by its allegations, the existence of a fact in which the witness J. J. Bishop had no concern except in conducting an investigation thereof as a constable. This exception is overruled.

As to the second exception: It was not error for the circuit judge to admit this testimony of Byers, when he forbade the jury to apply the same to the first count. It was competent to prove the fact of the sale of liquors by the defendant to this witness with reference to the second count of the indictment, which charged defendant with maintaining a nuisance. This exception is overruled.

As to the third exception, it must be overruled, because it was competent to prove by this witness that the elder he bought from the defendant made both his father and himself "foolish," when the same was restricted to the charge of defendant's maintaining a nuisance.

As to the fourth ground of appeal: Inasmuch as the appellant has reproduced the language in the charge of the circuit judge of which he complains, we do not deem it necessary to repeat the same. A reading of this charge is the best answer to the criticism of it. The circuit judge does not charge that any person who buys alcoholic liquors from the dispensary or beyond the state shall put tags on the same, which will be furnished by the dispensary authorities. He only suggests that, for more thorough protection to their keeping such liquors, such tags may be used. The case of *State v. Prater*, 59 S. C. 271, 37 S. E. 933, has so fully referred to the law governing indictments similar to that used in the cause at bar that we hardly deem it wise to go over the same again. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(61 S. C. 98)

CITY COUNCIL OF ABBEVILLE v. LEOPARD.

(Supreme Court of South Carolina. July 12, 1901.)

VIOLATION OF ORDINANCE—PROSECUTION—CONCEALED WEAPONS.

1. Const. art. 5, § 31, providing that all writs and processes shall run, and all prosecutions shall be conducted, in the name of the state, does not prohibit a prosecution for violation of a city ordinance by the city council.

2. A city charter, permitting a municipality to pass such ordinance for the safety of the citizens as may be necessary, and providing that no fine or penalty shall exceed \$100 or imprisonment for a longer period than 30 days, authorizes an ordinance against carrying a pistol within the city concealed about the person.

Appeal from general sessions circuit court of Abbeville county; Benet, Judge.

J. D. Leopard was convicted of violating an ordinance of the city council of the city of Abbeville by carrying concealed weapons. From an order sustaining defendant's appeal reversing the judgment, the city council appeals. Reversed.

M. P. De Bruhl, for appellant. Ellis G. Graydon, for appellee.

POPE, J. The defendant, J. D. Leopard, was tried in the mayor's court for the city of Abbeville upon information, under oath, charging him with having carried concealed about his person, on the 2d February, 1901, a pistol, in violation of an ordinance duly passed by the city of Abbeville on the 25th day of March, in the year 1897, wherein it was ordained that any person who should, after the date of said ordinance, carry a pistol concealed about his person, shall be guilty of a misdemeanor, and, upon conviction thereof before the mayor or city council, shall forfeit to the city council the weapon so carried concealed, and shall be fined in a sum not less than \$10, nor more than \$100, or be imprisoned not more than 30 days. The warrant for the arrest of the said J. D. Leopard was indorsed in these words, "The City Council of Abbeville against J. D. Leopard," and all proceedings in the case were entitled in the same manner. The defendant was found guilty, and sentenced to pay a fine of \$25 or be imprisoned 30 days. From this judgment the said J. D. Leopard appealed to the circuit court (the court of general sessions for Abbeville county, in this state) upon the two grounds: First, that the city council of Abbeville was without power to pass the ordinance against carrying concealed weapons, and therefore had no right to try said J. D. Leopard for such alleged offense; and, second, because the whole proceeding was null and void, for the reason "that the warrant does not run, and the prosecution was not conducted, in the name of the state of South Carolina, as required by the constitution."

The appeal came on to be heard by his honor, Judge Benet, on 21st day of Febru-

ary, 1901, when he sustained the appeal in the following order: "The defendant, J. D. Leopard, appeals to this court from a verdict and sentence of the mayor's court of the city of Abbeville on a charge of carrying a concealed weapon, in violation of an ordinance of said city. The grounds of appeal objecting to the jurisdiction of said court raise the points that the ordinance passed by the city council is null and void, because the warrant is not issued, and the prosecution was not conducted, in the name of the state of South Carolina, as required by section 31 of article 5 of the constitution of 1895. The ordinance in question prohibits the carrying of concealed weapons, and provides that any offense against the same shall be punished by forfeiture of the weapon to the city council of Abbeville, and by fine not exceeding \$100, or imprisonment at hard labor not exceeding 30 days. In my opinion, both said grounds of appeal are well taken. I hold that said ordinance is null and void, for want of power in the city council to enact the same. I also hold that prosecutions for all criminal offenses must be conducted in the name of the state of South Carolina, under the positive requirement of section 31 of article 5 of the constitution of 1895, identical with section 31 of article 4 of the constitution of 1868. It is, therefore, on motion of Ellis G. Graydon, defendant's attorney, ordered and adjudged that the appeal of the defendant be sustained; that the verdict and judgment of the mayor's court of the city of Abbeville be set aside and reversed; that the recognizance of the defendant be canceled; and that the said defendant, J. D. Leopard, be allowed to go hence without day." Thereupon the city council of Abbeville appealed from the judgment of Judge Benet on the following grounds: "(1) Because his honor erred in holding that said ordinance of the city of Abbeville is null and void for want of power in the city council to enact the same. (2) Because his honor, the circuit judge, erred in sustaining the defendant's (J. D. Leopard's) first exception to the judgment of the mayor's court, and holding, as therein contended, 'that the city council of Abbeville has no jurisdiction to pass an ordinance against carrying concealed weapons, and therefore no right to try a person for an alleged offense against such illegal and void ordinance.' (3) Because his honor, the circuit judge, erred in holding that said ordinance 'provides that any offense against the same shall be punished by forfeiture of the weapon to the city council of Abbeville, and by fine not exceeding \$100, or imprisonment at hard labor not exceeding thirty days,' it being respectfully submitted that an inspection of the ordinance will show that this statement of its provision is not correct. (4) Because the provision in said ordinance that any person carrying a concealed weapon shall, on 'conviction thereof before the mayor or city council, forfeit

to the city council the weapon so carried concealed, and be fined in a sum of not less than \$10 nor more than \$100, or be imprisoned not more than thirty days,' is not in violation of any provision of the constitution of this state, and his honor, the circuit judge, should have so held. (5) Because his honor, the circuit judge, should have held that, even if the provision in said ordinance for forfeiture of such weapon is in conflict with the statute of this state against carrying concealed weapons, such provision could be stricken out, and a complete and valid ordinance would remain. (6) Because his honor, the circuit judge, erred in holding that all prosecutions for violations of municipal ordinances must be conducted in the name of the state of South Carolina. (7) Because his honor, the circuit judge, should have held that section 31 of article 5 of the constitution of 1895 does not apply, and was not intended to apply, to prosecutions for offenses against municipal ordinances, but applies only to prosecutions for offenses against the state. (8) Because his honor should have held that a violation of a municipal ordinance is an offense against the municipality, and not against the state, and that no prosecutions can be maintained by the state for violation of such ordinances. (9) Because his honor erred in adjudging that the appeal of the said J. D. Leopard be sustained, that the verdict and sentence of the mayor's court be set aside and reversed, that the proceedings be dismissed, and that recognizance of the defendant be canceled, and that he be allowed to go hence without day."

There are only two questions of any moment involved in this appeal, viz.: First. Is the proceeding of the city council of Abbeville void by reason of its failure to have its process run in the name of the state of South Carolina? Second. Was the ordinance of said city council of Abbeville within the powers with which it was invested by the general assembly of this state?

We will dispose of these questions in their order. The circuit judge was so impressed with the language of the constitution of this state, adopted in the year 1895, and set out in section 31 of article 5, that he felt bound to deny to the city council of Abbeville the right, in its corporate name, to prosecute the defendant for the violation of one of its ordinances. The language employed in said section 31 of said article 5 was as follows: "All writs and processes shall run and *all prosecutions shall be conducted in the name of the state of South Carolina.*" (Italics ours.) We fear that the learned circuit judge for the moment overlooked the distinction between offenses against the general laws of the state, which affect and govern its entire citizenship, or, to be more accurate, all of its inhabitants, and those offenses which consist in a breach of the laws governing the inhabitants of a city or town in this state

within the corporate limits of such city or town. This distinction was recognized and enforced as early as the year 1787, as will be seen in the case of *McMullen v. City Council*, 1 Bay, 46. In the case cited the city council of Charleston had assumed jurisdiction to try the defendant for a violation of a state law. The court denied it any such power. It was then declared: "As to the conviction, this was for the offense of selling spirituous liquors,—an offense neither cognizable by them either under their charter or the act of 1784, any more than homicide or manslaughter. It is not an offense against any of their by-laws. Therefore their power to commit did not extend to this offense. It is an offense against the public revenue act of the state. This act is not one of the by-laws of the city corporation, but a public law, cognizable only by the supreme court throughout the state." The practice of prosecuting offenses against the ordinances of a city or town, in the name of the city or town council of the particular city or town affected, is hoary with age. It has existed far beyond the century last passed. No particular value can be ascribed to the phraseology used in section 31 of article 5 of the constitution of 1895, for the identical language was employed in section 31 of article 4 of the constitution of 1868. And an examination of the second section of article 3 of the constitution of 1790 will show this language as there employed: "The style of all process shall be 'The State of South Carolina.' All prosecutions shall be carried on in the name and by the authority of the state of South Carolina." See 1 St. at Large, p. 189. The power is always given to municipal corporations in this state to sue and be sued by their corporate names. This has always been accepted as authorizing a prosecution in the corporate name for an infraction of municipal ordinances, as the multitude of cases in the reports of this state shows. Such being the law in this state, the constitution of the year 1895 retained all such laws. See section 10 of article 17. Such being our view, we sustain all of the exceptions relating to this question.

We will now examine the question touching the power of the city council of Abbeville to pass the ordinance in question. Whenever the power of the city council is challenged, it must always be able to lay its finger upon some express grant of power by the general assembly of this state. Inherently it has no power. By referring to the act incorporating the city of Abbeville, as found at page 1134 of 21 Statutes at Large of this state, at section 6, we find such municipality was clothed with the power to make ordinances, " * * * and such other matters pertaining to the concerns of said corporation as shall be proper, necessary or advisable for the preservation or safety of the peace, order, comfort, health,

convenience and welfare of the citizens of said city; may fix and impose fines and penalties for the violation of law or its ordinances, but no fine or penalty shall exceed \$100, or imprisonment in the guard house for a longer period than thirty days. * * *

We consider this a grant of power to make an ordinance against carrying a pistol concealed about the person. But, if there was any doubt as to the foregoing grant of power, such doubt is set at rest by the act of 1896, by which said city of Abbeville is clothed with full power to do so. See 22 St. at Large, p. 67, which last was made to apply to the city of Abbeville by the provisions of an act passed in the year 1897, and found in 22 St. at Large, p. 464. The act of 1896, just referred to, at section 11, gives town councils full power to pass an ordinance such as that in question. Although we hold that the general assembly of this state has clothed the city council of Abbeville with power to pass the ordinance for the violation of which the defendant was convicted, yet we hold, at the same time, that it had no power to affix the penalty of a forfeiture of the pistol used by defendant. No such power is conferred by the constitution. But this does not affect the defendant, who was only sentenced to pay a fine or be imprisoned. It is no longer an open question in this state as to the power of a municipal corporation by its ordinances to make an act or acts offenses within its chartered limits which are already a violation of state laws. See *State v. Williams*, 11 S. C. 292; *City Council v. O'Donnell*, 29 S. C., at page 368, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; also *City of Greenville v. Kemmis*, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725. The exceptions of appellant, where conformable to the foregoing views, are sustained. It follows, therefore, that the judgment of the circuit court must be reversed.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded for the enforcement of the judgment of the city council of Abbeville against the defendant, J. D. Leopard.

(61 S. C. 71)

STATE v. EASTERLIN.

(Supreme Court of South Carolina. July 10, 1901.)

CRIMINAL LAW—APPEAL—PRESUMPTIONS—EVIDENCE—REVIEW—VIOLATION OF LABOR CONTRACT—CONSTITUTIONAL LAW.

1. Where a conviction by a magistrate has been affirmed by the circuit court, the supreme court, on appeal, where there is evidence of the locality in which the crime was committed, will assume that the trial court was satisfied that the designated place was within the territorial jurisdiction of the magistrate.

2. Where there was some evidence to sustain conviction by a magistrate, it was not error of law for the circuit court to affirm the judgment so as to authorize a review by the supreme court.

3. In a prosecution under 22 St. at Large, p. 457, for violation of a farm-labor contract verbally made, either party may testify to the terms of the contract.

4. In a prosecution under 22 St. at Large, p. 457, for violation of a farm-labor contract, a brother of one of the contracting parties is a "disinterested witness," within the terms of the statute, so as to be competent to testify as to the terms of the contract.

5. 22 St. at Large, p. 457, providing for prosecution for breach of farm-labor contracts, held not to violate provision of constitution against imprisonment for debt.

Appeal from general sessions circuit court of Orangeburg county.

Easter Easterlin was convicted of violating a verbal farm-labor contract. From a judgment of the general sessions circuit court, affirming that of magistrate's court, he appeals. Affirmed.

W. C. Wolfe, for appellant. James Evans, for the State.

JONES, J. The defendant was prosecuted before Magistrate Pou, in Orangeburg county, for violation of a verbal farm-labor contract, under the act of 1897, and was found guilty by the jury and sentenced. On appeal to the circuit court, the judgment of the magistrate was affirmed. The exceptions to this court are as follows: "(1) It was error to allow the prosecuting witnesses and the contractee to testify as to the terms of the alleged contract, because the statute provides a mode for proof of such contracts. (2) It was error to allow the contract to be proven by one disinterested witness, and the brother of the contractee, because such brother is not a competent witness to prove such contract, under the act of 1897. It was also error to refuse defendant's requests, as each one embodied a correct principle of law. (3) There was absolutely no evidence to show that the alleged contract was violated. (4) There was absolutely no testimony to show that defendant had refused to perform reasonable service after the advances were made or at any time. (5) There was absolutely no testimony to show that the cause was in the territorial jurisdiction of Magistrate Pou, or any particular magistrate; and the judgment cannot be sustained unless it affirmatively appears that the court of Magistrate Pou had territorial jurisdiction, each magistrate in Orangeburg county having, under the statute, separate districts, in which they exercise exclusive jurisdiction."

1. In reference to the fifth exception, as to the matter of jurisdiction: By section 23, art. 5, of the constitution, every criminal action cognizable by a magistrate must be brought before a magistrate in the county where the offense was committed, except in counties where magistrates have separate and exclusive territorial jurisdiction, in which case such actions are to be tried in the magistrate's district where the offense was committed, subject to such provisions

for change of venue as may be made by the general assembly. It may be—and, without so deciding, we will, for the purposes of this appeal, assume—that in Orangeburg county magistrates have each a separate district, in which jurisdiction is exclusive. 22 St. at Large, p. 472. If so, then there should be some evidence that the offense was committed within the territorial jurisdiction of the magistrate. There was some evidence not only that the alleged offense was committed in Orangeburg county, but at a designated spot within the county. The jury in the magistrate's court having found the defendant guilty, and the judgment of the magistrate's court having been affirmed by the circuit court, this court is bound to assume that the trial court was satisfied that the designated place of the offense was within the territorial jurisdiction of the magistrate, and this court has no power to review such finding of fact.

2. The third and fourth exceptions complain that there was no evidence of the alleged offense. We have no power to review the sufficiency of the evidence, and, there being some evidence tending to sustain the charge, it was not error of law for the circuit court to affirm the judgment of the magistrate in this regard.

3. In a prosecution under the act of 1897 (22 St. at Large, p. 457), for violation of a farm-labor contract verbally made, it is competent for either of the contracting parties to testify as to the terms of the contract. The statute does not exclude the testimony of the contracting parties. It merely provides that the verbal contract therein referred to shall be witnessed by at least two disinterested witnesses. The first exception is therefore overruled.

4. It appears that, in addition to the testimony of the prosecuting contracting party, two other witnesses to the contract were examined, one of whom was the brother of the prosecutor. It is contended that a brother of one of the contracting parties is not a "disinterested witness," such as is required by the statute. The term "disinterested," as applied to a witness, means devoid of pecuniary interest,—having no prospect of gain or loss. Therefore, the mere relationship of brother to one of the contracting parties is not such interest as would disqualify from being a witness to the contract. If the statute meant to exclude as witnesses to such contract all those who might be biased through friendship, enmity, or relationship, other appropriate words would have been used.

5. The magistrate refused to charge the jury that the act of 1897, supra, was void as in conflict with section 24, art. 1, of the constitution, providing that "no person shall be imprisoned for debt except in cases of fraud." This refusal of the magistrate was sustained by the circuit court, and the question is now sought to be presented here in the latter

part of the second exception. The act is not unconstitutional on the ground presented. This act was sustained as constitutional in the case of *State v. Chapman*, 56 S. O. 420, 34 S. E. 961, against the objections there presented; and, in construing the act, the court, speaking by Mr. Chief Justice McIver, said: "From the language of this act, it will be seen that the offense denounced is not merely the violation of a contract by a laborer employed to work the lands of another, but the offense consists in receiving advances either in money or supplies, and thereafter willfully, and without just cause, failing to perform the reasonable service required of him by the terms of the contract." The statute as thus construed does not provide imprisonment for debt; but, even if it could be so construed, the offense made punishable involves an element of fraud. This disposes of all points argued under the exceptions. The judgment of the circuit court is affirmed.

(61 S. C. 114)

BAKER et al. v. IRVINE.

(Supreme Court of South Carolina. July 13, 1901.)

APPEAL—DISMISSAL—REINSTATEMENT—MAGISTRATE'S JURISDICTION.

1. An appeal will be reinstated after dismissal for failure to file points and authorities, where such failure was caused by sickness of appellant's attorney.

2. Const. art. 5, § 21, gives magistrates jurisdiction in such cases as the general assembly shall prescribe, provided it shall not extend to cases where more than \$100 in value is claimed, or where the title to real estate is involved, or to cases of chancery. Section 23 prescribes that every civil action shall be brought before a magistrate in the county where the defendant resides. *Held* that, as the general assembly has not restricted territorial jurisdiction of magistrates in Greenville county as to civil actions, such jurisdiction extends throughout the county.

Appeal from common pleas circuit court of Greenville county; Aldrich, Judge.

Action by J. A. and W. C. Baker against W. H. Irvine. From an order reversing a judgment of the magistrate, plaintiffs appeal. Appeal dismissed for failure to file authorities. Motion to reinstate appeal granted, and judgment affirmed.

For former opinion, see 36 S. E. 742.

Blythe & Blythe, for appellants. Carey & McCullough and Shuman & Mooney, for appellee.

POPE, J. On the 2d day of November, 1899, the defendant was served with the following summons: "State of South Carolina, County of Greenville. By G. W. Nicholls, Esq., to W. H. Irvine, Defendant: Complaint having been made unto me by J. A. Baker and W. C. Baker that you are indebted to them in the sum of \$100 on account of damages for wrongfully taking from their possession a certain dark horse mule belonging to

them jointly, seizure made October 30, 1899. This is therefore to require you to appear before me in my office in Athens, S. C., on the twenty-first day from service of this summons, at 12 o'clock m., to answer to the said complaint, or judgment will be given against you by default. Dated 2d day of November, A. D. 1899. G. W. Nicholls, Magistrate. [Seal.] Blythe & Blythe, Plaintiffs' Attorneys."

The cause was called for trial on 23d day of November, 1899, and on motion the trial was postponed until the 7th day of December, 1899, on which latter day the magistrate gave judgment against the defendant for \$65. An appeal was duly taken from said judgment to the court of common pleas for Greenville county, and in that court the cause was placed on the calendar of said court for trial at the November term, 1900, of said court; whereupon, at the call of said cause in the said court of common pleas, the defendant made the motion of which due notice had already been given, to wit:

"You will take notice that upon the opening of the court of common pleas for the said county and state, on Friday, November 30, 1900, in the court house, Greenville, S. C., at 12 o'clock, or as soon thereafter as counsel can be heard, we will move his honor, the presiding judge, for an order vacating the judgment in the above-entitled cause, upon the following grounds: (1) That the magistrate, to-wit, G. W. Nicholls, Esq., who rendered the said judgment, was without jurisdiction of the person of this defendant or of the cause of action set forth in the summons, and that said judgment is therefore a nullity. The said W. H. Irvine, at the time the said action was commenced and judgment rendered, was and is now a resident of Greenville township, county and state aforesaid, and the said magistrate was not at that time a magistrate for Greenville township, but was a magistrate for Bates and Paris Mountain townships, and under the law then in force he had no jurisdiction of this defendant residing outside of his territorial limits. (2) Because it appears that the court had no jurisdiction of the cause of action sued on, the premises upon which the alleged distress for rent was made being situated at that time and now in Greenville township, and the said magistrate residing in Bates township, and the cause of action sued on being for damages which the plaintiffs contend they sustained by reason of such distress, which they allege was unlawful. You will further take notice that the said motion will be heard upon the record in said case, which is now on file in the clerk's office, by reason of the appeal taken by the defendant in said cause, and the return of the magistrate for the purposes of the said appeal, and the original record sent up in consequence thereof; also upon the affidavits which were previously served upon you in support of the previous motion given to dismiss the said appeal for want of jurisdiction, upon the affi-

davit of W. H. Irvine hereto attached, and such other affidavits as may in the meantime be served upon you, and the entire record and proceedings in the said cause, reference to which, for the purposes of this motion, is hereby craved.

"State of South Carolina, County of Greenville. Personally comes W. H. Irvine, who upon oath says that he is the defendant in the above-entitled cause; that the defendant was sued in the said case before G. W. Nicholls, Esq., magistrate, for damages, the plaintiffs alleging that the defendant wrongfully took from their possession certain property mentioned in the said complaint; that at the time the said action was instituted, as well as now, this defendant was a resident of the city of Greenville, township of Greenville, county and state aforesaid; that, at the time the said action was instituted and judgment rendered, the said G. W. Nicholls, Esq., the magistrate who rendered the said judgment, was a resident of Bates township, county and state aforesaid, and was magistrate for Bates and Paris Mountain townships; that the premises where the alleged unlawful seizure of their property took place was and still is situated in Greenville township, county and state aforesaid; the alleged property seized was also situated in the said township, and the distress for rent out of which this action grew was issued as against the property located upon the said premises; that the acts out of which plaintiffs' alleged cause of action arose were all performed in Greenville township, county and state aforesaid; and this deponent alleges that plaintiffs' cause of action, if any, also arose in the said township. Sworn to and subscribed before me, this 26th day of November, 1900. W. H. Irvine. J. A. McCollough, Notary Public, S. C."

When the matter of jurisdiction came on to be heard before his honor, Judge Aldrich, he passed the following judgment: "The defendant in the above case having moved to vacate the judgment in the case herein mentioned upon the grounds stated in the above notice of motion, and after hearing affidavit of W. H. Irvine in support of said motion, which affidavit was not controverted on the hearing before me, and after argument of counsel, I find as matter of fact: (1) That the magistrate who rendered the judgments in the aforesaid cases did not reside in, nor was he a magistrate for, Greenville township. (2) That the defendant therein, W. H. Irvine, was a resident of Greenville township, and the causes of action sued on also arose in that township. I conclude, as a matter of law, therefore, that said magistrate was without jurisdiction to render the said judgments, and the same are therefore null and void, and I so adjudge. The summons and complaint in each of the said cases are hereby dismissed, and the judgment vacated. By consent of counsel, the motions in each of the aforesaid cases were heard by consent together."

The plaintiffs then appealed on the follow-

ing grounds: "(1) Because the circuit judge erred in holding that because the magistrate who rendered the judgments in these cases did not reside in, and was not a magistrate for, Greenville township, and because the defendant, W. H. Irvine, was a resident of Greenville township, and the cause of action sued on also arose in said township, that, therefore, the said magistrate was without jurisdiction to render said judgments, and the same are therefore null and void. (2) Because section 23, art. 5, of the constitution of 1895, gives magistrates jurisdiction throughout their respective counties in civil cases, such as are now before the court, and this provision being inconsistent with the said section 863, Rev. St., said section is no longer of force, although it has never been repealed, and the circuit judge erred, therefore, in vacating the judgments rendered in these cases, and dismissing the actions."

It seems to us that the two grounds of appeal raise but a single question, viz. whether by the terms of the constitution adopted in the year 1895 there is either a limitation upon the jurisdiction of magistrates, or a power conferred upon the general assembly of the state to confine the jurisdiction of magistrates to certain defined territorial limits; for if either of these is true, and that power has been exercised, then clearly a magistrate appointed for Bates and Paris Mountain townships, in Greenville county, would have no jurisdiction to try a defendant who did not reside in either one of such townships, but who actually resided in the township within which the city of Greenville is located. Let us see, therefore, if the constitution, by its own terms, confined magistrates within the limits of the township or townships for which they were appointed. Section 21 of article 5 of the constitution provides as follows: "Magistrates shall have jurisdiction in such civil cases as the general assembly may prescribe: provided, such jurisdiction shall not extend to cases when the value of property in controversy, or the amount claimed, exceeds one hundred dollars, or to cases where the title to real estate is in question, or to cases in chancery. * * *" The only limitation upon the jurisdiction of magistrates here pointed out, after laying down the cases cognizable by them, is the declaration that "magistrates shall have jurisdiction in such civil cases as the general assembly may prescribe." (Italics ours.) Section 23 of the same article (5) of the constitution of 1895 provides: "Every civil action cognizable by magistrates shall be brought before a magistrate in the county where the defendant resides. * * *" The constitution was in this section laying down the requirement that no defendant should in a civil case be required to appear in such action except in the county of his residence, to the end that a magistrate of any other county in this state than that of the defendant's residence should not exercise any power to try the case against

such defendant. We do not think that the language in this section last quoted was intended to give magistrates appointed for a particular county in this state jurisdiction to hear civil cases against a defendant in utter disregard of any division by the general assembly of the territory of a county into certain well-defined territorial limits. We do not find, however, any positive recognition of such territorial divisions of a county, so far as the jurisdiction of the magistrates is concerned, but we do find that power is vested in the general assembly to do so. Whenever there is a grant of power to the general assembly to do certain acts by the constitution itself, the exercise of such power by the general assembly is legitimate. We find by section 863 of the Revised Statutes of this state: " * * * In Greenville county there shall be seventeen [afterwards reduced to ten] trial justices, one to each township thereof, except the township of Greenville, and it shall have two. Each of said trial justices shall have jurisdiction of all matters properly triable in courts of trial justices for the township in which they reside." There is a wide distinction between the cause at bar and the case of *Jones v. Brown*, 57 S. C. 14, 35 S. E. 397; for, in the instance of Beaufort county, in section 860 of the Revised Statutes it was expressly provided that, as to civil actions before trial justices for Beaufort county, "all civil actions must be tried in the township where the defendant resides." There is no such provision in section 863 of General Statutes in any general or special statute in this state, that all civil actions must be tried in the township where the defendant resides, as to Greenville county. Trial justices for Greenville county are given all the power of other trial justices in civil actions, unless the words, "for the township in which they [magistrates] reside," can be construed to mean that defendants must reside in such township. We cannot do this, for section 23 of article 5 of the constitution of 1895, fixing the jurisdiction for magistrates, provides: "Every civil action cognizable by magistrates shall be brought before a magistrate in the county where the defendant resides;" and as we have seen that by section 21 of article 5 the general assembly was given the power to "prescribe" the jurisdiction in civil cases to be exercised by magistrates, and this power the general assembly has not exercised as to Greenville county, no such law exists. The circuit judge was in error, therefore, in denying jurisdiction to try the cause to the magistrate of Bates and Paris Mountain townships of Greenville county. Inasmuch, however, as the question of jurisdiction operated as a stay upon the trial of the grounds of appeal of the defendant, we will send the cause back to the court of common pleas for Greenville county, with direction to pass upon the said grounds of appeal presented by the defendant. It is therefore the judgment

of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court to hear and determine the questions presented by the defendant on his appeal from the judgment of the magistrate.

(61 S. C. 24)

TOOLE et al. v. JOHNSON.

(Supreme Court of South Carolina. July 1, 1901.)

PARTIES — JUDICIAL SALE — SETTING ASIDE DEED—CHILLING BIDDING—LIMITATIONS.

1. Where an action is not authorized by one of the parties plaintiff, no relief should be granted as to him.

2. Where a deed at judicial sale is set aside for chilling the bidding, and the purchase money was paid by the husband, but the deed was made to the wife, she has no right to demand, as a condition precedent to set aside the deed, that the purchase money should be refunded to her.

3. At a sale under execution, where an attorney made the announcement that he hoped nobody would bid against his client who had bid the amount of the judgment and bought in the land for the children of decedent, it is ground for setting aside the sale as chilling the bidding.

4. Under Code, § 112, subd. 6, providing that a cause of action for relief on the ground of fraud shall not accrue until discovery of the facts constituting the fraud, the statute begins to run against a person seeking to set aside a sale under execution because of chilling the bidding from time of discovery of the fraud.

Appeal from common pleas circuit court, Aiken county; Gary, Judge.

Action by E. G. Toole and others against Lavinia Johnson. Judgment for plaintiffs. Defendant appeals. Modified.

Hendersons, for appellant. G. W. Croft & Son, for appellees.

GARY, A. J. This action was commenced on the 9th day of May, 1899. The facts are thus set out in the complaint: "(1) That Warren Toole died in 1874, leaving as his only heirs at law his children, the plaintiffs herein, and W. W. Toole and Mrs. Ida Sprowles, and the defendant, Lavinia Johnson; that he died seised and possessed of the following tract of land: 'All that tract or parcel of land situate in the county of Aiken and state of South Carolina, containing 380 acres, more or less. * * *' (2) That Hansford D. Johnson was the husband of the defendant, Lavinia Johnson, and administered on a considerable personal estate of the said Warren Toole; that the said Hansford D. Johnson died in 1896. (3) That in 1877 the tract of land hereinbefore described was advertised for sale under an execution against the said Warren Toole and in favor of one B. Weathersbee, on which there was due about \$200; that at said sale the attorney for the administrator of said Warren Toole, in behalf of Hansford Johnson, announced to those at and attending said sale, when the land was put up for sale, that Hansford D. Johnson was going to bid it off for the chil-

dren of Warren Toole; that said announcement chilled the bidding, and kept others who would otherwise have bid at said sale from doing so, and thereby fraudulently destroyed competition, and caused said property to be bid off at \$200 less price than it otherwise would have brought, and one that was not anything like its value at that time; that it was bid off and paid for by Hansford Johnson, and entered on the sales book of the sheriff in the name of his wife, the defendant herein, and the deed was executed to her by the sheriff; and the plaintiffs further allege that they have only had knowledge of such illegal and fraudulent conduct at such sale within six years next before the commencement of this action. (4) That the said Hansford D. Johnson, before he died in 1896, settled with W. W. Toole and Mrs. Ida Sprowles, two of the children of the said Warren Toole, for their interest in said tract of land, and are therefore not made parties to this action; the defendant herein has also received her full share of said tract of land by the sale hereinafter stated. (5) That the defendant, Lavinia Johnson, and Hansford D. Johnson, her husband, in 1894 conveyed 190 acres of said tract of land, being all that part thereof lying on the west of the public road leading from Aiken to Rouse's Bridge, to one E. A. Eubanks, for \$1,500, and is still in possession, claiming it as her own, of 190 acres, lying * * *. Wherefore the plaintiffs ask judgment (1) that said sale be set aside, and the deed to the defendant, Lavinia Johnson, canceled, and the title to said tract of land, now in the possession of the defendant, declared to be in the plaintiffs; (2) for such other relief as is equitable and just."

The defendant, answering the complaint, says: "For a first defense, that she denies each and every allegation in the said complaint contained, except what may be herein-after specifically admitted. She admits that the plaintiffs were children of Warren Toole, and that she purchased the tract of land in question at a sale by the sheriff of Aiken county, said sale being made under an execution against the property of Warren Toole. For a second defense, she pleads the statute of limitations, laches, lapse of time, and acquiescence in the sale; and, furthermore, that the plaintiff E. G. Toole did not authorize the bringing of this action. For a third defense, she alleged that she was the owner in fee, and that the plaintiffs are not the owners of the land or entitled to any part thereof. For a fourth defense, she sets up a title by adverse possession."

The case was heard by his honor, the circuit judge, on testimony taken by the master. His decree concludes by ordering and adjudging "that said sale be set aside, and the deed of the defendant, Lavinia Johnson, described in said complaint, be canceled." From this decree the defendant appealed.

The first exception is as follows: "(1) It is respectfully admitted that his honor, Judge

Gary, erred in not finding, as is shown by the testimony, that the plaintiff E. G. Toole did not authorize the bringing of this action; hence that no relief in any respect ought to be granted to him." The record shows that J. G. Toole testified as follows on cross-examination: "Q. Where is your brother Gilbert? A. I don't know. Q. How long since you have seen him? A. Three years. * * * Q. Did you authorize the bringing of this action for your brother? A. Yes, sir. Q. Did your brother Gilbert authorize you to employ a lawyer to bring this suit for him? A. He did not." When examined by plaintiffs' attorneys, he testified: "Q. Did you ever have any talk with your brother Gilbert about getting your and his interest in this property? (Defendant's counsel objects to any talk between one plaintiff, Gilbert Toole, and the other plaintiff, J. G. Toole.) A. I told him I was thinking about getting somebody to look into it for me, and see if there was any chance of getting our share of the estate, and he told me, 'All right,' to go ahead and 'do what I could; that he would be away, and could not be with us.'" The issue as to whether E. G. Toole authorized the bringing of this action was raised by the pleadings, and should have been decided. We are satisfied from the testimony that the exception should be sustained.

The second exception is as follows: "(2) It is respectfully submitted that his honor, Judge Gary, erred, while he decreed that the sale of the land in question should be set aside, in not decreeing that the money paid by Mrs. Johnson, as her bid at the sale, with the interest, should be refunded to her as a condition precedent of the setting aside of the sale." The testimony shows conclusively that the purchase money of the land was not paid by the defendant, but by her husband. She therefore has no right to claim that this money should be refunded to her. *Jennings v. Hare*, 47 S. C. 279, 25 S. E. 198. If there was a right of subrogation arising from the fact that the purchase money was used in satisfying the demands of creditors of the estate, it existed in favor of her husband, and not in her favor.

The third exception is as follows: "(3) It is respectfully submitted that his honor, Judge Gary, erred in setting aside the sale by the sheriff at all, because he should have found that the facts and circumstances surrounding the sale did not authorize the setting aside of the sale; and, further, that, the sale being a public sale at public auction, all declarations and transactions which took place there were presumed to be known to all parties interested, and that the statute of limitations began to run against the sale from the date of the sale." In disposing of that part of the exception raising the question of error on the part of the circuit judge in setting aside the sale, and urging that he should have found that the facts and circumstances surrounding the sale did not au-

thorize the setting aside thereof, it is only necessary to refer to that part of the said decree disposing of this question. The circuit judge says: "Was such an announcement made at the sale as would chill the bidding, and thereby operate as a fraud upon the plaintiffs? To answer this inquiry it is necessary to review some of the testimony as to what occurred at the sale. Mike Howard, sworn for plaintiffs, testified: 'Q. When that property was put up for sale, Mr. Howard, was there any statement made by anybody? A. Nobody, but what Judge Aldrich said. Q. What did he say? A. He said he hoped nobody would bid him in; he wanted to buy it for the children. Q. Was that announcement made before the sale was made? A. Yes, sir; before the sale commenced. Q. You remember what Judge Aldrich stated. What was it he said? A. I recollect him saying those words, that he wanted to buy it in for the children,—for their benefit; I don't think there was but one bid.' John Wooley examined: 'Q. At that sale, Mr. Wooley, do you remember any announcement made by anybody, and, if so, by whom? A. Lawyer Aldrich; he said he hoped—I think that was his words—hoped nobody would bid; it was to be bought for the children.' J. H. Busch examined: 'Q. Did anybody come to you about bidding on the property? A. Yes, sir; Judge Aldrich came to me. Q. Go ahead and state what he came to you and said, Mr. Busch. A. I don't exactly remember now. I went down to try to secure myself of what they owed me. He gave me satisfaction, and told me I would be paid, as near as I remember. Q. Did he say anything about bidding on the land? A. He told me when he spoke that they would secure me. Q. Did he tell you, Mr. Busch, that if you would not bid on the land, that you would be satisfied? A. I don't remember that he told me those words. I don't know if he told me anything about bidding on the land; he may have or not. I went there with the understanding of bidding on the land. They gave me satisfaction, and I paid no more attention to it. Q. Mr. Busch, would you have bid on that land if Judge Aldrich had not have told you what he did? A. If Mr. Aldrich and Johnson had not told me they would satisfy me, of course I would have bid on the land. Q. These gentlemen promised to satisfy you. Did they afterwards pay you? A. Yes, sir; Johnson told me before the sale that, if he could arrange it as he wanted, he would give me \$100. Q. And he gave you the \$100? A. Yes sir; he said he would give me a bond and mortgage on the land, and I told him I would take his note, if his wife would indorse it. Q. And they did so, and the note was afterwards paid? A. Yes, sir.' A. L. Burkhalter sworn: 'Q. Was there any announcement made by anybody that day, and, if so, what was it, and by whom made? A. When the

property was read out, Mr. Aldrich stepped down to the stand, and, if I am not mistaken, Mr. Aldrich said that he hoped that none of us would bid against Mr. Johnson, as he was going to bid to the amount of the judgment for the children.' Judge Aldrich sworn: 'I don't remember personally of the statement, if any, I made at the sale in reference to Mr. Johnson's buying in the property, or bidding it in for the interest of the children.' From this testimony the conclusion cannot be resisted that the bidding was chilled, competition was shut out, and the purchaser was thereby enabled to acquire a deed to the property for much less than its real value, and the sale is therefore void. *Lamar v. Wright*, 31 S. C. 60, 9 S. E. 736. Also the more recent case of *Herndon v. Gibson*, 38 S. C. 357, 17 S. E. 145, 37 Am. St. Rep. 765, in which the authorities in this state are cited upon the point. In the case just cited it appeared that at the sale the defendant, Mrs. Gibson, publicly announced, 'that it was her intention to bid at such sale; that she was a widow dependent upon such premises for support, and requested that no one would bid against her.' The circuit court held that in this statement there was nothing said by Mrs. Gibson to impeach the title of the property, or the validity of the sale, or the value of the property, in any way. On appeal, the supreme court reversed this holding, and in passing upon the same stated: 'That it is a principle ingrafted upon our laws that at public sales fair competition must exist is too long and firmly settled by our decisions to need comment.' The only remaining question is, are the plaintiffs barred by the statute of limitations from attacking this sale on the ground of fraud? In *Suber v. Chandler*, 18 S. C. 526, it was settled that the statute runs from the discovery of the fraud. That case has been cited and reaffirmed in the case of *McGee v. Jones*, 34 S. C. 152, 13 S. E. 326."

We will next consider the remainder of the exception, in which it is contended, "that, the sale being a public sale at public auction, all declarations and transactions which took place there were presumed to be known to all parties interested, and that the statute of limitations began to run against the sale from the date of sale." There is no express provision of law requiring those who do not attend a judicial sale to take notice of facts rendering the sale irregular, null, and void. On the contrary, such persons had the right to presume that the sale would be made in a regular manner and in accordance with law, rather than in such a mode as to necessitate its being set aside for acts rendering it null and void as against the policy of the law. All presumptions are in favor of the regularity of judicial sales. In order to rebut this presumption upon which the absent parties had the right to rely, it was incumbent on those interested in sustaining the sale to show that

those seeking to set it aside for fraud, as against public policy, had knowledge of such facts, which, if pursued with due diligence by an ordinarily prudent man, would have led to knowledge of the fraud. The circuit judge in his decree thus shows what knowledge the plaintiffs had of the announcement made at the sale, to wit: "The issue is then narrowed down to the inquiry, did these plaintiffs have notice of the facts constituting the fraud for such a time as would bar them from maintaining this action? And to determine this question we must again resort to the testimony. W. W. Toole sworn: 'Q. Mr. Toole, when the first time you ever learned or heard anything about this announcement being made at the sale being stated that it was bid in for the children? A. That was about, as well as I can remember— I was about 26 or 27 years old before I knew anything about the sale of the estate. I was not told anything about it. Q. How long before the death of Mr. Johnson? A. About three or four years, as well as I remember.' J. G. Toole, one of plaintiffs, sworn: 'Q. How did you get your information, Mr. Toole, about this announcement at this sale? A. Uncle Lawton Burkhalter give me the information I got. Q. When was that? A. In 1897. Q. Just state whether before that time, if you know anything of what happened. A. No, sir; I don't know a thing about it.' A. L. Burkhalter sworn: 'Q. Did you ever tell Mr. J. G. Toole the manner in which that sale was made at any time? A. Well, I met J. G. Toole when Angus Heath rented the Bob Ohafee place, year before last,—1897. Q. Did you say anything to him about the sale at that time? A. Yes, sir. Q. What did you tell him? A. I told him I was present at the sale, and I said Judge Aldrich can tell you. Q. What did you tell him? A. When the property was offered for sale, Mr. Aldrich said that he hoped he would not oppose Mr. Johnson, as he was going to buy it for the children, and would bid to the amount of the judgment.' From the foregoing testimony, my conclusion is that the plaintiffs did not discover the facts constituting the alleged fraud a sufficient length of time before the commencement of this action to bar them from prosecuting the same. The plea of the statute of limitations is therefore overruled." This conclusion is sustained by the testimony.

The fourth exception is as follows: "(4) It is respectfully submitted that his honor, Judge Gary, erred in applying to the plea of the statute of limitations in this case the exception that the statute only began to run from the discovery of the fraud, for the reason that said exception in the law applies only to secret frauds, and not to a transaction which was made public at a public sale, and he should have so held." Subdivision 6 of section 112 of the Code, providing what actions may be brought within

six years, is as follows: "Any action for relief on the ground of fraud, in cases which, heretofore, were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud." There is nothing in this provision limiting its application to secret frauds. The cause of action is not to be deemed to have accrued in any case of fraud until the aggrieved party either has knowledge of the fraud, or of such information which, if pursued with due diligence by a man of ordinary prudence, would lead to knowledge of the fraud.

The fifth exception is as follows: "(5) It is respectfully submitted that his honor, Judge Gary, erred in not sustaining the sale, and in not sustaining the plea of the bar of the statute as complete against the plaintiffs in this action, because the facts of the case show that, though they were minors for a long time after the sale, they had knowledge of the facts sufficient to put them upon inquiry, which, if followed up, would have given them full knowledge of facts at the sale; and, that being the case, though they were minors the statute began to run against them, and it was barred before the commencement of this action." This exception is disposed of by what was said in considering the other exceptions. It is the judgment of this court that the judgment of the circuit court be modified by striking E. G. Toole from the record as a party plaintiff, and that in all other respects the judgment of the circuit court be affirmed.

(61 S. C. 23)

STATE ex rel. GWYNN v. CITIZENS' TEL. CO.

(Supreme Court of South Carolina. July 12, 1901.)

MANDAMUS—TELEPHONE COMPANIES—DISCRIMINATION—RETURN.

1. Where a telephone company refuses to supply all in similar circumstances with similar facilities, without discrimination, it may be compelled to do so by mandamus.

2. Mandamus will lie to compel a telephone company to furnish petitioner with telephone facilities, though petitioner has not complied with a previous contract with respondent, whereby he agreed to use respondent's telephone exclusively, the remedy of respondent being in an action for breach of the contract.

3. It is a sufficient return to a writ of mandamus to compel respondent to furnish telephone facilities to petitioner that he has not the means to at once comply with the demand.

Appeal from common pleas circuit court of Spartanburg county; Buchanan, Judge.

Petition by J. B. Gwynn for mandamus against the Citizens' Telephone Company. From an order refusing the writ, petitioner appeals. Reversed.

H. E. De Pass, for appellant. Simpson & Bomar, for respondent.

McIVER, C. J. This was an application addressed to the circuit court, for a writ of mandamus, requiring the respondent to place a telephone in the relator's grocery store and one in his residence, in the city of Spartanburg, and to connect them properly with its exchange and its subscribers, and to do all acts necessary to afford the relator the like service and telephonic communication afforded to its other subscribers. The application was refused by the circuit judge, and the relator appealed to this court on the several grounds set out in the record, which it is not necessary to state here, as it will be sufficient to consider the several questions as stated by counsel for respondent in his argument here, which are presented by this appeal.

As is said by the circuit judge in his decree, "there is practically no dispute as to the facts," which may be stated, substantially, as follows: The relator is now, and has been since the 28th of June, 1898, engaged in the mercantile business, carrying on a retail grocery store in the city of Spartanburg, and occupies a residence in said city; that the respondent, on the 16th day of August, 1898, became a corporation under the laws of this state, for the purpose of owning, constructing, using and maintaining electric telephone lines and exchange within the city of Spartanburg, and as such is now, and was at the time of the commencement of this proceeding, engaged in the said business, having established an exchange in said city, from which connections were made to telephone instruments in offices, places of business, and residences of its subscribers; that the city council of Spartanburg has authorized the respondent to erect poles in the streets of the city for the purpose of transporting news over its wires to its subscribers, having a system of wires throughout the city, connected with telephone instruments furnished by it to its subscribers; that whenever a person desires a telephone it is placed in the office, residence, or place of business of the applicant, at the expense of the respondent, with authority to the subscriber to use the same, upon certain rates and terms, for the purpose of telephonic communication with others; that some time in the year 1899 the respondent placed telephones in relator's residence and grocery store, giving proper connections with respondent's exchange and its subscribers or customers throughout the city of Spartanburg and elsewhere; that this was done under an agreement with the relator that he would use respondent's telephones exclusively, and not the telephone of the Bell Telephone Company, and that certain of respondent's subscribers in the said city of Spartanburg, including most of the grocerymen, were furnished with telephones by the respondent under a similar agreement, but some of respondent's subscribers, including some merchants, physicians, and others, and one grocerymen, whose place of business

was on the same street of said city as the grocery store of relator, were supplied with telephones by respondent under agreements which contained no such stipulation as to the exclusive use of respondent's telephones, and they were using both telephones; that on or about the 6th of February, 1900, the respondent learning that the relator had purchased Holland's market, in which there was a telephone placed there by the Southern Bell Telephone Company, a corporation duly chartered under the laws of this state, and that said market immediately adjoined relator's grocery store, and that relator had cut a door through the wall separating his grocery store from said market, thus opening a means of communication between the two structures, immediately removed, against the protest of the relator, the telephones which the respondent had previously placed in relator's grocery store and residence, for the avowed purpose of preventing the relator from using respondent's telephones while he was using the Bell telephone, respondent claiming that under its agreement with relator he was bound to confine himself to the use of respondent's telephones; that on or about the 8th of February, 1900, the relator tendered to respondent the amount due for the past use of respondent's telephones, which was accepted, and that relator thereupon demanded that respondent place one of its telephones in his grocery store and one in his residence, with proper connections with respondent's exchange and its subscribers, but the respondent refused to comply with such demand unless the relator would agree to use respondent's telephones exclusively, and not use the telephone which had been placed in said market by the Bell Telephone Company.

The respondent, in its answer, alleges "that its supply of telephone instruments is limited, and that it is with difficulty that this respondent can furnish such instruments to all applicants therefor; that, even if the respondent was legally bound to furnish such instruments now, it would be impossible for it to do so within less than sixty days, for the reason of its inability to enlarge its switch board." But as this allegation is not responsive to any allegation contained in relator's petition, and was not sustained by any evidence, so far as the "case" shows, it cannot now be considered. Besides, this court having reached the conclusion, as will presently appear, that the relator is entitled to the mandamus, for which purpose the case will be remanded to the circuit court, with instructions to carry out the views herein announced, that court can, in its order directing the writ of mandamus to be issued, make such provision by giving a reasonable time within which the duty sought to be enforced shall be performed, provided the fact be as alleged in the foregoing quotation from respondent's answer.

We will next proceed to consider the sev-

eral questions of law growing out of the facts above stated, and presented by this appeal. These questions are thus stated in the argument here on the part of the respondent, and we propose to adopt that statement: (1) Is the defendant telephone company in any sense a common carrier? (2) Can the defendant telephone company be required in any case, against its will, to supply one of its instruments to petitioner? (3) Can the defendant telephone company be required by mandamus, under the circumstances of this case, to so furnish its instruments to petitioner?

The first, and as it seems to us the controlling, question in the case, is, we think, conclusively determined by the provisions of section 3 of article 9 of the present constitution, which reads as follows: "All railroad, express, canal and other corporations engaged in the transportation for hire and all telegraph and other corporations engaged in the business of transmitting intelligence for hire, are common carriers in their respective lines of business, and are subject to liability and taxation as such,"—the balance of the section not being pertinent to the present inquiry. Now, if the respondent, Citizens' Telephone Company, is a corporation, and is "engaged in the business of transmitting intelligence for hire," then it is expressly declared by the highest authority to be a common carrier. That it is a corporation is not and cannot be denied, and, as we think, it is equally undeniable that it is "engaged in the business of transmitting intelligence for hire." Indeed, that, so far as appears in this case, is the only business in which it is engaged. The distinction sought to be drawn by counsel for respondent in his argument here, between the mode of transmitting intelligence or a message, as it is usually called, by telegraph and by telephone, is a distinction without a difference, so far as the question with which we are concerned is involved. While it is true that a person desiring to send a message by telegraph to another usually writes out his message and delivers it to the agent of the telegraph company (though we see no reason why it may not be delivered by word of mouth, or over a telephone, as no doubt is frequently the case), and the agent transmits such message, through the agency of instrumentalities provided by the telegraph company, to another agent of such company at its destination, who writes it out, or delivers it by word of mouth or over a telephone to the person for whom such message is intended, whereas a person desiring to send a message by telephone simply goes to the instrument provided for the purpose by the telephone company, calls up the agent of the company at the central office, and expresses his desire to be connected with the person to whom he wishes to speak, which being done by the agent of the company at the central office, the message is delivered directly to the per-

son for whom it is intended, through the instrument and over the wires provided by the telephone company for the purpose, in both instances the intelligence or message is actually transmitted by the use of agencies and instrumentalities furnished either by the telegraph or the telephone company, for which they are entitled to receive proper compensation, and one is just as much engaged in the business of transmitting intelligence for hire as the other. Both are devices by which one person is enabled to communicate with another beyond the reach of the human voice, unaided by some artificial appliance, and, although there are some differences in the mode of transmitting intelligence, yet the end sought and attained by each is substantially the same. Again, it is argued that there is another difference between the telegraph and the telephone which differentiates the former from the latter, and prevents legislative or constitutional provisions expressly applying to the former from being applied to the latter, and that is in the one case the purport of the message or intelligence to be transmitted must be known to the agent of the company, while in the other it need not be. In the first place, this difference does not always exist, as a matter of fact; for in many cases the purport of messages sent by telegraph are just as effectually concealed from the agent of the telegraph company as a message sent by telephone,—in fact, more so; for in the case of a telegram in cipher, which is quite common, the purport of the message is entirely concealed, and is intended to be concealed, from the knowledge of the telegraph operator, and from every one else, except a person holding the key to the cipher, while, on the other hand, messages sent by telephone are not, as matter of fact, always concealed from the knowledge of the agent of the telephone company, nor from third persons who may choose to listen. But, even if such differences did exist, it is difficult to conceive how that would affect the substantial identity of the business in which the two companies are engaged.

Again, it is argued that the framers of the constitution, being, as they were, familiar with the use of the telephone, would, if they had intended to include telephone companies within the provisions of the section of the constitution above quoted, have mentioned such companies by name. This argument is based upon a misconception of the fundamental idea of the constitution, which is that such an instrument is the organic law, and deals with general principles, and does not and should not descend into details. But the conclusive answer to such argument is that the framers of the constitution certainly did not intend to limit its operation to telegraph companies, as otherwise the additional words, "and other corporations engaged in the business of transmitting intelligence for hire," would become wholly

unmeaning and useless. These additional words were manifestly inserted for some purpose, and it is impossible to conceive of any other purpose except to include every other corporation, by whatever name it may be called, and by whatever means it conducts its business, which may be "engaged in the business of transmitting intelligence for hire," and, as we have shown that a telephone company is engaged in that business, telephone companies must be regarded as included within the terms of the constitutional provision.

The reference to section 3 (manifestly a misprint for section 4) of article 8 of the constitution, and to the act of 1898 (22 St. at Large, p. 779), and also act of 1898 (22 St. at Large, p. 780), to support respondent's contention, will next be considered. This constitutional provision simply forbids the general assembly from passing any law "granting the right to construct and operate a street or other railway, telegraph, telephone or electric plant, or to erect water or gas works for public uses, or to lay mains for any purpose, without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes." What possible bearing this provision can have upon the question we are considering, to wit, whether a telephone company can be regarded as, in any sense, a common carrier, it is impossible to conceive. Indeed, if it has any bearing at all, it would seem to be adverse to the contention of respondent; for it seems to recognize the idea that, when a telephone company establishes its plant in a town or city, it devotes its property to public uses, and thus brings it under legislative control. Nor do we see the relevancy of the two acts above referred to. The former forbids telephone companies from making unreasonable discrimination in the rates at which they furnish telephonic service to its patrons, and this necessarily implies that its business is subject to legislative control. The other act simply invests the railroad commission with power to regulate the charges of express companies for transportation and the charges of telegraph companies for the transmission of messages. But until it is shown, as it has not and cannot be shown, that the power to regulate charges by law is a feature essential to the business of a common carrier, the provisions of this act do not even tend to show that a telephone company is not a common carrier. Indeed, as matter of fact, the rates of charges by all classes of common carriers—for example, steamboat companies—are not regulated by law.

But, even if there were no constitutional provision and no legislation upon the subject, we are of opinion that this question is settled by the principles of the common law, which, being elastic in their nature, may be applied to subjects and conditions which have

but recently become known and used in the business of the country. In this state we have no case, so far as we are informed, upon the question whether a telephone company is, in any sense, a common carrier, and we have only two cases relating to the somewhat analogous question as to whether a telegraph company is a common carrier, viz. *Aiken v. Telegraph Co.*, 5 S. C. 358, and *Pinckney v. Telegraph Co.*, 19 S. C. 71, 45 Am. Rep. 785; but neither of these cases decides that a telegraph company is in no sense a common carrier, though the contrary seems to be supposed (erroneously, as we think) by some. Both of these actions were brought to recover damages for errors in the transmission of messages sent over the lines of the telegraph company occasioned by the alleged negligence of the defendant companies. In neither of these cases was the question made or decided as to whether a telegraph company was a common carrier. On the contrary, in the *Aiken Case*, Willard, J., in delivering the opinion of the court, uses language implying that a telegraph company is a common carrier; for on page 370 he says: "It is a contract with one exercising a public employment under express statute powers created for that purpose. The nature of the occupation of that class of persons, and the tender of their services to the community, make them common agents for the transmission of messages, for all persons who may desire and pay for such services, to any person, either as the final receiver of such message, or as a means or agent for its further transmission. The object of the contract is to modify and limit the contract which, by operation of law, would arise between the common carrier of messages and any person employing such carrier, in the absence of any stipulation of terms between them. The foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit." It is true that on the next page the learned justice does say: "The regulation of the defendants in conformity with which the terms of the contract limiting their liability was made was a reasonable regulation, and such as the defendants were authorized to make. In examining the proposition just stated, it must be borne in mind that the analogy between common carriers of goods and common carriers of messages is not perfect. The nature of the services performed differs materially in the two cases, and the real responsibility differs in a corresponding manner." That case, therefore, as we understand it, simply decides that where a telegraph company agrees to send a night message, which it is not bound to send under certain stipulations as to its liability in case of errors in the transmission of such message, such stipulations are reasonable, and

may be enforced; but the case throughout recognizes the doctrine that a telegraph company is a common carrier; though the analogy between common carriers of goods and common carriers of messages is not perfect, owing to the fact that the nature of the services rendered differs materially in the two cases, and hence the measure of responsibility for any default in rendering the services must likewise differ. So, in the Pinckney Case, supra, the court, while not undertaking to decide whether a telegraph company could in any sense be regarded as a common carrier, as no such question was presented in that case, simply decided that a telegraph company was not held to the stringent rule of the common law whereby common carriers of goods were held liable for all such losses and damages as they could not show resulted from the act of God or the public enemy, but were only liable for all such losses and damages as they could not show were not due to the fraud or negligence of their agents or servants; and the reason for such a limitation of the rule was found in the peculiar nature of the business in which a telegraph company is engaged, differing in material respects from that of common carriers of goods. While it is true that the late Chief Justice Simpson, in delivering the opinion of the court, does use some expressions which may possibly seem to indicate that he thought a telegraph company was not a common carrier, yet that was not a question in the case, and therefore such expressions, even if amounting to what is claimed for them, are not authoritative; for, as the learned chief justice himself says on page 82, there is but a single question in the case, and he thus states that question: "The question to be considered, therefore, is whether telegraph companies are liable for all mistakes made in the transmission of messages except such as occur from any act of God or irresistible force, the onus of showing which is upon them."

In other jurisdictions, however, the question has been made and distinctly decided. Among the various cases which we have consulted we cite, first, the case of *State v. Nebraska Telephone Co.*, 17 Neb. 126, 22 N. W. 237, reported also in 52 Am. Rep. 404. In that case the facts were in substance very similar to the facts in the case which we are now called upon to decide, and it was there held that a telephone company cannot arbitrarily or capriciously refuse its facilities to any person desiring them and offering compliance with its reasonable regulations, and that mandamus will issue to compel the company to do its duty. The facts of that case were substantially as follows: The relator made an arrangement with the defendant company to place an instrument in his office, but for some reason failed to furnish the relator with a directory or list of its subscribers with their numbers, which relator claimed was essential

to the profitable use of the telephone, and which it was the custom of the company to furnish to its subscribers. After a time such list was furnished to the relator by the company, but when called upon by the company to pay for the use of the telephone in his office the relator refused to pay for the use of the telephone during the time the company was in default in furnishing the directory or list of subscribers. Thereupon the defendant company removed the telephone from the office of the relator. Subsequently the relator applied to the company to become a subscriber and to have an instrument placed in his office, which the company refused to do, whereupon the relator applied for a writ of mandamus to compel the company to comply with his demand. In that case the court proceeded upon the fundamental doctrine that when a person or company, especially one who is exercising its franchises under its charter, devotes its property to a public use by undertaking to supply a demand which "is affected with a public interest," it must supply all alike, who are alike situated, and cannot discriminate in favor of or against any one. In the course of the opinion the court uses the following language: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great part of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

So, in *Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co.*, 66 Md. 399, 7 Atl. 809, reported also in 59 Am. Rep. 167, Alvey, C. J., in delivering the opinion of the court, uses this language: "The appellant [the telephone company] is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. * * * The telegraph and telephone are important instruments of commerce, and their services as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and, while offering [themselves as] ready to serve some,

refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations."

Again, in *State v. Telephone Co.* (C. C.) 23 Fed. 539 (decided in 1885), Judge Brewer, now one of the associate justices of the supreme court of the United States, after laying down the general principle that where a corporation, deriving its franchises from its charter, devotes its property to public uses, its property is put into the channel of commerce, and thereby becomes subject to the control of the law regulating such commerce, uses this language: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case seems to have been carried by writ of error to the supreme court of the United States, but was never considered by that court, for in 127 U. S. 780, we find this simple statement: "Dismissed with costs, on the authority of the plaintiff in error. April 18, 1888." In 25 Am. & Eng. Enc. Law, at page 750, we find the following: "Telephone companies, like telegraph companies, are to some extent common carriers, and are bound to afford equal facilities to all. They can be compelled by mandamus to furnish facilities to one offering to comply with their regulations, even though such a party is a rival company." To same effect, see page 775 of same volume, and on page 776 it is said: "In many of the states statutes exist which provide for the enforcement of these obligations, but it seems that the rule would be the same whether the obligation was declared by statute or considered as arising from the common law;" for, as was said in *State v. Nebraska Telephone Co.*, supra, in commenting on *State v. Bell Telephone Co.*, 36 Ohio St. 290, 38 Am. Rep. 583, where there was a statute upon the subject: "So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty), they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute, and the same is true of the clause of the act making its provisions applicable to telephones." Again, it is said in the same case: "Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that, where a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike who are like situated, and not discriminate in favor of nor against any." It is true that, in the more recent edition of the *Encyclopædia* above referred to, the rule is stated in a more modified form (see 6 Am. & Eng. Enc. Law [2d Ed.], at page 261), where the following language is used: "It was at

one time attempted to class telegraph companies as common carriers, but the view universally adopted now is that they can in no sense be regarded as common carriers. *They are like common carriers in that they are bound to serve impartially all those applying to them, but they are liable for improper transmission of messages only upon proof of negligence.*" So that it is apparent, from the language which we have italicized in the foregoing quotation, that the rule, even when stated in its modified form, supports the contention of the relator, assuming, as we are authorized to do by the authorities, that the rule applicable to telegraph companies is also applicable to telephone companies, at least so far as the obligation to serve all alike who apply for the use of the facilities which it offers to the public for the transmission of news is concerned.

We are satisfied, therefore, that while a telephone company may not be, in every sense of the term, a common carrier of goods, and as such subject to the same stringent rules which govern in ascertaining the liability of such carriers, yet, in one sense at least, it is a common carrier of news, and as such bound to supply all alike, who are in like circumstances, with similar facilities, under reasonable limitations, for the transmission of news, without any discrimination whatsoever in favor of nor against any one; and this is so under the well-settled principles of the common law, without the aid of any constitutional or statutory provision imposing such an obligation. The answer to the second question, under what has already been said, must necessarily be in the affirmative.

To dispose of the third question, it will be necessary to recur somewhat to "the circumstances of this case." The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become at least a quasi common carrier of news, and as such was under an obligation to serve all alike who applied to it, within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal—that the relator refused to agree that he would use respondent's telephone system exclusively—was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the re-

spondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper unless such shipper would agree to patronize its line exclusively, and not give any of its business to any competing railway line. Nor does the fact (if fact it be) that the relator had committed a breach of its previous contract with respondent when he purchased Holland's market, in which an instrument of the Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of its previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one.

As to the other reason suggested why the mandamus prayed for should not issue under the circumstances of this case, to wit, that respondent did not have the means to comply with the demand of the relator within less than 60 days, it is only necessary to repeat what we have said above, that there does not appear to be any evidence in the "case" to sustain the fact upon which this suggestion is based, and therefore it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the circuit court, which can, in ordering the mandamus to issue, as herein directed, make suitable provision for allowing respondent reasonable time, if such shall be shown to be necessary, to comply with relator's demand.

As to the position taken in the argument, that mandamus is not the proper remedy, we think it entirely clear, both upon principle and authority, that mandamus is the appropriate remedy in a case of this kind. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court, with instructions to carry out the views herein announced.

(61 S. C. 75)

KERSHAW COUNTY v. RICHLAND COUNTY.

(Supreme Court of South Carolina. July 12, 1901.)

CRIMINAL LAW—COSTS—CHANGE OF VENUE.

There is no statute providing for payment by a county in which a crime is committed of the costs of the trial for such crime in another county to which venue has been changed.

Appeal from common pleas circuit court of Richland county; Townsend, Judge.

Claim by Kershaw county against Richland county for costs and expenses of murder trial. From decree of circuit court reversing order of board of commissioners of Richland county disallowing the claim, Richland county appeals. Reversed.

Melton & Belser, for appellant. C. L. Winkler and John P. Thomas, Jr., for respondent.

POPE, J. The statement in the case for appeal is as follows: On the 3d day of April, 1899, a bill of indictment was found by the grand jury for Richland county, S. C., charging W. R. Crawford with the murder of one Mrs. Stewart, alleged to have been committed in the said county of Richland. Subsequently, on motion of the defendant, Crawford, an order was obtained changing the venue from Richland county to Kershaw county, and the case so removed was tried thereafter at the June term of the court of general sessions for said Kershaw county. On the 9th day of June, 1899, the following itemized statement, duly verified, of the fees, costs, and expenses of the trial,—all of which accrued subsequently to the order changing the venue as aforesaid,—was presented to the county board of commissioners of Richland county for approval: "12 jurors, 3 days, \$54.00; 5 constables, 3 days, \$22.50; 2 constables, 2 nights, \$6.00; 1 porter, 3 days, \$4.50; 1 porter, 2 nights, \$3.00; 1 ticket boy, 1 day, \$1.50,—\$91.50; 72 meals for jury and constables, at 25c. each, \$18.00; total, \$109.70,"—which account was duly certified by Joel Hough, Esq., as clerk of court for Kershaw county. And the following language is used in the case for appeal: "The county board of commissioners for Richland county disallowed the whole of said claim on the ground that the same did not constitute a legal claim against said Richland county, but made no objection to the proof of said claim." Thereupon Kershaw county appealed from said disallowance by the said county board of commissioners for Richland county to the circuit court for Richland county, which appeal came on to be heard before his honor, Judge Townsend, who reversed the order of disallowance by the county board of commissioners for Richland county; whereupon the said board appealed to this court from Judge Townsend's judgment on the following grounds: "(1) Because his honor erred in finding, as matter of fact, that the correct-

ness of the items making up the claim of Kershaw county herein was conceded upon the hearing of this cause. (2) Because his honor erred in finding, as matter of law, that the claim of Kershaw county herein constitutes a legal and valid claim against Richland county, and that the county board of commissioners for Richland county erred in declining to allow and pay the same; whereas, it appearing that all of the items of said claim accrued after the order changing the venue from Richland county to Kershaw county, and during the trial of the cause so transferred, in said Kershaw county, his honor should have held that the same do not constitute a legal and valid claim against said Richland county, and, so holding, should have dismissed the appeal. (3) Because his honor erred in ordering and decreeing that the county board of commissioners for Richland county do audit the whole of said claim and order the same to be paid as a valid and legal claim against Richland county; whereas, it appearing that Kershaw county had not paid the items representing fees of witnesses, aggregating \$688.40, and clerk's costs, aggregating \$8.65, and had made no claim therefor, and that no appeal had been taken from the action of the county board of commissioners for Richland county in declining to allow and pay said items, the same were not involved at the hearing, and his honor was without jurisdiction to render judgment with reference thereto."

It was argued by counsel that the decree of the circuit judge should be altered by striking out the figures "\$796.55" therefrom, and by inserting the figures "\$109.70" in lieu thereof.

We will now consider the first ground of appeal. It is true, as stated by the appellant, that the correctness of the items making up the claim of \$109.70 was not presented as an issue to be passed upon by the circuit judge; hence this ground of appeal is sustained.

The question raised by the second ground of appeal is for the first time presented to this court for determination. In the case of Colleton Co. v. Hampton Co., 52 S. C. 589, 80 S. E. 484, no such question was presented, considered, or determined,—indeed, it was reserved; hence it is no authority in this contention. This is a case of costs, fees, and expenses arising from the trial of a cause in the circuit court. It is admitted that the common law allowed no such claims to be made. It is purely a question, therefore, under the statutes of this state. 8 Enc. Pl. & Prac. 955; Whittle v. Saluda Co., 56 S. C. 506, 35 S. E. 203; Green v. Anderson Co., 56 S. C. 411, 34 S. E. 691; Hightower v. Bamberg Co., 54 S. C. 538, 32 S. E. 576. Costs are regarded in this state in the nature of penalties. State v. Orangeburg Co. Treasurer, 10 S. C. 43; Lancaster v. Barnwell Co., 40 S. C. 445, 19 S. E. 74; Thompson v. Farr, 1 Rich. Law, 4. Is there any statute in this state di-

recting, in so many words, that the county from which a case is removed for trial to a different county shall pay to such latter county the costs or fees or expenses which accrue from the trial of such removed case? We have been unable to find any such statute, and the industry of counsel on each side to this controversy has not brought such a statute to our attention. Two reasons are suggested by the respondents why Richland county should pay these costs, fees, and expenses to Kershaw county: First, because, strictly speaking, it is no longer a question of costs, fees, and expenses, for as such they were presented to, and paid by, the county of Kershaw, but it is a question of liability for a burden borne by Kershaw county for, and instead of, Richland county. Reference is made in respondent's argument to the power confided in the county board of commissioners, both by the constitution of 1895 and the statutes of the state providing for a county government, to pay claims against the respective counties of the state. As wide as the latitude accorded under these instruments to the exercise of power in the county governments in the payment of claims may be, still the statute law has so wisely limited such county governments in the exercise of such power that only legal claims can be paid by them. There can be no claim based upon any supposed equity. Equity follows the law. There has never been cited a claim as to costs, fees, and expenses which has been paid as resulting from equity. 7 Am. & Eng. Enc. Law (2d Ed.) p. 955, is as follows: "Costs are not given in criminal cases by the common law, and county commissioners have no authority to pay them except in specific circumstances prescribed by statute." And on page 956 the same work contains these words: "Statutes exist in many states providing that the costs accruing from a change of venue in a criminal case shall be paid by the county in which the indictment was found. *And it seems to be settled that the county in which a crime was committed can be held liable to the county to which the cause was removed for trial only by virtue of some statute.*" (Italics ours.) The circuit judge was in error.

The third ground of appeal was passed upon in our preliminary remarks. The circuit judge was in error here also, but it has been corrected by consent.

Lastly, we observe that we have not paid any attention to the items comprising the costs, fees, and expenses herein involved, because we have already determined that no costs, fees, or expenses could be recovered by the plaintiff in this cause from Richland county. It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be recommitted to the circuit court, with instructions to formulate a judgment dismissing the plaintiff's appeal from the judgment of the county board of commissioners for Richland county.

(60 S. C. 532)

DUNCAN et al. v. CITY OF CHARLESTON
et al.

PEIPER v. SAME.

(Supreme Court of South Carolina. June 20,
1901.)MUNICIPAL CORPORATIONS — BONDED DEBT —
UNLAWFUL INCREASE — SUBMISSION TO
ELECTORS — CONSTITUTIONAL LAW — CON-
TRACTS.

1. Const. art. 8, § 7, forbids any town to incur any bonded indebtedness exceeding 8 per cent. of the value of the taxable property therein, and provides that no such debt shall be created without submission to the voters. Article 10, § 5, forbids the increase of the bonded indebtedness of the city if at the time of such proposed increase the aggregate bonded debt amounts to 8 per cent. of the value of all taxable property therein. A city having a bonded indebtedness of more than 8 per cent. of its taxable property contracted under seal to pay a certain sum each year out of its current receipts for a number of years for the purpose of supplying the city with light and water. *Held*, that such contract was void, as in violation of such constitutional provisions.

2. 23 St. at Large, pp. 51, 52, authorizing cities to purchase or contract for waterworks, and to issue certificates of indebtedness, to be paid out of current taxes for future years, is unconstitutional, as violating Const. art. 8, § 7, prohibiting an increase of bonded indebtedness where the question of such indebtedness has not been submitted to the electors.

3. Where some of the members of a city council are stockholders of a corporation, the council cannot contract with such corporation for its benefit.

Suits by John Duncan and Catherine Mansfield and by John F. Peiper against the city council of Charleston and the Charleston Light & Water Company for an injunction. Decree granted.

A. M. Lee, for petitioners Duncan and Mansfield. R. W. Shand and John P. Thomas, Jr., for petitioner Peiper. Geo. S. Legare, for respondent city council of Charleston. W. C. Miller, for respondent Charleston Light & Water Co.

POPE, J. These actions, in the original jurisdiction of this court, have for their common object the perpetual injunction by this court of the city council of Charleston from entering into the contract with the Charleston Light & Water Company in regard to the latter furnishing to the former a water supply from the stream known as "Goose Creek," at a distance of about 16 miles from the city of Charleston, and at a point situate in Berkeley county. By the order passed by this court on the 3d day of June, 1901, the two actions were blended and ordered to be heard together. The plaintiffs in each action are citizens and taxpayers of the city of Charleston, and have a status in this court, under the present constitution of the state and the laws passed by the general assembly of this state, to enforce such constitutional right, always provided they can show themselves entitled to the extraordinary writ of a perpetual injunction to restrain the inva-

sion of their rights by the defendants, respondents. The defendants are corporations under the laws of this state, and may sue and be sued in all of our courts under their respective corporate names.

It is alleged in the pleadings that the city council of Charleston is about to execute a contract under its corporate seal to and with the Charleston Light & Water Company, whereby it binds the city of Charleston for the period of 50 years to allow the said light and water company to lay its pipes and mains in and under its streets, alleys, and ways, so that it may furnish water for public and private use and purposes for the said period of 50 years next ensuing, upon the execution of said contract by the said two parties defendant, and that as a compensation therefor the city council of Charleston will pay to said Charleston Light & Water Company \$42,000 for each and every year embraced in the said period of 50 years, and will further allow said Charleston Light & Water Company to collect from its citizens the sums of money laid down in a schedule of prices for the use of water by its citizens; and all these concessions are bottomed upon the expenditure by the said Charleston Light & Water Company of large sums of money from its own treasury, to wit, \$100,000, and of about \$1,500,000 to be realized from the sale of its coupon bonds, at 95 per cent. of the par value of said bonds; said bonds to mature in 50 years, to bear interest at 5 per cent. per annum, and to be secured in their payment by a mortgage of all the property, immediate or prospective, of said Charleston Light & Water Company. An option is provided in said contract for the purchase by the city of Charleston of all the property of said Charleston Light & Water Company, whenever said city shall be clothed by law with the power to make such purchase on terms which are embodied in said contract. It is alleged that for a favorable consideration the American Pipe Manufacturing Company has been induced to lend a helping hand to this enterprise, and carefully prepared specifications for the system of waterworks as contemplated in the contract by the Charleston Light & Water Company with the city of Charleston are attached to the said contract. It is also sought by the petitioners or plaintiffs to enjoin the issue of any bonds by the said Charleston Light & Water Company in furtherance of the alleged contract between it and the city council of Charleston. We need not pause to enlarge upon the right of these petitioners to invoke the aid of this court in its original jurisdiction to prevent the alleged invasion of their rights as taxpayers of the city of Charleston by the alleged contract between the respondents. To better understand this contention, we deem it proper to insert the alleged contract. It is as follows:

"This agreement, made and entered into this — day of —, A. D. 1901, by and

between the Charleston Light and Water Company, a corporation duly authorized by and under the laws of the state of South Carolina, party of the first part, and the city council of Charleston, of the said state, party of the second part, witnesseth:

"I. First. In consideration of the promises and covenants of the party of the second part, hereinafter set forth, the party of the first part hereby covenants and agrees: (1) That it will build and equip, or cause to be built and equipped, in a thorough and workmanlike manner, and in accordance with the plans and specifications prepared by the American Pipe Manufacturing Company of Philadelphia, Penn., and identified by the signature of the parties hereto, a copy of which specification is hereto annexed, a system of waterworks, complete, of the capacity hereinafter guaranteed; the said system contemplating the purchase of the plant of the present waterworks company, and the use of the same so far as it may be available; the taking of water from a point on Goose creek, in the county of Berkeley, in the state aforesaid; the filtration of said water, and the conveyance to and the distribution throughout the city of Charleston, by means of suitable pipes and mains, of the said water when so filtered; it being understood and agreed, however, that the party of the first part shall have the right to substitute a 24" main for the 30" provided for in said specifications, and that, with the consent of the board of water commissioners, hereinafter appointed, said plans and specifications may be otherwise modified or altered by the party of the first part: provided, the said modifications and alterations shall not be such as to impair the efficiency or capacity of the plant contemplated in said plans and specifications. (2) The work of constructing said plant shall begin within thirty days from the date of these presents, and said plant shall be fully and finally completed and ready for use and operation within twelve months of the date hereof: provided, however, that if the party of the first part shall be prevented from beginning or prosecuting and completing the said work within the time herein agreed upon by reason of the act of God, the public enemy, by strikes, by injunction, or other legal proceedings, by municipal, state, or national interference, or by failure of the party of the second part to comply with its part of the contract, the time during which the said party may be so delayed or prevented from beginning, prosecuting, or completing said work shall be added to the said period of thirty days or twelve months, as the case may be, hereinbefore fixed for the beginning and the completion of the said plant. (3) The said system of waterworks to be built as aforesaid in accordance with said plans and specifications, and of such detailed plans and specifications as shall from time to time be furnished by the party of the first part, shall be constructed, equip-

ped, and completed according to the plans and specifications, and the board of water commissioners of the city of Charleston, hereinafter appointed, shall at all times have the right of inspecting, for the purpose of determining whether said plant has been so constructed, and of ascertaining the progress of the said work, and the quantity and quality of the work completed, from time to time: provided, that the said board of water commissioners shall not in any way impede the construction of the aforesaid works; and it is agreed that, in case of any dispute arising relative to the said works, the same shall be settled by arbitration, the party of the first part appointing one arbitrator, the party of the second part one arbitrator, and the two arbitrators thus appointed appointing a third; the decision of the majority of said arbitrators to be final and binding. (4) In the construction of the said plant the party of the first part shall exercise the greatest care and diligence in the use of the streets, alleys, and public places of the city of Charleston, and shall cause no unnecessary stoppage or interruption of the public travel over or upon the same, nor any unnecessary injury to or interference with any pipes or sewers which may now be lawfully located beneath the surface thereof, and will promptly repair any injury which may be occasioned thereto. It will cause all excavations and obstructions to be properly lighted and guarded at night, and when necessary it shall station watchmen to guard the same; and after the completion of the work it shall restore all roads, highways, streets, alleys, and other public places, as nearly as practicable, to their former condition, without unnecessary delay. It shall further take every precaution to provide against danger to life and limb or property happening in the construction of the said plant. And the said party of the first part hereby agrees to hold the party of the second part harmless from any liability which may result to it by means of any violation of this section. (5) The party of the first part, for itself and its successors, covenants, promises, agrees, and guarantees to and with the party of the second part, its successors and assigns, that the supply of water at the point of intake on Goose creek shall not be less than a continuous available supply of 5,000,000 gallons of water per twenty-four hours at all seasons, and that if, at any time during the next two years after the completion of the works the said supply of water shall fall below the amount so guaranteed, the party of the first part will establish such auxiliary system as shall bring the supply of water up to the said guaranty of a continuous available supply of 5,000,000 of gallons per twenty-four hours. And it further covenants, promises, and agrees and guarantees that the system of works to be constructed by the party of the first part shall be capable of delivering and shall deliver within the limits of the city of Charles-

ton not less than 5,000,000 gallons of water per twenty-four hours, at all seasons, and that the water, after filtration, shall be, when delivered, good, potable water, and suitable for domestic, laundry, and manufacturing purposes. (6) Upon the completion of the said plant the party of the first part shall notify the said board of water commissioners, and shall submit the said work for the inspection and approval of the said board, and, with a view of determining whether the said work has been completed in accordance with the provisions of this contract, the said work shall be submitted to the tests hereinbefore agreed upon; and it is covenanted and agreed between the parties that in case of any dispute with reference to the said work, or any part thereof, that such dispute shall be submitted to and decided by arbitration in the manner hereinbefore provided. It is agreed that the tests before mentioned shall be as follows, viz.: Each of the main pumping engines shall have a capacity of 5,000,000 gallons per twenty-four hours, under a test working pressure of 100 pounds per square inch. The duty of each pumping engine shall be not less than 75,000,000 foot pounds per 1,000 pounds of dry steam; the boiler pressure to be not less than 125 pounds per square inch while the said duty test is being made. The slip of the pumps is guaranteed to be not greater than three per cent. For the purpose of duty test, the party of the first part shall have the right to waste the water near the pumping station, and the said duty test shall be made independently of said other tests. The pumps shall work smoothly, and be free from pound, undue noise, or heating of the bearings. The pumping main to the city shall be subjected to hydrostatic test of 100 pounds per square inch, and, should any defects develop, they shall be immediately repaired. To test the capacity of the works the party of the first part agrees to operate the same for two months, and furnish to the water distribution station 5,000,000 gallons per twenty-four hours, while the pressure at King and John streets, in said city, is maintained at sixty pounds per square inch. The party of the second part shall furnish means for disposing of said water, and the measurement of the quantity shall be made by the displacement of the pumps. If, however, the party of the second part wishes to measure the quantity of water at the city, it shall be empowered to use a meter, weir, or other accurate means of measuring said water: provided, any water delivered to consumers or industries, or for any other purpose, outside of the city limits, shall be added to the quantity measured within said city, to bring the total up to 5,000,000 gallons per twenty-four hours. If necessary, a test shall be made to determine the amount of leakage in the mains laid between the said pumping station and the city limits, and any leakage or defects found in said mains or any other pipes

laid by the party of the first part, or any of the mains in the old system, shall be repaired by the party of the first part. The water, after filtration, shall show a removal of at least eighty-five per cent. of the matter held in suspension, eighty-five per cent. of the color by the platinum cobalt standard, and eighty-five per cent. of the albuminoid ammonia held in suspension. The number of bacteria per cubic centimeter in the filtered water after forty-eight hours incubation shall not exceed 200. The hardness of the water by the soap test shall not be greater than forty parts per 1,000,000, and the filtered water shall be free from objectionable odor and taste. Chlorine not to exceed ten parts per 1,000,000.

"Second. The party of the first part further covenants and agrees: (1) That the party of the first part shall cause to be kept accurate accounts of all work done, machinery and material furnished, and labor employed, during each and every month in connection with the execution of this contract, which accounts shall at all times be subject to the examination of the party of the second part; and the party of the first part further agrees to submit monthly to the board of water commissioners aforesaid, on or before the tenth day of each month, an approximate estimate of the work done, machinery and materials furnished and delivered on the ground, and labor employed during the preceding calendar month; and the said board of water commissioners shall pass upon the said approximate estimates, and, when approved by them, they shall authorize the party of the first part to order the mortgage trustee, hereinafter nominated, to issue the bonds of the party of the first part in payment for said work. And, before the final payment for the said work is made, the party of the first part will submit to the said board of water commissioners accurate accounts of all work done, machinery and materials furnished, and labor employed upon the said work, and said final payment will be made after said board of water commissioners shall have had the opportunity of examining said accounts and approving the same: provided, that such examination shall be made within thirty days after said accounts shall have been submitted as aforesaid, and within thirty days after said plant shall have been completed and accepted. (2) That for the costs and expenses of constructing said works, including therein interest on money borrowed, and on bonds issued up to the final completion of said works, the cost of printing and engraving, of revenue stamps, trustee's fees, fees of engineers and inspectors, legal expenses, and all other costs, charges, and expenses which have been borne by the party of the first part to the date of this contract as preliminary to the execution thereof, and which may be hereafter borne by the party of the first part in performance of said contract, and in the con-

struction and completion of the said works to be built thereunder, the said party of the first part shall employ its capital of \$100,000, and shall issue bonds of the character hereinafter described: provided, however, that said bonds shall not be sold for less than ninety-five per cent. of their face value, and that the entire amount of the bonds issued shall not, at ninety-five per cent of their face value, exceed the actual bona fide cost of the construction and expense as above defined, after the application to such construction of the said capital of \$100,000: and provided, further, that the entire issue of bonds at their face value shall not exceed the sum of \$1,325,000 in the event of the use of a 30" main or \$1,225,000 if a 24" main is substituted for the said 30" main, except as hereinafter provided. (3) That the bonds to be issued as aforesaid shall be first mortgage gold bonds, in the denomination of \$1,000, payable fifty years after date, and bearing interest at the rate of five per cent. per annum, payable semiannually; and said bonds, both principal and interest, shall be payable at the office of the trustee, but the coupons may be payable at Charleston, S. C.: provided, however, that any or all of the said bonds may be retired at any time upon three months' notice to that effect, printed weekly in a daily paper published in each of the cities of Philadelphia and Charleston, upon the payment within three years from the date of said bonds of 102½ per cent. of the par value thereof, with accrued interest, and after the expiration of three years, and within five years from the date of said bonds, of 105½ per cent. of the par value thereof, with accrued interest, and after the expiration of five years, of 110 per cent. of the par value thereof, with accrued interest, or the deposit of the said amount with the mortgage trustee hereinafter nominated, or its successors; and upon such deposit the said bonds thus proposed to be purchased shall forthwith cease to bear interest, and each of the bonds issued as aforesaid shall bear the foregoing provision upon its face. Each and every bond so issued shall bear a certificate, signed by the board of water commissioners aforesaid, that said bond is one of the bonds herein provided for, and shall be issued only in payment of a portion of the cost of the said works, and the expense above defined, and said certificate shall also contain a summary of the provisions of this contract. The bonds so executed by the party of the first part, and so certified by the board of water commissioners, shall be placed in the hands of the mortgage trustee hereinafter provided for, and by said trustee shall be issued upon the order of the party of the first part, accompanied by the authorization of the said board of water commissioners to the party of the first part monthly as the work progresses: provided, however, that at no time shall said bonds, at ninety-five per cent. of their face value, be issued in excess of the

cost of the work completed and the material and machinery furnished and property acquired at such times, less the sum of \$100,000; and the monthly certificates of the said board of water commissioners shall be the evidence of such costs, and the authority to the trustee to make deliveries of such bonds to the party of the first part or its assigns. (4) That as security for the payment of said bonds issued by the party of the first part, and certified by the said board of water commissioners, as hereinbefore and hereinafter provided, and for no other bonds or obligations of any kind, the said party of the first part will execute to the Girard Trust Company of Philadelphia, Penn., a mortgage deed covering all of its franchises and property, both present and to be acquired.

"Third. That for and in consideration of the rights, powers, and privileges hereinafter granted to the said party of the first part, its successors and assigns, by the party of the second part, the said party of the first part has given and granted, and by these presents does give and grant, unto the party of the second part and its successors, the right, power, and privilege of purchasing, all and singular, the plant and property of the party of the first part, including all real and personal property, choses in action, and all cash on hand, at any time before or after the completion of the said plant, and within the period of fifty years from the date hereof, for a sum equal to the proposed capital stock of the said Charleston Light and Water Company, viz. \$100,000, and interest thereon from the dates when the capital stock shall be paid into the treasury of the said company, at the rate of ten per cent. per annum, less any dividends which may be paid by the said company to its stockholders prior to such purchase, and upon the payment of said sum to execute and deliver to the party of the second part such deed or deeds as shall be necessary to convey and vest in said party the absolute ownership of, all and singular, the said property, real and personal, choses in action, and all cash on hand, subject only to the lien of the mortgage to be executed by the party of the first part as herein provided: and provided, further, that if the party of the second part shall elect at any time to purchase the said plant, and shall submit the question of such purchase to the electors of the city of Charleston, then and in that case, there shall likewise be at the same time an election of three citizens, to be known as 'commissioners of public works,' who shall hold office under all the terms and provisions of an act entitled 'An act to authorize all cities and towns to build, equip and operate a system of water works and electric lights, and to issue bonds to meet the cost of same,' approved March, 1896, and all acts amendatory thereof; and, so soon as the board of public works shall be elected and organized, all the powers and duties herein and hereafter devolved upon the said board

of water commissioners shall at once devolve upon the said board of public works, and said board of water commissioners shall cease to exist.

"Fourth. And the party of the first part, for itself, its successors and assigns, further covenants and agrees to and with the party of the second part and its successors, as follows: (1) That unless and until the party of the second part shall purchase the said property under the option hereinbefore given, and receive the said plant from the party of the first part, its successors or assigns, then and in that case the said party of the first part, its successors and assigns, will, for and during the full unexpired period of fifty years from the date of the completion and operation of said plant, maintain in good order and repair, and conduct and operate the said works in such manner as to be able fully to keep and perform the covenants, agreements, and guaranties of the said party, and to fully and efficiently supply the quantities of water herein agreed to be furnished to the city of Charleston, and to the party of the second part, of the character herein guaranteed. (2) That during the period aforesaid the party of the first part shall keep set and connected to the system of mains to be constructed as aforesaid not less than 550 fire hydrants, which shall be located as directed by the party of the second part, and shall keep the said hydrants fully supplied with water to the extent provided in the plans and specifications; and the party of the second part shall have the right to use the water from any or all of the said hydrants for building and repairing roadways, for the extinguishment of fires, and for the necessary fire practice, but for no other purpose; and in no case, except for the extinguishment of fires, shall a hydrant be opened without first notifying and obtaining the permission of the officers of the water company; nor shall more than two hydrants be opened at any one time; and longer than ten minutes in any one week, for the purpose of fire practice. In addition to the water supply through fire hydrants as aforesaid, the party of the first part will furnish to the party of the second part a maximum quantity of 300,000 gallons of water per day for sanitary and other purposes; the said water to be furnished not through fire hydrants, but through separate connections, with water meters attached thereto. (3) At no time before the expiration of the said period of fifty years from the date of the completion and operation of the said plant shall the party of the first part, its successors or assigns, charge consumers any rate or rates exceeding the following, which may be made payable quarterly in advance. But they may at any time insert a meter into the service pipe of any consumer and supply him at meter rates, provided the meter rates shall not exceed the rates fixed in the following schedule; and any consumer shall have the right to set in an accurate meter,

and pay the rent indicated by such meter, provided the amount used by the meter shall exceed twelve dollars per annum. The maximum rates per annum above referred to shall be as follows. * * *

"Fifth. And it is understood and agreed between the parties hereto that the party of the first part will purchase the property of the present water company, if the same can be obtained at a cost not exceeding \$350,000, and that such purchase is to be construed as a part of the cost of the plant to be constructed under this agreement.

"II. First. (1) And the party of the second part, for and in consideration of the promises, covenants, agreements, and guaranties of the party of the first part herein contained, hereby gives, grants, and ordains to the party of the first part, its successors and assigns, the right and privilege to construct a system of waterworks within the limits of the city of Charleston, as they now exist or may be hereafter extended, and for a period commencing at the date of the completion and operation of the said work, and ending at the expiration of fifty years from the date of such completion and operation, the right and privilege to maintain and operate said works for the purpose of supplying said city and its inhabitants with water for private and public use for the purposes aforesaid; and during the period aforesaid, and for the consideration and upon the conditions above referred to, it hereby gives, grants, and ordains to the said party of the first part, its successors and assigns, the right to use the streets, alleys, sidewalks, and public grounds, and the rivers, streams, and bridges, within the present or future corporate limits, for placing, replacing, repairing, maintaining, and operating mains, pipes, hydrants, and all other structures and devices requisite for the service of water from time to time during the period aforesaid, and in the manner contemplated by this contract: provided, however, that upon the purchase by the party of the second part of the plant and property of the party of the first part under the option given to said party of the second part as aforesaid, and upon the retirement and cancellation of the bonds of the party of the first part at the time of such purchase, all the said rights, powers, and privileges herein granted to the party of the first part shall be thereupon finally terminated and ended: and provided, further, that nothing herein contained shall be construed to prevent the party of the first part from granting, or any person or corporation from exercising, the right to maintain and operate any existing water plant, and to supply the city of Charleston and its inhabitants with water therefrom, until the full and final completion of the works hereinbefore agreed upon, and the acceptance thereof by the board of water commissioners. (2) That during the performance of the covenants, agreements, and guaranties by the party of the first part, here-

in set forth, upon the part of the said party to be kept and performed, and unless and until the party of the second part shall, under the option hereinbefore given said party, purchase the said plant from the party of the first part, its successors or assigns, and retire and cancel the bonds of the party of the first part, the said party of the second part will pay to the party of the first part, its successors or assigns, for and during the period of fifty years from the date of the completion and operation of the said plant, an annual rental of \$42,000 for the use of the hydrants, and for the water to be supplied to the party of the second part by the party of the first part as hereinbefore provided, which said annual rental shall be paid to the party of the first part, its successors or assigns, by the party of the second part, at the office of the trustee of the mortgage given to secure the said bonds, in quarterly installments, on or before the first day of January, April, July, and October of each year. (3) That after the purchase of the existing waterworks, and pending the completion of the new plant, the said existing works shall be operated by the party of the first part, and from the date of the said purchase and operation, and until the completion and operation of the new plant, the party of the second part shall pay to the party of the first part at the rate of \$20,000 per annum for hydrant rental, and for water used for other public purposes. (4) And it is mutually agreed between the parties hereto that the party of the second part shall have the right to direct the extension of any of the mains or the setting of additional hydrants: provided, that no extension shall be ordered unless the party of the second part shall at the same time order to be erected and connected for its own use one or more additional hydrants: and provided, further, that for every mile of extension ordered by the party of the second part said party shall order at least ten additional hydrants, all of which additional hydrants so ordered shall be used only for the purposes and upon the conditions hereinbefore named. Nothing herein contained shall be construed as preventing the voluntary extension of its system by the party of the first part under the rights herein conferred upon the said party, in which case the party of the second part shall be under no obligation to order any further hydrants. (5) And for the purposes of this contract, and of providing the necessary capital for extension and improvements, it is hereby mutually agreed that the mortgage to be executed upon the said plant by the party of the first part shall secure the payment of bonds in the total amount of \$1,500,000, and that \$175,000 of the said bonds, together with so many of the issue of \$1,325,000 herein provided for, as shall remain in the treasury of the party of the first part, after purchasing the property of the present water company and constructing and equipping the plant hereinbefore referred

to, shall be retained by the trustee of the said mortgage, and shall thereafter be issued only upon the certificates of a board of water commissioners, to be appointed in like manner as the board hereinbefore provided for (in the event such extensions are made and such bonds are issued), which bonds shall be sold at not less than 95 per cent. of their face value, to pay the necessary cost of such extensions, additions and improvements in said plant which may be required from time to time after the completion thereof; and, in the event of the issue of any bonds in excess of the sum of \$1,325,000, the supply of water to be used by the city for public purposes may be increased in the same proportion which such additional bonds shall bear to an issue of \$1,325,000; and the party of the second part hereby agrees, in the event that they shall order any extension of the mains, to pay, as an additional annual rental or compensation for the hydrants and for the water to be used therefrom, and for the privilege of taking such additional proportionate supply of water, to be used in the city's metered connections, for other public purposes, a sum which shall bear the same proportion to the annual rental and compensation of \$42,000 for water supplied as hereinbefore provided for as the amount which the additional bonds so issued bears to the issue of \$1,500,000 of said bonds, which additional rental or compensation shall be payable at the same time and place and in the same manner as the principal rental or compensation hereinbefore referred to, and shall be subject to all provisions of this contract in respect to such principal rental or compensation. (6) The bonded indebtedness of the party of the first part shall in no wise be regarded as an indebtedness of the party of the second part, and nothing herein contained shall be construed as creating or imposing upon the party of the second part any liability or obligation for the payment of money, other than for the payment of the sums provided to be paid as rental or compensation to the party of the first part for the public supply of water hereinbefore referred to. (7) It is mutually understood and agreed that in the construction of the said plant the party of the first part may let the same, or any part thereof, to contractors or subcontractors, and the amount paid to such contractors or subcontractors shall, to that extent, be taken as the cost of said work, or such portion thereof as may be so sublet. (8) And the party of the second part hereby resolves and ordains that the mayor shall appoint a committee, to consist of three members, to be confirmed by council, and to be known as the 'Board of Water Commissioners,' who shall act as the representatives of the city council, and whose duty it shall be to supervise the construction of the said plant, and examine into and keep accounts of the cost of construction of the same, issue permits for the issue of bonds for payments

approved by them for the cost of construction accrued from time to time, and certify and keep a record of the bonds issued by the party of the first part, in accordance with the terms and conditions of this contract, and to perform the duties and exercise the powers hereinbefore provided to be performed and exercised by the board of water commissioners. And they shall also have such further powers and be subject to such further duties as may be hereafter lawfully vested in or imposed upon them by the city council of Charleston, and not inconsistent with the terms of this contract. The said commissioners shall elect the chairman and secretary, and may make such rules for their government as they may deem proper: provided, however, that such rules shall at all times be subject to revision and amendment by the city council of Charleston. The said board shall hold office until the completion and acceptance of the said plant; and if the bonds of the party of the first part remaining in the treasury, or any part thereof, be thereafter issued for any of the purposes hereinbefore named, then and in that case a new board of water commissioners shall be appointed and confirmed as hereinbefore provided, and the duties of such commissioners shall be the same with reference to such extension and improvements as those defined by the present board, with reference to the plant to be constructed as aforesaid.

"In witness whereof, the said Charleston Light and Water Company has caused these presents to be signed by its president, countersigned by its secretary, and its corporate seal to be affixed by such secretary; and the said city council of Charleston has caused these presents to be signed by the mayor of Charleston, countersigned by the clerk of council, and its corporate seal to be affixed by said clerk, on the day and in the year above written. * * *

The questions presented in common in the actions hereinbefore set out are: First. That the contract under investigation is illegal, null, and void, because in violation of section 5 of article 10 of our state constitution, in that the city of Charleston is plainly forbidden in said section to increase its bonded indebtedness "if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per cent. of the value of all taxable property therein as ascertained by valuation for state taxation." The value of all taxable property in the city of Charleston, as ascertained by the valuation for state taxation, is about \$18,000,000, while the amount of its already existing bonded debt is \$3,827,700, which is far in excess of the 8 per cent. allowed by the constitution. Second. That the proposed contract is also violative of the seventh section of article 8 of our state constitution, which provides that "no city or town in this state shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed

eight per centum of the assessed value of the taxable property therein, and no such debt shall be created without submitting the question as to the creation thereof to the qualified electors of such city or town as provided in this constitution for such special elections; and unless a majority of such electors voting on the question shall be in favor of creating such further bonded debt, none shall be created: provided, that this section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates are issued and payable out of such taxes: and provided, further, that such cities and towns shall on the issuing of said bonds create a sinking fund for the redemption thereof at maturity. * * *

Thrd. That the act of 1899 is unconstitutional, by which act any city in this state having over 45,000 inhabitants is authorized to enter into contract for debts and to incur liabilities by "note, bond, draft or obligation, executed, indorsed or guaranteed by the city or town council of such city or town, and approved or confirmed by a two-thirds vote of the whole of said city or town council at a regular meeting thereof, for the purpose of the establishment of a sewerage system, or for the purpose of securing a system, or for the purpose of securing a supply of water or light for its public use, by contract, or for the purpose of a lease, purchase or construction or operation by the said city or town council of any plant or plants for water or lighting purposes, one or both; and for any of such purposes the city or town council of cities or towns of over 45,000 inhabitants are hereby expressly authorized and empowered to create debts and incur liabilities beyond the municipal income of the current year, upon the same being approved and confirmed by a two-thirds vote of the whole of the said city or town council at a regular meeting thereof: provided, that no purchase or construction of said plant or plants for water or lighting purposes shall be made by the said city or town council except upon a majority vote of the electors in such cities or towns who are qualified to vote on the bonded indebtedness of the said cities or towns." Section 2: "That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed." That the said act of 1899 is unconstitutional, and therefore null and void, because it authorizes the city of Charleston, being a city of over 45,000 inhabitants, to increase its bonded indebtedness, when not only the bonded debt of the city is already more than 8 per cent. of its whole property as listed for taxation, but especially because the indebtedness she now seeks to create, in the sum of \$42,000 each year for 50 years next ensuing, is itself a bonded indebtedness, being issued under the seal of said city council of Charleston; and, furthermore, said bonded indebtedness, being for the purchase of water for the public of the

city of Charleston, is forbidden by section 5 of article 8 of the constitution of this state, in that the question of such bonded indebtedness has not been submitted to the electors of said city. And, again, because such increase of the indebtedness of said city of Charleston is really a bonded debt of said city, which is forbidden by the act of 1881, by which it is especially provided that there shall never be an increase of the bonded debt of said city as it existed in the year 1881, unless: "First. A resolution declaring the intention of the said city council to create such indebtedness or incur such liability, and specifying the amount thereof, shall first be passed at a regular meeting of the said city council by a vote of two-thirds of the whole body. Second. That the proposition, after being adopted in such manner by the said city council, shall be submitted to the qualified voters of the city of Charleston, at an election to be held under resolution of the said city council, after ninety days' notice thereof; and should two-thirds of the number of qualified voters voting at the preceding municipal election vote affirmatively at said election, the proposition shall then be submitted to the general assembly of the state of South Carolina for approval." See pages 532, 533, 17 St. at Large.

The action of John Fred. Pelper also urges, in addition to the foregoing grounds, that the water supply provided for in said contract between the Charleston Light & Water Company and the city council of Charleston "is to be taken from Goose creek, which is a stream subject to the ebb and flow of the tide, and at times the waters of said stream are salt to its source, and at all times is salt at the proposed place of intake; that this defect cannot be remedied by filtration or by any practical process, nor can the salt water be excluded from the supply by the erection of a dam across Goose creek below the place of intake, as proposed in the specifications of the American Pipe Manufacturing Company attached to said contract, for the reason that Goose creek is a tidal, navigable stream, the bed of which is the property of the state of South Carolina, upon which no structure can be placed without the consent of the state, which consent has not been given; nor can the navigation of said stream be obstructed or interrupted without the consent of the United States government, which consent has not been obtained; that Goose creek is the natural channel for the drainage of a large swamp area, covered with stagnant water, which is polluted with decaying vegetation, and the water of said stream at the place of intake is entirely unfit for the purposes of a water supply. And, upon information and belief, the petitioner alleges that neither the proposed method of filtration, nor any other feasible or practical method of purification, can make the said water potable, or otherwise than detrimental and injurious to the health of the inhabitants of the city of Charleston, and that said contract has been

accepted by the city council without sufficient analysis of the water having been made on their behalf, or without other adequate assurances that a supply of pure and suitable water can be secured from the proposed source." Also that three or more members of the city council of the city of Charleston are directly or indirectly interested pecuniarily in the said Charleston Light & Water Company. And also that the price fixed for water for the city is exorbitantly high, and that expenses for construction, etc., are too large.

The city council of Charleston and the Charleston Light & Water Company in their return in the case first named admit the facts, but deny the legal conclusions, and in their return to the second action they both demur to the additional grounds set out in the case brought by John Fred. Pelper. It now remains for this court to pass upon the questions here raised.

1. It seems to us that the paramount issue here involved is whether the \$42,000 to be paid each year for 50 successive years from this date by the city of Charleston to the Charleston Light & Water Company under the contract between them is a bonded indebtedness. Is it a bonded indebtedness? It certainly is, and confessedly so by all the parties to these actions, an agreement to pay \$2,100,000 within 50 years, in annual installments of \$42,000, made by the city of Charleston under its corporate seal. A bond is nothing more than an agreement or contract under seal to pay money, "or to do some other thing." See 1 Rap. & L. Law Dict. 141; *Canty v. Duren*, Harp. 434. See, also, 4 Am. & Eng. Enc. Law, at page 620, where it is said: "In the technical sense, a bond is an obligation in writing, and under seal, binding the obligor to pay a sum of money to the obligee. * * * Under this definition is included every sealed obligation for the payment of money, whether absolutely or upon condition." See, also, *Boyd v. Boyd*, 2 Nott & McC. 126, where it is said: "A bond is defined to be a deed or obligatory instrument in writing whereby one doth bind himself to another to pay a sum of money or to do some other act." Any indebtedness, the payment of which is secured by a contract under seal, is a bonded indebtedness. This being, then, a bonded indebtedness, which confessedly is beyond the limit set out in section 7 of article 8, and also in section 5 of article 10, of our state constitution, to wit, 8 per cent. of the assessed value of the taxable property of the city of Charleston, is utterly null and void. To make our meaning perfectly clear, we will state the matter in detail. The city of Charleston has property listed for taxation which is about \$18,000,000. It has already a bonded indebtedness of about \$3,327,700, which is confessedly and actually in excess of 8 per cent. of all the said city's taxable property. Section 7 of article 8 of our state constitution provides, "No city or town in this state shall hereafter incur any bonded debt which, including existing bonded

indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, * * * while section 5 of article 10 of our constitution provides, " * * * The bonded debt of any county, township, school district, municipal corporation or political division or subdivision of this state shall never exceed eight per centum of the assessed value of all taxable property therein. And no county, township, municipal corporation or other political division of this state shall hereafter be authorized to increase its bonded indebtedness, if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per centum of the value of all taxable property therein, as ascertained by the valuation for state taxation." Hence, as the contract of the city of Charleston proposes to add to its bonded indebtedness the sum of \$42,000 each year for fifty years next ensuing the date of the execution of said contract, while its bonded indebtedness is already more than 8 per cent. of its taxable property, it is clearly undertaking to make a contract in violation of the constitution of the state of South Carolina, and such contract is null and void.

2. But it is urged by the respondents that the power to create this debt and incur this liability beyond the municipal income of the current year is expressly given to the city of Charleston by the act of 1899. See 23 St. at Large, pp. 51, 52. The respondents overlook the fact that, even if this contract did not actually add to the bonded indebtedness of the city of Charleston, the provision of section 7 of article 8 of our state constitution would present an insuperable barrier to the attempt by the general assembly of this state to clothe the city council of Charleston with any such power to pledge or dispose of the municipal income for an indefinite term of years, for it is there provided " * * * that this section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained, or to be contained, in the taxes for the year when such certificates are issued and payable out of such taxes." This provision was evidently inserted in this section in order to enable a city council to make some definite provision for current indebtedness which it was intended should be paid from taxes when collected, but in anticipation of the collection of said taxes. Such a scheme would terminate with the year in which the taxes would be collected. It was not intended, nor did it do so, to clothe the city council with power by one contract to pledge \$42,000 of each year's taxes for the period of 50 years next ensuing. The terms of the section are exhaustive of the power. The general assembly could not add to it, for the expression of the constitution whereby a municipal corporation is allowed to issue certificates of indebtedness in advance of the receipt of the taxes to pay such certi-

icates is a negation of any power in a city government to do more than what is expressly contained in the grant of power heretofore recited as contained in such section of the constitution. It appears that its framers had in view the well-preserved distinction existing between what is known as "ordinary or current indebtedness," and what, on the other hand, is known as "extraordinary indebtedness"; for in section 11 of article 10 of the constitution, where the general assembly of this state was forbidden to add to the present bonded debt of the state without first obtaining a vote of the people of the state authorizing such increase, the constitution expressly authorizes the general assembly to create a debt "for the ordinary and current business of the state"; and in section 2 of this same article 10 the general assembly was directed to provide an annual tax "to defray the estimated expenses of the state for each year; and whenever it shall happen that the ordinary expenses of the state for any year shall exceed the income of the state for such year, the general assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." This section 11 of article 10 of the state constitution provides that any extraordinary indebtedness of the state (that is, not ordinary) shall be contracted by loan on state bonds, in these words: "And any debt contracted by the state shall be by loan of state bonds. * * *

It is thus seen that, while the provisions of the state constitution gave latitude to the general assembly as to indebtedness for ordinary and current business, yet it required such indebtedness wiped out by money received from taxation the year of, or the next year to, the creation of such indebtedness. So, in the matter of cities and towns, they were not allowed to create a bonded indebtedness beyond eight per cent. of their taxable values; yet they, too, were allowed to create an indebtedness in anticipation of the payment of the taxes to be collected during the year such indebtedness for ordinary or current purposes was created. As before remarked, this contract between the Charleston Light & Water Company and the city of Charleston is unconstitutional, and therefore null and void.

3. We might rest here, but, as some reference was made in the petition of John Fred. Peiper to the presence of three members of the city council of Charleston among the stockholders of the Charleston Light & Water Company, we will say that the high character of the three gentlemen in question would show that their presence in this contract on both sides, so to speak, was due to their great anxiety to promote the best interests of the public in the matter of a water supply, and not for any profit to themselves. Still it is our duty to say that their

conduct is illegal. No trustee can, under the law, contract with himself in his individual character. *Thomson v. Peake*, 38 S. C. 440, 17 S. E. 45, 725; *Turnipseed v. Sirrine*, 60 S. C. 272, 38 S. E. 423.

We will not, because it is unnecessary, disturb the waters of Goose creek in this opinion.

It is the judgment of this court that the prayer of the petitioners be granted, and therefore that the contract between the Charleston Light & Water Company and the city council of Charleston, herein embodied, is declared to be beyond and without the power of said city council of Charleston to enter upon, agree to, and make, and that the said city council of Charleston, its successors, officers, agents, and employés, be perpetually enjoined and restrained from entering into or executing the said contract, or, if the same be already executed by them, from entering upon or performing any matters in the said contract undertaken, and by the said city of Charleston agreed to be performed, and that the Charleston Light & Water Company be perpetually enjoined and restrained from issuing, or undertaking to issue, any bonds or evidences of debt purporting to be issued in pursuance of said contract.

McIVER, C. J., and GARY and JONES, JJ., concur in the result.

(60 S. C. 572)

VERNER v. SEIBELS.

(Supreme Court of South Carolina.)

APPOINTIVE OFFICE—BEGINNING OF TERM—MANDAMUS—DELIVERY OF BOOKS AND PAPERS.

1. The term of an appointive office commences to run, not from the date of the commission, but from the date of the appointment.

2. Code, § 434, subds. 2-4, provide that, if any person refuses to deliver over to his successor in office any books or papers on demand, such successor may make complaint to judges of the supreme court, who, on evidence, may grant an order directing a person so refusing to show cause why he should not be compelled to deliver the same, the party making out a prima facie title to an appointive office is entitled to a summary writ against the party in possession of the books.

Petition by John S. Verner against John T. Seibels for an order requiring respondent to surrender the office of master of Richland county. Petition granted.

Leroy F. Youmans, for petitioner. R. W. Shand, for respondent.

GARY, A. J. On the 31st day of January, 1895, at chambers in the city of Columbia, S. C., John S. Verner, Esq., the above-named petitioner, exhibited his verified petition and made application to me for an order directing John T. Seibels, Esq., to show cause before me why he should not be compelled to deliver to the petitioner the books and papers in

his custody in any way appertaining to the office of master for Richland county. The order was granted and made returnable on the 1st day of February, 1895, at which time the said Verner and his attorney, Gen. Youmans, and the said Seibels and his attorney, Mr. R. W. Shand, appeared before me. It appears that his excellency B. R. Tillman, then governor of South Carolina, on the 30th day of January, 1891, issued a commission to the said John T. Seibels to hold the office of master for Richland county for four years from January 15, 1891. A notice, of which the following is a copy, was sent to the secretary of state by his excellency, John Gary Evans, governor of South Carolina, to wit:

"State of South Carolina, Executive Chamber.

"Columbia, S. C., January 2, 1895.

"Hon. D. H. Tompkins, Secretary of State—Sir: His excellency the governor has this day appointed:

Name.	Office.	Post Office.	County.
J. S. Verner.	Master,	Columbia.	Richland.
	Jan'y. 15th, '95.		

"Very respectfully,

"U. X. Gunter, Private Secretary."

This notice was filed out on one of the blank forms used in such cases. On the 18th day of January, 1895, John S. Verner executed his official bond as master for Richland county, with four sureties, which bond was approved by the county board for Richland county and the attorney general as to form and sufficiency of execution. The condition of said bond was as follows: "Whereas, the above-named John S. Verner hath been appointed to the office of master of Richland county: Now, the condition of the above obligation is such that if the above-named John S. Verner shall well and truly perform the duties of said office, as now or hereafter required by law, during the whole period he may continue in said office, then," etc. This bond was recorded and was filed on the 22d day of January, 1895. The said J. S. Verner took the oath of office, and the 21st day of January, 1895, a commission signed by the governor and attested by the secretary of state, with the seal of state affixed, was delivered to said Verner, declaring him to be master for Richland county for the term of four years from the 15th day of January, 1895. Subsequently the said Verner, without any other appointment or notification of appointment, or further bond or qualification, destroyed the said commission, and obtained a second commission, dated the 31st day of January, 1895, declaring him to be the appointed master for Richland county for the term of four years, the beginning of the term not being stated. The said John T. Seibels, in paragraph 5 of his return, makes the following allegations: "That on said 31st January, 1895, the said J. S. Verner demanded of respondent the surrender of the books and papers in his custody in any way appertaining to the office of master for said county,

but your respondent declined to do so, because advised that the appointment of the said Verner as master was made to take effect January 15, 1895, when there was no vacancy in the office of said master at that date to which an appointment could be made; that the bond of the said Verner and his sureties was, as matter of law, for a term of four years from January 15, 1895, to January 15, 1899, and not for a term of four years from January 30, 1895, to January 30, 1899; that without a valid appointment, and without a bond as required by the statute, given after a valid appointment, with the oath of office indorsed thereon to cover the acts and doings of the master for the term for which appointed, the said J. S. Verner is not duly qualified by law to enter upon the discharge of the duties of the office, is not the successor in law of your respondent, and a surrender of the property of the office to said J. S. Verner would not be a discharge to respondent and his sureties of liability for the property so surrendered, as the respondent is advised and respectfully submits; that said appointment, made (and completed by the issue of a commission) to take effect when there was no vacancy in said office, is invalid, and the bond based thereon is void. And the respondent is further advised that the said commission, based on an invalid appointment and a void bond, confers no authority of office on the said J. S. Verner."

1. Article 2, § 30, of the constitution requires "that before entering upon the duties of their respective offices, all officers of the state shall take the oath therein prescribed." Article 3, § 17, requires that the "governor shall commission all officers, and that all grants and commissions shall be in the name and under the seal of the state." Section 529, Rev. St. 1893, provides that "no executive, judicial or other officer elected or appointed to any office in the state shall be entitled to receive any pay or emoluments of office until he shall have been duly commissioned and qualified." Section 836, Id., provides that "the master shall hold his office under the appointment of the governor, by and with the advice and consent of the senate. He shall hold his office for four years and until his successor shall be appointed and shall qualify." Section 837, Id., provides that, "Before entering on the duties of his office, the master shall enter into bond for the faithful discharge of the duties of the office," etc. Section 838, Id., provides that, "before entering upon the duties of his office, he shall take in writing, endorsed on his bond, the oath of office prescribed by the constitution, and also the oath prescribed in sections 501 and 502." These oaths are indorsed on his bond. Section 839, Id., provides that "the bond of the master must be furnished, executed, approved and filed within thirty days after notice of his appointment; and if the said bond be not executed, approved and filed within this period, the

appointment shall be deemed revoked." Under the view which we take of the law governing this case, we have no right in this proceeding to enter into a consideration of its merits; but, if we had such right, a very material question would present itself,—as to when the term of office of Mr. Seibels expired. It is true, his commission bears date the 30th of January, 1891; but it is stated in the commission that he holds for four years from the 15th day of January, 1891, which might indicate that his appointment to the office was made at a time anterior to the date of his commission, as it has been decided time and again that the commission is only evidence of the appointment, but does not confer the right to the office. The leading case in our state on this question is that of *Macoy v. Curtis*, 14 S. C. 371, in which Mr. Justice McGowan reviews the authorities and states the principles deducible therefrom, citing *State v. Billy*, 2 Nott & McC. 356; *Jeter v. State*, 1 McCord, 233; *State v. Lyles*, Id. 239; *Kottman v. Ayer*, 3 Strob. 92; *State v. Toomer*, 7 Rich. 227; *Ex parte Smith*, 8 S. C. 515; *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50. In the case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, the following language is used: "They [the clause of the constitution and laws of the United States] seem to contemplate three distinct operations: (1) The nomination. This is the sole act of the president, and is completely voluntary. (2) The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. (3) The commission. To grant a commission to the person appointed might perhaps be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'" Mr. Seibels held the office for the term of four years from the time of his appointment, and not for four years from the date of his commission.

2. The facts herein make out a prima facie title to the office in the petitioner, John S. Verner; and under the authority of *Ex parte Whipper*, 32 S. C. 5, 10 S. E. 579, and the cases therein cited, the said John S. Verner is at this time entitled to possession of the books and papers appertaining to said office. In the case of *Ex parte Whipper*, supra, Mr. Justice McGowan, delivering the opinion of the court, says: "The Code, in certain cases stated, provides the means for obtaining possession of an office, which are of a very summary character; and, in a matter so important, obviously intended to prevent all unnecessary delay. Subdivisions 2, 3, and 4 of section 434 of the Code provide as follows: (2) 'If any person shall refuse or neglect to deliver over to his successor any books or papers, as required in the preceding section [on demand], such successor may make complaint thereof to any judge of the circuit or justice of the supreme court, where the per-

son so refusing shall reside; and if such officer be satisfied by the oath of the complainant, and such other testimony as shall be offered, that any such books or papers are withheld, he shall grant an order directing the person so refusing to show cause before him, within some short reasonable time, why he should not be compelled to deliver the same." Proceeding, he says: "The authority created for that purpose had declared Talbird duly elected. Right or wrong, he had been commissioned, qualified, and entered upon the discharge of his duties as probate judge. His prima facie title was clear, and, in the language of Judge Strong in the Case of Baker, the remedy of the petitioner [Whipper] was to surrender the books and papers of the office, and, if so advised, to resort to his civil action in the nature of a quo warranto to test the title. The records of a public office are in no sense private property. They are very important to every citizen. It is good policy to require that there should be no unreasonable delays in determining contests to elective offices. Upon that subject especially it concerns the interest of the country that there should be an end of litigation." The same reasoning is applicable to an appointive office. The order in accordance with our views herein announced has already been filed.

(49 W. Va. 478)

TAYLOR, Sheriff, v. LA FOLLETTE,
Auditor.

(Supreme Court of Appeals of West Virginia.
June 13, 1901.)

MANDAMUS—ASSESSMENT OF TAXES—COLLECTION BY SHERIFF—APPLICATION BY AUDITOR.

1. K., sheriff of M. county, on the 14th day of August, 1899, in the last year of the term of his office, being thereunto required by the said county court of said county, executed a new bond as such sheriff. On the 18th day of January, 1900, certain moneys were paid by a railroad company to the auditor, under section 67, c. 29, Code, on account of taxes assessed against said company for the year 1899 for county purposes of M. county. K., in writing, directed the auditor to apply said payments on account of said K.'s indebtedness to the state for taxes prior to July 1, 1899. Notice was given the auditor by the sureties of K. on his bond of August 14, 1899, not to so apply such payments. On the 8th day of February, 1900, said K. was removed from said office of sheriff for failure to give another bond as required, and on the day following T., one of K.'s sureties on this bond of August 14th, was appointed sheriff in the place of K., and gave bond and qualified as such sheriff. T. sued out a writ of mandamus nisi to require the auditor to account to him as such sheriff, under section 67, c. 29, Code, for the taxes so paid in by the railroad company on the 18th day of January, 1900, notwithstanding K.'s special direction as to its application. Held error to make the mandamus peremptory.

2. Under the provisions of said section, it is the duty of the auditor to account for and settle the taxes assessed for the last year of the term of office of a sheriff with the occupant of the office at the time such taxes were assessed.

3. In the case of taxes so assessed and paid into the treasury by a railroad company for the last year of the term of office of a sheriff, where he has given a new bond covering such taxes, it would be the duty of the auditor, unless otherwise specially directed by the sheriff, to apply such payments to the taxes charged against said sheriff for the said year for which they were assessed.

Dent, J., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Kanawha county; F. A. Guthrie, Judge.

Application of C. W. Taylor, sheriff, for writ of mandamus against L. M. La Follette, auditor. Writ granted, and defendant appeals. Reversed.

Brown, Jackson & Knight and Flournoy, Price & Smith, for appellant. Chilton, MacCorkle & Ohlton and Douglas W. Brown, for appellee.

McWHORTER, J. N. J. Keadle was elected sheriff of Mingo county for the regular term of the office beginning January 1, 1897, gave bond and qualified and assumed the duties of said office, and afterwards, being thereto required by the county court of his county, executed an additional bond, under which bond said Keadle proceeded to receive and collect the tax money and levies of the year 1898 due the state and county, and thereby became legally indebted to the said county of Mingo and to the auditor of the state; and the county court of said county, deeming it proper to require still another new bond, so notified said Sheriff Keadle, who executed a bond on the 14th day of August, 1899, with W. Taylor, J. E. Peck, Mary Taylor, S. J. Stratton, and G. S. Buskirk as sureties; and on the same day said Keadle executed a bond for the school moneys that should thereafter come into his hands as such sheriff, with said G. W. Taylor, J. E. Peck, Mary Taylor, and others as sureties. On the 4th day of September, 1899, said Keadle, as such sheriff, entered into a written contract with J. E. Peck and G. W. Taylor (all the sureties of both of said bonds of August 14, 1899, being named in said contract as parties of the second part, but signed only by Keadle, Peck, and Taylor), whereby it was agreed that, in consideration of the suretyship of the said parties of the second part, the said Peck and Taylor were to have control and management of the sheriffalty of said county, for which said second parties would be liable on condition that said Keadle should perform certain duties of said office and receive certain fees and emoluments therefor as specified. In January, 1900, notice was given by his sureties on the bonds of August 14th to said Keadle that on the 25th of January, 1900, they would move the county court of Mingo county to release them as such sureties. Keadle was granted until January 29, 1900, to obtain sureties, on which day, he having failed to furnish the required surety, the county court made an order releasing

said sureties, and demanding another bond, and fixing the 8th day of February, 1900, when such bond should be given, failing in which the court removed the said Keadle from the office of sheriff, and on the 9th day of February the said court appointed said G. W. Taylor to fill the vacancy for the unexpired term of said sheriff, and the said Taylor executed bond as such sheriff, which was duly approved, and entered upon the duties of his said office. On the 18th day of January, 1900, the Norfolk & Western Railway Company paid into the treasury of the state, among other moneys, \$8,008.17 for county purposes of Mingo county, and \$325.03 for road purposes; and the Pullman Car Company on the same date in like manner paid in the sum of \$46.85 for such county purposes, and \$2.21 for road purposes; said moneys being for the taxes assessed for 1899, under section 67, c. 29, Code. It appears that Keadle, as such sheriff, at the time of such payment of said moneys into the treasury was indebted to the state on account of taxes collected by him in former years in large sums, for which he was in default. The appellant auditor contends that it was his right and duty, conferred and imposed by law upon him, to apply said moneys to said indebtedness for which said sheriff was in default, and that Keadle by letter of date January 19th directed it so applied; that, indeed, with said letter were two orders covering the amounts, without date, but which Keadle afterwards dated January 24, 1900; that before making such application said auditor was notified by said Peck and Taylor not to so apply said moneys to the payment of Keadle's old indebtedness for which he was in default, but that it should be applied to the taxes of 1899. Taylor, as sheriff, sued out of the circuit court of Kanawha county a mandamus nisi, requiring said auditor to account to said Taylor for said sums of money so paid into the treasury, by issuing his proper warrant and draft upon the treasury of the state for said sums in favor of said Sheriff Taylor, or by making application thereof to the payment of any state taxes due by said Taylor, sheriff, or in such manner as said auditor and said Taylor might agree, or to show cause, if any he could, why he should not do so. Auditor La Follette, by his counsel, demurred to the petition, and moved to quash the mandamus nisi, which demurrer and motion were overruled, and the auditor filed his answer and return to the mandamus nisi; and thereupon plaintiffs moved the court to award the peremptory mandamus prayed for, notwithstanding the said answer and return thereto; and, the matter being considered by the court, the mandamus was made peremptory, and the auditor required to account to said Taylor, sheriff, for the said moneys so paid into the treasury, by making proper warrants and drafts upon the treasury therefor in favor of said Taylor, or by making application

thereof as in the mandamus nisi stated; and it appearing to the court that the auditor, in the matter in refusing to account to the said Taylor, was acting in good faith, to find out with whom said accounting should be had and payment made, it was ordered that each party pay his own costs, and no statute fee be recovered. Said La Follette, auditor, applied for and procured a writ of error to said judgment, assigning the following errors: "That the court erred: First, in overruling said demurrer and motion to quash; it appearing upon the face of said petition and the exhibits therewith filed that the said relator, Taylor, had farmed of the said Keadle, sheriff, the office aforesaid, wherefore he was disqualified to become sheriff for the unexpired term, and was not entitled to receive said moneys in any event, or to maintain said proceedings as such sheriff or otherwise; and, further, for want of parties, because said Keadle was a necessary party to the proceedings wherein was to be determined the disposition of said moneys. Also, in that said judgment required your petitioner to draw said warrants payable to said substituted sheriff, or else credit said funds upon state taxes due from said substituted sheriff, when in fact said taxes were received into the treasury during the term, and paid to the credit of said Keadle, and before removal from office. Also, in that it denied to this respondent the right under the law to apply the moneys so due said Keadle to the indebtedness due by him to the state. Also, in that it denied to the said Keadle the right to make such application."

It is insisted that Taylor was, by reason of the contract with Keadle, incapacitated, under section 5, c. 7, Code, for holding said office of sheriff. Does the question arise here? Would Taylor, as sheriff, in any event, be entitled to control this fund, even if eligible to the office? As far as his disqualification by reason of the illegal contract is concerned, the statute applies as well to Keadle as to Taylor,—applies to both the buyer and the seller. If the former is incapacitated thereby to take the office and exercise its duties, the latter is equally incapacitated to continue in and perform its duties. These sums of money were paid into the treasury while Keadle was yet sheriff, and some three weeks before the appointment and qualification of Taylor. That they should in all good conscience have been applied to the taxes of 1899 there can be no question, and being paid to the auditor, as they were, with his full knowledge of their source, he had no authority, under the law, as a discretionary power or otherwise, to direct their application elsewhere than upon the taxes of 1899, without such direction from Sheriff Keadle. The auditor claims that under section 67, c. 29, Code, he has a right to apply these payments to the old indebtedness of the sheriff,—his default of former years. In *State v. Wade*, 15 W. Va. 524, at page 535, Judge Greene, in speaking of the discretion of

the auditor in making application of payments "so that it should go to the account to which the convenience of the state at the time required it to go, and of which the auditor is always in a condition to judge," says: "This, I understand, was the discretion intended to be conferred on the auditor,—a discretion the exercise of which could not possibly injure any set of sureties. But to construe this statute to authorize the auditor, at his mere will and pleasure, to apply a sum of money paid on the taxes of one year to the taxes of other years, so as to relieve one set of sureties from responsibility and attach responsibility to another set, would be to convert a statute intended merely for the convenience of the state into a statute which would enable the auditor to do gross injustice to some sureties, and to confer great pecuniary favors on others, according to his pleasure. The law cannot be so interpreted. If this were its meaning, its constitutionality would be, to say the least, doubtful. But it cannot be so interpreted." In the *Wade Case*, just cited, payment was made into the treasury on January 26, 1870, by the sheriff, of nearly three-fourths of the taxes of 1869, with directions to the auditor to apply it on the taxes of 1869, yet the auditor directed the whole of it applied upon the taxes of 1867 and 1868, for which the sheriff was delinquent, claiming the right to do so. It was held that "the auditor was bound when directed at the time of payment to apply the whole of the payment to the taxes of 1869." This language implies that, in the absence of such direction from the sheriff at the time of payment, the auditor might have applied the payment, as he attempted to do, to the defalcations of 1867 and 1868, which undoubtedly he could have done with a general payment made by the sheriff without direction as to its application, unless when he (the auditor) received it he was aware that it was the proceeds of the taxes and levies of 1869, in which case the principles of equity and right would have required its application to the taxes of 1869. The appellee cites a part of section 681, *Murph. Off. Bonds*, to show that the money so paid cannot be so misappropriated; that taxes collected under a second bond applied to make good the default under a former bond of the same collector. But that section further says: "Although the law, when it falls to its lot to appropriate payments, will not suffer the revenues received under one term to be applied to a defalcation incurred under another term, yet if the officer himself makes the misappropriation, and the money is received in good faith by the proper officer, the misappropriation cannot be avoided, and is binding on the sureties." Appellee also cites section 637, *Id.*, based on *Porter v. Stanley*, 47 Me. 515, 74 Am. Dec. 501, where it is held that: "Where the same person was collector in a town for several successive years, and failed to pay over or account for a portion of the taxes committed

to him the first year, moneys collected and paid over by him, arising from the taxes committed in the subsequent years, cannot be appropriated to make up the deficiency of the first year, so as to affect the relative rights and liabilities of the sureties on his several bonds, without their consent." And further: "A settlement made with him by the selectmen, in which such appropriation is attempted to be made, is inequitable and unauthorized, and does not bind the town or the sureties." In the opinion by Tenney, C. J., it is said: "This does not appear to have been done at the request of William Stanley [the collector], or by his consent, any further than, if it was right that it should be done so, he would consent thereto. A consent so qualified in a case of that kind was not consent, as the condition, 'if it was right,' was not fulfilled." The authority which comes nearest sustaining the position of appellee that even Keadle, when making the payment, could not by his direction apply the payments to his former indebtedness, is the case of *U. S. v. January*, 7 Cranch, 572, 8 L. Ed. 443; and that is treating of the application of payments made of current collections on former indebtedness of the collector by the officer recovering the same, and not by the collector. And the case of *U. S. v. Eckford*, 1 How. 250, 11 L. Ed. 120, where, on page 261, 1 How., and page 124, 11 L. Ed., the court say: "We think the rule established by this court in the case of *U. S. v. January*, 7 Cranch, 572, 8 L. Ed. 443, is the true one." In that case the court say: "The debtor has the option, if he think fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it. If he also neglects to apply the payment, the law will make the application." But the court adds: "A majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case where different sureties under distinct obligations are interested. For the treasury officers and the agents of the law, it regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot by any exercise of their discretion enlarge or restrict the obligations of the collector's bond. Much less can they by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires; and in the faithful performance of this trust his sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector should misapply the public funds, his sureties are responsible; but this is not the question under consideration. The collector does not misapply the funds in his hands, but pays them

over to the government, without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration." These cases only refer to the misapplication of such payments (and it is misapplication) by the receiving officers of the government, but recognize all the way through the collector's right to direct the application, however unjust it may be to the sureties. In the case of *State v. Wade*, cited, the case of *Inhabitants of Readfield v. Shaver*, 50 Me. 37, 79 Am. Dec. 592, is cited in support of the collector's right to direct such payment, while it is held that a collector of taxes when he paid the same into the treasury had a right to direct it to be applied to the taxes due from either of two years in which he had different sureties on his bond.

That Sheriff Keadle was so interested in the matter of this proceeding as to be a necessary party thereto manifestly appears from the record. *Cross v. Railroad Co.*, 34 W. Va. 742, 12 S. E. 765; *Armstrong v. County Court*, 15 W. Va. 190. The question arises, can the appellee maintain this proceeding in his name as sheriff of Mingo county? Section 67, c. 29, Code, provides "that the taxes assessed for the last year of the term of office of the sheriff shall be paid to or settled with the sheriff who was in office at the time the assessment was made." The taxes so paid into the treasury in this case were assessed in the last year of the term of Keadle in said office, and were also paid in while he was yet sheriff,—paid to the auditor, under the statute, whose duty it was to account to said sheriff therefor; and, as has been seen, the sheriff had the right to direct its application to his indebtedness, however inequitable such application may be as affecting his sureties; and while, without such direction on the part of Keadle, it would have been the plain duty of the auditor, having, as was the fact, full knowledge of the source of its payment, and on what accounts, to have applied the same to the taxes of 1899. Such application as was made in this case may well be said to be a hard case, but, as said by Judge Holt in *Cross v. Railroad Co.*, 34 W. Va., at page 747, 12 S. E. 765, "hard cases make bad law." When we undertake to correct particular wrongs or prevent great hardships in special cases, which can only be done by the violation of long-established and well-settled principles, the particular wrong would better go uncorrected. The wrong that results from the misapplication of these payments at the direction of Keadle is only disclosed inci-

dentally, and is not really in issue. If the money should be in this proceeding directed to be paid to G. W. Taylor, as sheriff of Mingo county, it would go to relieve the said Sheriff Taylor and his sureties on his official bond, and might not go to any extent to the relief of the sureties of Keadle on his last bond. The peremptory mandamus should not have been awarded, and the judgment of the circuit court is reversed, and the petition dismissed.

DENT, J. (dissenting). The essential facts in this case are as follows: N. J. Keadle was elected sheriff of Mingo county for the term beginning January 1, 1897, and gave bond as such, with certain persons as sureties, whose names are not revealed in the record. On the — day of —, 1898, by the requirement of the county court, he executed an additional bond, with John Effler and William M. Cox as his sureties. The county court, having ascertained that Keadle was defaulting in the discharge of the duties of his office, and that his sureties were insufficient, required him to execute a second additional bond, which he did on the 14th day of August, 1899, with J. E. Peck, G. W. Taylor, G. R. Buskirk, Mary Taylor, S. J. Stratton, M. E. Beavers, John A. Sheppard, M. H. Waldron, J. S. Miller, M. W. Hawley, Lucy E. Keadle, Wells Goodykoontz, W. A. Johnson, H. W. Peck, and J. B. Buskirk as his sureties. These sureties, being aware of Keadle's defalcation, before they would become his sureties, required him to enter into an arrangement to appoint J. E. Peck and G. W. Taylor, of their number, his deputies, and permit them to arrange and control all financial matters, so as to prevent any further defalcation on his part, and preserve them harmless from loss thereby. The auditor and the county court both had notice of this arrangement, and made no objection thereto. Under it these deputies proceeded to collect, and account to the state, county, and district for, the tax levies of 1899. Sheriff Keadle was in arrears to both county and state for taxes, licenses, and fines collected for the year 1898. In January, 1900, the sureties on the last bond, learning that the sheriff, in violation of his agreement, was about to make an effort to have the auditor to apply the tax levies for county purposes on railroad corporation for the year 1899 paid to the auditor, for the county's benefit, on his defalcation to the state for the year 1898, for the purpose of self-protection notified the auditor not to make such application, and moved the county court because thereof to relieve them from further liability on the sheriff's bond. The county court required Keadle to give a new bond, and, he failing to do so, on the 29th day of January, 1900, his office was declared vacant; and George W. Taylor, one of the sureties, and a deputy, was appointed to fill out the unexpired term. He therefore demanded that the auditor

should pay over or account to him for said railroad tax levies for county purposes for the year 1899, amounting to \$6,390.23. This the auditor refused to do, for the reason that Keadle had given directions in writing before his removal from office to apply these levies on his defalcation for the year 1898, and, while he had not yet done so, he believed he had the legal right to do so. Thereupon these proceedings were instituted to test this question, and to determine promptly to whom these county funds now in the hands of the auditor were legally payable. The circuit court determined that it was the duty of the auditor to pay or account for these levies to the present sheriff, as the treasurer of and for the benefit of the county, and that Keadle had no right to direct, or the auditor any right to apply, these funds to the sheriff's default for the year 1898 to the state; and now this court, in its wisdom, holds that the circuit court erred, and that Keadle had the right to misappropriate the county's levies for county purposes for the year 1899, and to pay his default to the state for the year 1898, and that he is legally authorized to make such appropriation.

The auditor is simply seeking to discharge his duty to the state, and has wisely left such misappropriation of the county's funds to be made by this court. This makes such appropriation a legal application by the defaulting sheriff of funds held to be subject to his order, and relieves his sureties on his last bond from any liability by reason thereof. His legal application of such funds could create no default for which sureties could be held liable, as such sheriff during the existence of their liability never had such funds in his possession or under his control, but they were in the hands of the joint collecting agent of both the state and the county. If his direction to misapply this fund was legal,—and the judgment of this court makes it so,—these sureties incur no liability, for he is guilty of no default under his bond. It is true, he has authorized the misappropriation of the county's funds to the payment of his indebtedness to the state, yet this court holds that he had the right to do this, for the reason that he was sheriff at the time the assessment was made, and that he is chargeable with the funds, not at the date of the receipt thereof, but at the date of the assessment, which throws the liability wholly on his sureties at that time, and not on those who subsequently became his sureties, and that after such assessment the county court could not remove him, so as to prevent his making such application, without regard to who was injured thereby. For, if the county court could effect such result one day after the assessment was made, they could do so at any time before the fund was paid over to him. By this holding the liability for these funds is placed on the sureties getting the benefit thereof, and they must account to the county therefor, and hence they

gain nothing and are put in no better condition by this misapplication of the county's funds. Their liability remains the same, and they have no interest in this controversy. The last sureties, being relieved from all liability by the holding of the court in sustaining the legality of the sheriff's misappropriation, are no longer interested in this controversy. But if it is an illegal misappropriation of the county's funds, notwithstanding the court's decision, now *res adjudicata*, the sureties on the last bond have relieved themselves from all liability by doing far more than is required of them, in notifying the proper authorities of such threatened illegal misappropriation in time for them to prevent the same; and they cannot be made liable by a miscarriage of justice in a proceeding in this court to which they are not parties, and by which they are not bound. When the county authorities have notice of a wrong about to be committed, to the county's detriment, it becomes their duty to prevent such wrong, for the protection of interested third parties not in a position to protect themselves; and, if they fail to do so, the county, and not such interested third parties, should bear the loss. These last sureties, not being liable, whatever may be the final result of this suit, are not necessary parties thereto; and the former sureties, having a fixed liability, which this suit cannot change, are also unnecessary parties. If they could get the funds credited on their old liability, they acquire a new liability equal in extent. Nor is Keadle a necessary party, for his liability continues regardless of the result of this litigation. His creditor may be changed from the state to the county, but not the amount of his indebtedness. He creates a new debt to pay an old one.

The question in this case narrows itself down between the county of Mingo, represented by its treasurer and collector, Sheriff Taylor, on the one side, and the state, represented by its auditor, on the other side, as to whether the county or state shall be compelled to sue the sheriff and his sureties on the first two bonds, or, they being admittedly insolvent, which shall bear the loss occasioned thereby,—the taxpayers of the county or the taxpayers of the state? It is argued that, because the court failed to take a good bond, the loss, equitably, should fall on the taxpayers of the county. This would make the taxpayers of the county all sureties of the sheriff, although the law nowhere so provides. The county court, in taking a sheriff's bond, acts as the agent of the state as well as of the county, under laws made by the former, and which has not yet seen fit to enact a law making the taxpayers of each county responsible for the defaults of its sheriff. Before this is done the people must be consulted, unless it can be effected by judicial construction in violation of the constitutional inhibitions, regardless of the fundamental principles of right and justice.

The funds in controversy belong to the county. They arise from levies made to meet the county's current expenses for the fiscal year beginning in 1899 and ending in 1900. The auditor holds them as trustee for the county. There is no law, other than the decision of this court, authorizing him to use them to pay a default of the sheriff of state moneys for the fiscal year 1898; but, if the sheriff was treasurer and collector of public moneys for state funds for 1899, to this extent the two funds may be set off against each other, but not otherwise. In such case the sheriff would have state funds to substitute for the county funds in the hands of the auditor. A fair exchange would be no robbery. But where the sheriff has no state funds in his hands, but he is a defaulter to the state for a previous year, there is no law, except the decision of this court, that will permit him to satisfy his default to the state by creating a like default to the county. He cannot spoli the few to satisfy the obligations of the many. Such was not the intention of the legislature in authorizing the auditor to make such arrangements with the sheriffs as may be most convenient. To adapt the argument of Judge Green in the case of *State v. Wade*, 15 W. Va. 535, to this case, we would say: "To construe this statute to authorize the auditor, at his mere will and pleasure, by connivance with or direction of a defaulting sheriff, to apply a sum of money paid on the taxes of one year for county purposes to the arrears of taxes of other years for state purposes, is to convert a statute intended merely for the convenience of the state into a statute which would enable the auditor to do gross injustice to the taxpayers of the county, and confer great pecuniary benefit on the taxpayers of the state, by shifting liability from the large resources of the latter to the limited resources of the former, and thus render the burdens of taxation grossly unequal. A statute thus interpreted, its unconstitutionality is undoubted. The just burdens of the taxpayers of the state ought not to be imposed on the taxpayers of a single county." The legislature enacted no such law, but it becomes law by the misconstruction of this court, and, if persisted in, it can only be obviated by the legislature placing the liability where it justly belongs.

Admitting that this controversy is a question of liability between two sets of sureties, the same conclusions must follow. The last sureties, if liable for the taxes of 1899, have the right to prevent their principal from misapplying them to his default for the year 1898, for which they are not liable. They do this by notifying the auditor not to make such misapplication, even though authorized so to do by their principal. This relieves them from all liability if the auditor persists in making the misapplication. For, as is said in *Chapman v. Com.*, 25 Grat. 748: "The auditor must, of course, act in good

faith. He cannot legally apply to the benefit of A. money he knows ought to be applied to B. If a sheriff receive money for which his surety, B., is liable, he ought to apply it to the discharge of such liability, and not to the discharge of the liability of A. on his account. Such misappropriation would be a fraud on the rights of B., and, if the auditor received the money with knowledge of the fraud, he would be *particeps criminis*." Such misapplication would be void, and the parties legally entitled thereto have the right to recover the money so misapplied. The sureties on the last bond, to avoid such liability—First, protected themselves by an agreement, as they had a perfect right to do, of which the auditor and county court both had notice; second, they notified the auditor not to make the threatened misapplication; and, third, they notified the county court, and it became its duty to protect the sureties. This it undertook to do, by removing the old and appointing a new sheriff, who was authorized, as its agent and treasurer, to receive the money due the county in the hands of the auditor. He forthwith demanded the fund, and, on refusal of the auditor, immediately began this proceeding, not in his own interest, but in that of the county, to secure the funds due it. If he had received the fund to which he was legally entitled, he would receive it as treasurer of the county, and his sureties would have become liable for the proper disbursement on the order of the county court. But not being able to secure same, but being deprived of it by the decision of this court, neither he nor his sureties became responsible for it in any manner. It is for the county's, and not for his or his sureties', interests for him to receive it. Had he failed to do or neglected his duty in this respect, the county court could have held him and his sureties liable for his default. In taking these many steps to protect themselves, the sureties did far more than the law required of them; for it was the duty of the auditor, having full knowledge of the source of the fund, and being both the agent of the state and county with regard thereto, to apply the same as the law directs; and, if he fails to do so, they cannot be held responsible for his malfeasance, but are thereby relieved from all liability for the fund, especially when such illegal misapplication is sustained by this court; for, however erroneous such decision may be, it is law until abrogated by the legislature. These sureties, without taking any steps whatsoever, had the right to rely on the auditor's legal application of the fund.

The law governing in such cases is plainly stated in the fifth point of the syllabus of *Chapman v. Com.*, 25 Grat. 722, as follows: "If the debts be due by a collector or other receiver of public money under bonds with different sets of sureties, then the law will so apply the payment, if possible, as that the money collected under one bond shall be

applied to the relief of the sureties in that bond. And the creditor, in such a case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by the directions of the principal debtor." The provisions of the statute directing the auditor to account for and settle the taxes assessed for the last year of the term of office of a sheriff, with the occupant of the office at the time such taxes were assessed, were not intended to apply to a defaulting sheriff, nor to enlarge his rights, nor authorize him to change the rights of his sureties, nor transfer his default from the state to the county; but it was to have each year's taxes preserved separately, and applied properly to the year to which they belong. If Keadle had received the taxes levied for the state on persons and property within the county of Mingo for the year 1899, other than the railroad taxes, then he is entitled to receive the railroad taxes for such year. As the record discloses, he, by agreement with his sureties, was to receive no taxes for the year 1899. They were to go into the hands of his sureties, and now they must go into the hands of his successor, who succeeded to all his unsettled business, and who must account to the state for its share of the taxes for 1899. Taylor, as sheriff, might have held back from the auditor the state taxes for the year 1899, sufficient to cover the county taxes for the same year withheld by the auditor, and thus compelled the auditor to sue him and his sureties on a final settlement, and in such suit raised the questions here presented. The writ of mandamus, however, furnishes a more speedy, efficacious, and just remedy to all the parties concerned, and the right thereto is undoubtedly clear. The sureties, as heretofore shown, are not interested in this controversy. Nor is Taylor or his sureties, for, if he does not receive the money, he is not chargeable therewith. Neither a sheriff nor his sureties are chargeable with the moneys collected by the auditor until they are actually paid over or accounted for in some way to such sheriff's credit or benefit, being an obligation for which such sureties are liable. An auditor, by paying a sheriff's back defaults, though with his consent or direction, cannot make his present sureties liable, unless they were liable for such debts beforehand. An auditor, without the consent of parties interested, cannot change old or create new liabilities; nor can a principal, without their consent, increase the liability of his sureties.

This case, plainly stated, is this: The auditor has in his hands \$6,390.23, funds belonging to the county of Mingo, arising from the tax levies on railroad property for county purposes for the year 1899. The sheriff, as treasurer and agent for the county, in its name and for its benefit demands its application to the purposes for which the levies were

made. This court says: "No; the fund cannot be so applied, because a defaulting sheriff, whose place the plaintiff now holds, has directed the auditor to misapply the same on his defalcation to the state for a previous year, and thus transfer his default to the state for the year 1898 to the county for 1899, lifting a burden from the shoulders of the taxpayers of the state, and placing it on the shoulders of the taxpayers of the county." Such a perversion of law, justice, right, and the taxing power has not, nor ever will receive, the sanction of the legislature; nor will the taxpayers of the state at large become particeps criminis thereto, by suffering the taxpayers of the little county of Mingo to bear this unjust burden imposed upon them by the inequitable judgment of this court. If they permit injustice to grow, though they sow not the seed, in the end they will reap its fruits, more bitter than gall.

(113 Ga. 705)

BRYCE v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

TRESPASS—CULTIVATED LANDS—EVIDENCE.

1. Under section 220 of the Penal Code, a tenant placed in possession of land by the owner is authorized to forbid a trespass upon the land by another.

2. The words "cultivated land," in this section, are not intended to apply to such land only as at the time has growing crops upon it. If it is actually prepared for a crop, or if it has been used for growing crops, and the owner intends to again devote it, in due season, to such use, a trespass upon it may be punished under this section.

3. The evidence warranted the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

William Bryce was convicted of trespass, and brings error. Affirmed.

Roland Ellis, Minter Wimberly, and D. W. Rountree, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

SIMMONS, C. J. The record discloses that Bryce was accused under section 220 of the Penal Code. Mrs. Sheffield, the prosecutrix, and Bryce, the defendant claimed certain land under deeds made by a common grantor. The prosecutrix claimed she had no notice of the deed to the defendant when she purchased the land. The defendant's statement and evidence tended to show that she did have such notice. The evidence for the state was to the contrary, and also showed that Mrs. Sheffield and her immediate grantor had lived upon the land for nearly seven years before the trespass complained of was committed. Just prior to the time of the trespass she removed from the land, and placed her daughter in possession. While the daughter was in possession, she forbade the

defendant to trespass or go upon the land. Subsequently the daughter left the place, putting another family in possession. While this family was in possession, the defendant entered the house, and put a tenant therein; and this tenant, under the direction of the defendant, sowed the land in oats, and plowed in the same. This land was uninclosed, and had no crop growing upon it at the time of this trespass, which was in December. It had, however, for several years been used as a garden, and vegetables had been grown upon it the preceding season. Under this state of facts, the defendant was found guilty by a jury in the city court of Macon. He moved for a new trial, and the motion was overruled. To this he excepted. The principal grounds insisted upon by counsel for the plaintiff in error here were: First, that the owner of the land did not give personal notice to Bryce to keep off of the land until after the trespass had been committed, and that the daughter, left in possession by the owner, was not authorized to give the notice required by the Code; and, second, that the judge erred in charging as to the meaning of the words "cultivated land," as used in the section of the Code under which the defendant was convicted.

1. The defendant was accused under section 220 of the Penal Code, which is as follows: "If any person shall willfully enter, go upon or pass over any field, orchard, garden or other inclosed or cultivated land of another, after being personally forbidden so to do by the owner or person entitled to the possession for the time being, or authorized agent thereof, he shall be guilty of a misdemeanor." It will be observed that this section provides that any one of three classes of persons may give the requisite notice,—the owner, the person entitled to the possession for the time being, or the authorized agent. The evidence shows that the owner did not give the notice until after the trespass had been committed; but it also shows that her daughter, left by her in possession of the premises, did, while in possession, forbid Bryce's trespassing upon the land. We think the notice by the daughter was sufficient, under the statute. She was entitled to the possession at the time she gave the notice, for the owner of the premises had placed her there. She was a tenant, and it was her duty to protect the premises from trespass, and, when it was necessary to their protection, to give the notice required under the Code. It would have been a breach of her duty as tenant to sit by and see trespass committed upon the property in her possession without taking any steps to prevent it. Moreover, she was, while in possession, the authorized agent of the owner to protect and preserve the property. As such agent she

had full authority to give the notice required under the Code. It is true that, according to the evidence, the trespass was not committed until after the daughter had left the place; but it also appears that, before leaving, she took the precaution to put a family in the house, who held the same for her and for the owner. We think the notice given by the daughter of the owner was a compliance with the terms of the statute.

2. The judge charged the jury, in substance, that the words "cultivated land," as used in this section of the Code, did not mean that the land must have crops growing upon it at the time the trespass was committed. There was no error in this charge. To restrict these words, as contended for by counsel for the plaintiff in error, so that no trespass would be punishable under this section unless committed upon lands upon which crops were actually growing, would be too narrow a construction; would, indeed, be narrower than the plain language of the Code. These words evidently include, not only land upon which crops are growing, but also land actually prepared and ready for a crop, and land which has been used for growing crops, and which the owner intends again to devote, in due season, to such use. According to the evidence in the record, the land here in question was an uninclosed garden, which had been in cultivation continuously, in the proper seasons, for six or seven years. The construction contended for by the plaintiff in error would allow any person to go upon the uninclosed lands of another at a time when the crops had been gathered, and commit any sort of trespass, although he had been fully notified beforehand, and forbidden to enter upon the land. He might cut ditches, make roads, sow grain, or do anything else he desired, against the will of the owner, and still be exempt from punishment under this section. Such a construction would, in our opinion, be clearly erroneous.

3. It was contended that the verdict was contrary to the evidence, because it was shown that the prosecutrix purchased the land with notice of the deed under which the defendant claims. The charge of the judge was sent up in full in the record, and we find from reading it that he submitted this question fairly to the jury. The jury believed the prosecutrix, who testified that she had no such notice. She was contradicted in part by one of the defendant's witnesses and by the defendant's statement, but the jury passed upon this disputed question of fact, and the trial judge approved their finding. There was evidence to support that finding, and there was, therefore, no error in refusing a new trial. Judgment affirmed. All the justices concurring.

(113 Ga. 772)

MINDER v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—CONTINUANCE—HOMICIDE—INSTRUCTIONS—INSANITY—NEW TRIAL.

1. Even if refusing to continue a criminal case because of the absence of material witnesses for the accused, who reside in another state, is, under any circumstances, cause for a new trial, it certainly is not when it appears that the court unsuccessfully employed all the power at its command to procure the attendance of these witnesses. It is not within the power of a court of this state to send its officers beyond the territorial limits of this state, with a view to enforcing the attendance of non-resident witnesses upon such court. The failure of the law to provide a method for enforcing the attendance of nonresident witnesses, or for the procuring and reception of their depositions, is not, in a particular case, a denial to the accused of the equal protection of the laws, or a deprivation of his life or liberty without due process of law.

2. The charge of the judge presented with sufficient fullness and clearness not only the general rule applicable to the defense of insanity at the time of the killing, but also the rule relating to delusional insanity. It was not essential, in charging the jury on this branch of the law, for the court to use the term "paranoia," but enough if the principle involved was plainly stated to the jury.

3. In order to sustain the independent defense of insanity at the time of the commission of an alleged criminal act, it is incumbent upon the accused to prove that he was insane at that time; and an instruction that he must prove this to a "reasonable certainty" is not erroneous, when the jury are distinctly informed that a preponderance of the testimony is all that is requisite to establish such reasonable certainty.

4. The assignments of error in the motion for a new trial not referred to above presented no sufficient reason for granting a new trial. The case was fairly submitted to the jury, the evidence authorized the verdict, and the discretion of the trial judge in refusing to grant a new trial will not be interfered with.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

J. Minder was convicted of murder, and brings error. Affirmed.

John R. Cooper and Herman Brasch, for plaintiff in error. Wm. Brunson, Sol. Gen., Robt. Hodges, and J. M. Terrell, Atty. Gen., for the State.

COBB, J. Minder was placed on trial upon an indictment charging him with the offense of murder, and, having been convicted, was sentenced to death. His motion for a new trial was overruled, and he excepted.

1. In one of the grounds of the motion for a new trial complaint is made that the court erred in refusing to continue the case. The application for a continuance was made upon the ground of the absence of certain witnesses whose testimony, it is claimed, was very material to the defense of insanity set up by the accused. It appeared that these witnesses resided in the state of Alabama; that the court had caused subpoenas to be issued, directed to these witnesses; that they had been transmitted by mail to the wit-

nesses; that the subpoenas had been received by them; and that they had refused to attend court, upon the advice of their counsel in Alabama that there was no law requiring them to leave their state to attend as witnesses a court of another state. It distinctly appeared that the witnesses had refused to attend, and there is nothing in the record to indicate that there were any reasonable grounds for hoping that they might be induced to attend at a subsequent term of the court if the case had been continued. Under such circumstances, it does not seem to us that the court erred in refusing to postpone the case. In a case of this character, where the life of the accused is at stake, and the court has at its command no compulsory process which could be used to enforce the attendance of the witnesses from beyond its jurisdiction, a promise by the witnesses to attend at a subsequent term of the court might address itself very strongly to the discretion of the trial judge, and authorize him to continue the case; but certainly there is no abuse of discretion when the witnesses are beyond the jurisdiction of the court and beyond the power of its process, and not only refuse to attend voluntarily, but give no indication that they will at any time in the future be willing to attend upon the sessions of the court. It was argued here that the court should have sent an officer into the state of Alabama, and served each of the witnesses personally with subpoenas. We do not think the court had any authority to do this, even if there was no impropriety in an officer of this state going into the state of Alabama and making personal service of a paper. The courts of this state are under no obligations to litigants to send their officers beyond the limits of the state to do acts which would be purely voluntary on the part of such officers; and certainly the court should not use one of its officers in this way, when the sole purpose in so doing would be to produce a species of moral coercion upon a citizen of another state to come into this state, when he is not required by law to do so, and would have a right to ignore the command of the court thus transmitted to him. The point was made in the court below, and was argued here, that the failure of the law of this state to provide a method for compelling the attendance of witnesses from beyond the jurisdiction of the state, or for obtaining the depositions of such witnesses and allowing them to be introduced in evidence in behalf of a person charged with crime, was a denial to such person of the equal protection of the laws, and his conviction under such circumstances would be depriving him of life or liberty, as the case may be, without due process of law, in violation of the fourteenth amendment to the constitution of the United States. We do not see how a person on trial could be said to be denied the equal protection of the laws, when he is tried under laws of procedure ap-

plicable to every person charged with crime. Nor can we see how a person is deprived of life or liberty without due process of law on account of not having the benefit of the testimony of witnesses who are beyond the jurisdiction of the court, when the lawmaking power of the state is powerless to make any provision which would result in the compulsory attendance of the witnesses, and the use of depositions in such cases is directly contrary to the usages, customs, and principles of the common law.

2. Complaint was made that the court did not in its charge fully cover all of the contentions of the accused bearing upon the defense set up by him of delusional insanity, and did not explain to the jury what was meant by "paranoia," or delusional insanity. An examination of the charge has satisfied us that the judge clearly stated to the jury not only the proper rule applicable to the defense of insanity at the time of the killing, but also the rule relating to delusional insanity, sometimes denominated "paranoia." It is true that nowhere in his charge did the judge use the term "paranoia," but the charge contained a clear exposition of the law applicable to the defense of delusional insanity, and under the charge the jury could not have had any misunderstanding as to the contention of the accused.

3. Complaint is further made that the court erred in charging the jury that when the accused relies upon the defense of insanity he must prove the truth of this defense to a "reasonable certainty." While the court did use the expression quoted, the charge clearly indicates that it was used as the equivalent of the expression "preponderance of the evidence"; for in another part of the charge the judge instructed the jury that if the accused "proves his insanity to a reasonable certainty, by a preponderance of the testimony in the case," the jury will be authorized to acquit. When the charge is considered as a whole, we do not think there is anything in the use of the expression "reasonable certainty" to mislead the jury, even if reasonable certainty would require a higher degree of mental conviction than that brought about by a preponderance of the evidence.

4. We have examined carefully all of the numerous assignments of error in the motion for a new trial, and none of them, other than those above referred to, require any extended discussion. The charge of the judge, when taken as a whole, appears to be free from error, and we are certain that none of the assignments of error on the portions of the charge set out in the motion for a new trial are well taken. There appears to have been no error committed in the rulings on evidence complained of, but, even if there was any error in the admission of any of the testimony which was objected to, the error so committed was not of such a character as to require

the granting of a new trial. The deceased was an Irishman. The accused was a Jew, and undoubtedly a man weak both in mind and body, but not to such an extent as to be irresponsible. The deceased seems to have been thoroughly imbued with an antipathy to Jews in general, and to the accused in particular, and never lost an opportunity to insult by language, and place upon the accused indignities which were hard to bear. The evidence authorized an inference that, on account of the overbearing conduct of the deceased towards the accused at different times, the accused was in mortal dread of him, and his mere presence would sometimes throw the accused into a highly-excited and nervous condition. At different places at which the accused lived the deceased had lived, and his conduct towards the accused had been that which was calculated to insult and degrade. He was goaded in a manner that was pitiable, and in a fit of desperation he took the life of his persecutor. Under the law, he was guilty of murder. The jury were authorized to so find, the trial judge has approved this finding, and we have no authority to interfere. We would, however, have been better satisfied in affirming the judgment of the court in refusing to grant a new trial, had the jury seen fit, in the exercise of the authority which the law vests in them, to commute the penalty to life imprisonment. That, however, is a matter which is, under the law, left to the jury, and neither the trial judge nor this court has a right to change the punishment which the law prescribes. If a mistake has been made, and this is one of those cases where the penalty should be imprisonment instead of death, the accused is without a remedy, so far as the judicial department of the government is concerned, and must make his appeal to the executive. Judgment affirmed. All the justices concurring.

(113 Ga. 720)

CARROLL v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL—REFUSAL OF NEW TRIAL.

There being sufficient evidence to authorize the conviction of the accused, this court will not interfere with the discretion of the trial court in overruling the motion for a new trial on the ground that the verdict was contrary to the evidence. The charge of the court, taken as a whole, was a full and fair presentation of the law bearing upon the case, and the request to charge which was insisted upon was properly refused.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Levi Carroll was convicted of crime, and brings error. Affirmed.

W. J. Grace and R. L. Anderson, for plaintiff in error. Wm. Burnson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LEWIS, J. The plaintiff in error was tried and convicted of the offense of murder. The testimony shows a case of outrageous assassination; a willful, deliberate, and felonious killing without any provocation whatever. The only defense was the plea of insanity. There was some evidence tending to show that the accused was of weak mind; but there was, on the other hand, evidence amply sufficient to authorize the jury to conclude that he had sufficient mental power to distinguish right from wrong with reference to the particular criminal act which he was committing, and that he was not the victim of any delusion which overmastered his will in regard to this crime. The charge of the court, taken as a whole, was a full and fair presentation of the law bearing upon the case. There was no error in refusing to charge, as requested, that the jury should give great weight and consideration to certain expert testimony. The court should not try to influence the jury by designating any particular witness or class of witnesses to whose testimony they should give special attention or unusual weight. Judgment affirmed. All the justices concurring.

(112 Ga. 759)

KENDRICK v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—ALIBI.

When, on the trial of an indictment for assault with intent to murder, alleged to have been committed by shooting with a pistol, the evidence for the state, if credible, unequivocally demanded a general verdict of guilty, and this evidence was met only by a statement of the accused which, if true, established an alibi, a verdict finding the accused guilty of the statutory offense of unlawfully shooting at another was unwarranted; there being, under such circumstances, no evidence whatever upon which to base the same.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Edward Kendrick was convicted of unlawfully shooting at another, and brings error. Reversed.

John R. Cooper and Herman Brasch, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

FISH, J. The only question to be considered in this case is whether the verdict was contrary to law and the evidence. The accused was tried under an indictment charging him with the offense of assault with intent to murder, and the jury found him guilty of the statutory offense of "shooting at another." He made a motion for a new trial upon the general grounds, which was overruled, and he excepted. The indictment charged that he made an assault upon one Zeno Dixon with certain pistols, and that he "did unlawfully, willfully, deliberately, felonious-

ly, and of his malice aforethought, shoot at said Zeno Dixon with intent to murder Zeno Dixon." It is contended in behalf of the plaintiff in error that "the evidence for the state made a case of assault with intent to murder, and the evidence for the defendant clearly established the innocence of the accused, so that the verdict of guilty of the statutory offense of shooting at another is wrong and unauthorized by the evidence," and that "the defendant is either guilty of assault with intent to murder, as charged in the bill of indictment, or he is not guilty." So far as we have been able to ascertain, the precise question here made has never been determined by this court. It has decided in several cases that, under an indictment containing a single count for assault with intent to murder by shooting at the person charged to have been assaulted, the jury may find the accused guilty of "shooting at another," that being a lesser offense of the same general character. *Arnold v. State*, 51 Ga. 144; *Moody v. State*, 54 Ga. 660; *Wostenholms v. State*, 70 Ga. 720; *Gaines v. State*, 108 Ga. 772, 33 S. E. 632. But, while this is true, if the evidence for the state demands a verdict of guilty of assault with intent to murder, and the sole defense relied upon is an alibi, it is not erroneous for the court to fail to charge the jury upon the law relating to the offense of "shooting at another," because the law relating to this offense is not involved in the case. *Tyre v. State*, 112 Ga. 224, 37 S. E. 374. Under an indictment for murder, the accused may be found guilty of voluntary manslaughter, if there is evidence to support such a verdict; but, if from the evidence and the prisoner's statement it appears that the law relating to this latter crime is not involved in the case, it is erroneous for the court to give it in charge to the jury. "but so doing will not in such a case be cause for a new trial, if the accused be rightly convicted of murder, or if, though he be convicted of voluntary manslaughter only, a verdict of murder was really demanded. If, however, in such a case the accused be convicted of voluntary manslaughter, when there was evidence which would have warranted an acquittal, or when his statement, if believed, would have so warranted, there should be a new trial." *Robinson v. State*, 109 Ga. 506, 34 S. E. 1017. It seems to us to logically follow from the last two cases cited—especially the *Robinson Case*—that in a case where the evidence for the state, if believed by the jury, demands a verdict of guilty of the crime charged in the indictment, and the evidence for the accused, if accepted as true, demands an absolute acquittal, a verdict finding him guilty of a lesser offense of the same general character is contrary to evidence and to law. In the present case, if it would have been erroneous for the court to have charged the jury upon the law relating to the statutory offense of "shooting at another," then it must have been illegal for

the jury to find the defendant guilty of that offense, unless a verdict finding him guilty of the greater offense of assault with intent to murder was really demanded, in which event he would have no right to complain of the verdict finding him guilty of the lesser offense. The evidence for the state, if credible, absolutely demanded a verdict of guilty of assault with intent to murder. The defendant introduced no evidence, but simply made a statement in which he denied any connection whatever with the alleged assault, and set up an alibi. If the jury believed the testimony for the state, they should have convicted the accused of assault with intent to murder,—the crime charged in the indictment. If they believed the statement of the prisoner, they should have acquitted him entirely. Under the testimony and the statement, the issue was clear-cut,—guilty of assault with intent to murder, or guilty of nothing. There was no middle ground. This, then, according to the decision in *Robinson v. State*, supra, was a case in which not only would it have been erroneous for the court to have charged the jury upon the law relating to the offense of "shooting at another," but, had the court done so, and the jury found the same verdict, the error would have afforded sufficient cause for a new trial. This being true, it must necessarily follow that, with or without such charge by the court, the verdict finding the defendant guilty of that offense was contrary to law and the evidence. For if, under the circumstances of this case as presented to the jury, a verdict of guilty of "shooting at another" was authorized by the law, the accused, when such a verdict was rendered, could not have been heard to complain if the court had charged the jury the law relating to that offense. But, had the court so charged the jury, it would have been cause for a new trial; hence it must likewise be cause for a new trial that the jury, without such charge, found the defendant guilty of "shooting at another." Judgment reversed. All the justices concurring.

(113 Ga. 742)

ROSS et al. v. BATTLE et al.

(Supreme Court of Georgia. July 17, 1901.)

ACTION BY MINORS—GUARDIAN AD LITEM—ACCOUNTING BY ADMINISTRATOR—CREDITS—EXCEPTIONS TO AUDITOR'S REPORT.

1. Overruling a motion to dismiss, as to minors, a petition wherein they appear as plaintiffs suing by a named next friend, the ground of the motion being that no guardian ad litem has been appointed, is not erroneous.

2. In an accounting between an administrator and the heirs of his intestate, he is not entitled to credit for sums expended by the sureties on his bond in settling debts of the estate, when it appears that the latter have been fully reimbursed by a conveyance to them of property not belonging to the estate, and under circumstances which will prevent them from asserting, either against the estate or the administrator, any claim based upon the fact that they had settled such debts.

3. Nor, in such an accounting, can an administrator lawfully charge against the heirs the costs or expenses of litigation brought about by his own fault or misconduct.

4. Where one who is a surety upon a debt due by the estate of a decedent, and also surety upon the bond of the administrator of that estate, after paying off the debt waives all claim for reimbursement either from the estate or the administrator, the latter is not, in a settlement with the heirs, entitled to credit for the amount paid by such surety in satisfaction of that debt.

5. Exceptions to an auditor's report, which are so general in their terms that they fail to plainly and distinctly point out wherein the auditor erred in any ruling or finding of which it is intended to complain, are without legal merit.

6. It does not, in the present case, appear that the court erred in overruling the exceptions of the plaintiffs in error to the auditor's report, or in rendering the judgment excepted to in the bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Schley county; Z. A. Littlejohn, Judge.

Suit by E. L. Battle and others against W. J. Ross and others, administrators. Judgment for plaintiffs, and defendants bring error. Affirmed.

J. A. Hixon, W. A. Dodson, O. R. McCrory, and E. B. Hart, for plaintiffs in error. J. H. Lumpkin, for defendants in error.

LEWIS, J. While the record in this case is voluminous, and the facts somewhat complicated, the bill of exceptions really presents for our decision only those points which are dealt with in the headnotes. It appears that J. R. Battle, Jr., died intestate in the year 1885, and that W. J. Ross and C. L. Ross were appointed administrators of his estate. His heirs were his widow, Edna L. Battle, and his children, R. E., Lottie, John A., and Randolph Battle. They brought in the superior court of Schley county an equitable petition against the administrators for an accounting and settlement. Three of the children, being minors, sued by their mother as next friend. The case was referred to W. M. Hawkes, Esq., as auditor, and in due time he filed his report. To this the plaintiffs filed certain exceptions, both of law and fact. The former were overruled, and of this they did not complain, and they also withdrew their exceptions of fact. The defendants likewise filed exceptions of law and fact, all of which were overruled, and a judgment was entered in accordance with the auditor's report. The defendants sued out a bill of exceptions complaining of the court's action in overruling their exceptions to the auditor's report and in entering judgment against them. We will now undertake to deal with the several questions thus presented for our consideration, and in connection with each set forth such facts as may be necessary to an understanding of our rulings in the case.

1. The first question for determination is whether or not the minor children of the in-

testate were properly in court as plaintiffs. The point was made by the defendants below that the action could not, as to these children, proceed, for the reason that they appeared in the petition by their mother as next friend, and that no order had ever been passed appointing her their guardian ad litem. The auditor held (and his ruling on this point was confirmed by the superior court) that the action, so far as they were concerned, was properly proceeding. A formal order appointing a guardian ad litem was not requisite to give the minors a standing in court. The action, so far as related to the minors, was not void in the first instance; and, if defective at all, the defect was certainly cured by the action taken by the court in the premises. See, in this connection, Civ. Code, § 4947, and cases there cited.

2. From the evidence it appeared that there were several tracts of land belonging to the estate of the intestate, all of which were, at sales thereof by the administrators, bought by Mrs. Battle, and duly conveyed to her. Subsequently she conveyed one of these tracts, known as the "Ross Place," to the wife of W. J. Ross, one of the administrators. Later several persons, who were sureties on the bond of the administrators, brought an equitable petition against them and Mrs. Battle and Mrs. Ross, alleging, in substance, waste and mismanagement by the administrators, and also that the sales of the lands to Mrs. Battle were made under a fraudulent and collusive arrangement to place the same beyond the reach of the creditors of the estate. The petition prayed for relief appropriate to such a state of facts as that disclosed by its allegations, which are briefly summarized above. While this litigation was pending, the parties thereto agreed to a settlement, by the terms of which the Ross place was to be reconveyed to Mrs. Battle, who in turn was to convey the same to the sureties, and in consideration of her so doing they were to pay off and settle the debts of the estate, amounting in the aggregate to about \$4,000. This settlement was made the decree of the court in the case last mentioned, and its terms were actually carried into effect; the securities, however, comprising the debts at less than their face value. In this connection it is proper to state that the prices at which all the lands were bid off by Mrs. Battle were far below their actual value, and it will be observed that by the terms of the settlement and the decree she was enabled to hold all of these lands except the Ross place. At the hearing before the auditor the defendants insisted that they were entitled to credits for the various items of indebtedness against the estate of their intestate which were settled by their sureties under the arrangement and the decree above mentioned. This contention the auditor overruled, and we think that he was clearly right in so do-

ing. Had the Ross place been used as a part of the estate in settling this indebtedness, it is certain that the heirs could not hold the administrators liable for the money for which they sold this property, without at the same time allowing proper credit for the indebtedness discharged by the sureties in consideration of the conveyance of the Ross place to them. But that is not this case. When this property was used, in the manner above stated, for clearing the estate of indebtedness, it was not used as the property of the estate, but as the property of Mrs. Battle. She, for reasons of her own, the nature of which has been hinted at, was willing to give up this property to accomplish the several ends the parties to the decree above mentioned had in view. So it turned out that the indebtedness was disposed of, not by a sale of the property of the estate, but by an arrangement satisfactory to the parties to the litigation, set on foot by the sureties. It clearly appears that Mrs. Battle is making no claim against the sureties for having thus settled with her property the debts of the estate, and that they never can or will be held liable to any one for the amount of these debts. This being so, and the administrators not having used one dollar, either of their own money or of the funds of the estate, in settling the indebtedness, there is no principle, either of law or justice, which would entitle them, in an accounting with the heirs, to any credit for the amounts paid by their sureties in settling this indebtedness in the manner stated. Of course, in the accounting which was taken by the auditor between the administrators and Mrs. Battle as an heir of the intestate she was properly given credit for her proportion of the price the Ross place brought when it was sold to her; and it is equally true that the auditor, in striking a balance between the administrators and Mrs. Battle, properly charged her with the full price for which she bid off the Ross place at the administrators' sale. A matter of prime importance, and one which must not be overlooked in this connection, is that in the present proceeding Mrs. Battle and the other plaintiffs are standing by the sales of the Ross place and all the other lands by the administrators to Mrs. Battle, and they are in no way seeking to set that sale aside, or in any manner affect its results.

3. The administrators, at the hearing before the auditor, claimed that they were entitled to their counsel fees and costs incurred in the litigation to which reference has already been made. This claim was properly disallowed by the auditor. It is manifest from the evidence that the administrators were at fault in bringing about the state of affairs which led to the bringing of the equitable action against them and Mrs. Battle and Mrs. Ross. Having, by their conduct, thus confused the affairs of the estate so as to render necessary the suit referred to, it

would be manifestly unjust to the heirs to, in effect, charge them with the expenses thus incurred. We think, therefore, that the exception to the auditor's report which complains of his ruling on this point was properly overruled by the superior court.

4. It appeared that a small debt of the estate was settled by one Cranford, who was surety thereon for the intestate, and who was also one of the sureties for the administrators. They claimed before the auditor that they should be allowed a credit for the amount thus paid. The auditor held otherwise, upon testimony affirmatively showing that, when Cranford paid off this debt, he did so intending to lose it, and that he had, by his conduct and declarations, waived making any claim on account of this payment against either the estate of Battle or these administrators. It follows that the refusal of the auditor to allow this credit, which was confirmed by the superior court, was right.

5. One exception to the auditor's report alleged in general terms that he erred in his method of calculating interest, but in this exception it is not pointed out in what the error consisted, or upon what plan the interest should have been calculated. The exceptions not specifically dealt with above were in the most loose and general terms, and did not specifically point out any particular error on the part of the auditor. Exceptions of this nature do not properly present questions for the superior court. See, in this connection, *Mason v. Commissioners*, 104 Ga. 35, 30 S. E. 513, and the cases cited on page 42, 104 Ga., and page 515, 30 S. E.

6. After a thorough and careful examination of the entire record, we find no reason for holding that the court below committed any error in dealing with the exceptions to the report of the auditor, whose work was admirably and accurately done; nor in entering the judgment of which complaint is made. Judgment affirmed. All the justices concurring.

(113 Ga. 323)

PIRKLE et al. v. COOPER et al.

(Supreme Court of Georgia. July 18, 1901.)

ADMINISTRATOR'S SALE—PURCHASE BY ADMINISTRATOR—ELECTION BY HEIRS
—PLEADING—EVIDENCE.

1. An administrator who purchases property at his own sale must take all the legitimate consequences of an election by heirs, duly made, to set the sale aside; and the right to exercise such election cannot be defeated because of the insolvency of the estate, or because on a resale the property would bring less than at the first sale, or because the administrator, in good faith believing that the sale to himself would be allowed to stand, used his own money in discharging indebtedness due by the estate.

2. That an administrator procured a creditor of his intestate, secured by a deed to land, to allow the same to be sold by the administrator free from the incumbrance of the deed, if a beneficial arrangement, operated to the advantage of heirs, but not that of the administrator; nor could such a transaction defeat an

election by heirs to annul a sale thus had when the administrator became the purchaser thereat.

3. A general averment that "heirs" or "members of the family" of an intestate consented to a given arrangement does not amount to a clear and unequivocal allegation that the plaintiffs in a particular action, who are such heirs, so consented.

4. It is not erroneous to reject as irrelevant testimony which does not throw light upon any issue made by the pleadings in the case on trial.

5. When an administrator's sale to himself is set aside by a court, the annulment cannot be partial. It must be complete; but those only are affected by the judgment and its consequences who are before the court when it is rendered.

(Syllabus by the Court.)

Error from superior court, Hall county; J. B. Estes, Judge.

Action by A. R. Cooper, Jr., and others against R. N. Pirkle and W. H. Cooper. Judgment for plaintiffs, and defendants bring error. Affirmed.

Fletcher M. Johnson and W. R. Hammond, for plaintiffs in error. Dean & Hobbs, for defendants in error.

LUMPKIN, P. J. This was an equitable proceeding, begun in due time by A. R. Cooper, Jr., Mrs. Ella Wellborn, and others, as heirs at law of A. R. Cooper, Sr., deceased, against R. N. Pirkle and W. H. Cooper, as administrators of his estate, and others, to set aside the sale of certain lands belonging to that estate by R. N. Pirkle, as administrator, to himself. Mrs. Caroline Cooper, the intestate's widow, was a party plaintiff when the petition was filed, but the same was, as to her, dismissed on the day the case was tried, and evidently before the trial was had. It appears that some of the heirs at law did not join in the petition. The answer, after alleging that Pirkle, as the active administrator, had taken the exclusive management of the estate, admitted the purchase by him of the lands in controversy at his own sale thereof, but denied all actual fraud, and averred that the sale was fair, and that the property brought its full value. It also alleged that the purchase by the administrator was "at the earnest and repeated request of the widow, Caroline Cooper, and other heirs," and that the arrangement for him to become the purchaser was made at the request of her "and other heirs." An amendment to the answer tendered by Pirkle was rejected by the court. So far as material, its contents were, in substance, as follows: The intestate, before his death, had borrowed a considerable sum of money from a named mortgage company, giving therefor a promissory note, and securing the same by a deed to the lands now in dispute. This deed was of force at the time the sale by Pirkle was to take place, and a claim was about to be filed by the mortgage company. Pirkle, being anxious to protect the estate, "agreed with the

said Caroline Cooper, and with other members of the family," who were the heirs of the intestate, "and whose names he cannot now recall with certainty after so long a lapse of time, that he would arrange to have said property bought off, and, if necessary, would take the same, in order to satisfy said indebtedness, and in order to protect the interests of said estate." This was "at the urgent solicitation of the said Caroline Cooper, and with the knowledge and consent of the family, as hereinbefore stated." By promising the mortgage company to pay its claim in full, he procured its consent for him to sell the lands as administrator, free from the incumbrance of the security deed; and he actually did so. The proceeds were not sufficient to pay the debt, and he supplied the deficiency, amounting to over \$300, from his own pocket. The company confirmed his sale by a conveyance of the lands. The estate is insolvent, and he has paid out more than he has received as administrator. The lands, if resold, will not bring as much as they did when first sold. The amendment concluded with a prayer that, if the sale by the administrator to himself be set aside, the court decree a resale of the lands, the same to be conducted by some one other than himself, and direct that the proceeds be applied, so far as necessary, to the reimbursement of Pirkle for all amounts he had, from his own means, paid out in behalf of the estate. After the evidence was closed, the court directed a verdict for the plaintiffs to the effect that the sale in question be set aside, that the conveyances purporting to evidence the same be canceled, and that the title to the lands be revested in the intestate's estate. Judgment was entered accordingly. The defendants thereupon made a motion for a new trial, which was overruled. Their bill of exceptions assigns error in rejecting the offered amendment to the answer and in refusing to grant a new trial.

1, 2, 3. The amendment was rightly rejected. It set up no real equity against the plaintiffs, or any of them. Nothing is better settled in the law of this state than that heirs may, within a reasonable time, elect to set aside a purchase by an administrator at his own sale. Every administrator is absolutely chargeable with knowledge that such is the law, and therefore one who buys at his own sale must take all the consequences necessarily resulting from the exercise by heirs of their right to annul the transaction. It makes no difference with what amount of good faith the administrator acts, or that the estate is insolvent, or that a resale would yield a smaller return. He must, as already indicated, take all the chances of his sale to himself being allowed by those who have a perfect right to repudiate it, to stand. Nor can he set up any supposed equity growing out of his own disregard of the plain letter of the law which would defeat, or even qual-

ify, the right of the heirs to exercise their option in the premises. To hold otherwise would uproot all of the established principles bearing on this subject. When the resale is had, the administrator may, of course, reimburse himself from the proceeds for any legitimate outlay he has made in behalf of the estate; but, if the proceeds are inadequate, the loss will be his. Nor can he, to avoid such loss, demand that the court decree a resale to be conducted by some one other than himself, in order that he may be a competitive bidder at the same, and thus force the property to bring a higher price than it otherwise would. The amendment derived no strength from the allegations relating to the arrangement made with the mortgage company, however advantageous it may have been to the estate. If it did operate beneficially to the trust with which he was clothed, he did more than his duty in the premises, and the heirs—not he—became entitled to the corresponding gain. Certainly, the making of such an arrangement could not, as against the heirs, give the administrator any lawful right to buy the property sold in pursuance thereof. There is no sufficient averment in either the answer or the amendment that any of the original plaintiffs except the widow consented to or ratified Pirkle's purchasing at his own sale; and, as has been seen, the action was, as to her, dismissed. The loose expressions "and other heirs," "other members of the family," etc., were certainly too indefinite to be treated as tendering any distinct issue on this point to the plaintiffs in whose behalf the case was pressed to trial. Especially is this so in view of the fact, mentioned above, that some of the intestate's heirs were never parties to the petition, and of the administrator's expressed inability to remember what "heirs" or "members of the family" had agreed that he might purchase at his own sale. Moreover, he did not undertake to allege that those who did consent were at the time of age, and therefore competent to enter into an agreement binding in law upon them. We therefore uphold the ruling striking the amendment. The foregoing disposes also of several of the questions presented by the motion for a new trial. We will now give attention to those which are not thereby fully covered.

4. Error is assigned upon rejecting as irrelevant the offered testimony of Pirkle that the plaintiffs A. R. Cooper, Jr., and Mrs. Wellborn were living, at the time of the sale of the lands in controversy, on a different farm, and "expected" Pirkle to buy those lands "to get a home on; and all the family understood it, and didn't object." The exclusion of this testimony was clearly right, for the reason, before stated, that the pleadings nowhere set up the defense that either one of these plaintiffs had consented to or ratified Pirkle's purchase from himself. Again, the testimony was itself exceedingly vague and in-

definite. Evidence merely showing that A. R. Cooper, Jr., and Mrs. Wellborn "expected" Pirkle to buy the lands in order, presumably, that they might somehow "get a home" thereon, and that "all the family" understood and did not object to this expectation, would fall far short of proving that these two heirs deliberately agreed that Pirkle might sell the lands to himself. Furthermore, it affirmatively appeared elsewhere in the testimony that A. R. Cooper, Jr., was a minor when this alleged expectation on his part existed, and it does not appear that Mrs. Wellborn had then attained her majority.

5. The verdict is attacked because it sets the sale aside entirely, and not merely as to some of the heirs. It was argued that the sale could be annulled as to those heirs only who rightfully exercised the election to set it aside. All of the heirs before the court when the verdict was returned established their right to have the sale declared void. There could be no such thing as a partial annulment of it. On the resale of these lands the fee in each parcel must be put up and disposed of. In the settlement to follow, the plaintiffs and the administrator will be bound by the result; but the adult heirs who did not join in this proceeding will stand as they did before. Judgment affirmed. All the justices concurring.

(112 Ga. 824)

ADAMS et al. v. ADAMS.

(Supreme Court of Georgia. July 18, 1901.)

SALE OF DECEDENT'S LAND—COLLATERAL ATTACK—ACCOUNTING BY ADMINISTRATOR—ANSWER—NONSUIT.

1. An order for the sale of land, duly granted by the ordinary, cannot be collaterally attacked in the superior court on the ground that it was granted upon insufficient evidence.

2. Where such an order was for the sale of a reversion in realty after the expiration of a widow's dower, and before the sale took place the widow died, the order constituted authority to sell the fee.

3. It is not ground of objection to an answer filed by an administrator to an equitable petition, which waived discovery and prayed for an accounting and settlement, that the answer did not have attached thereto a schedule of the returns of the administrator.

4. Where, on the trial of an equitable petition against an administrator for an account and settlement, the plaintiffs, by affirmative proof, charged him with the receipt of assets, the mere fact that the evidence offered by them showed that he had previously obtained an order for the sale of realty for the purpose of paying debts did not entitle him to the grant of a nonsuit. On such a state of pleadings and evidence, the plaintiffs would have been entitled to recover.

(Syllabus by the Court.)

Error from superior court, White county; J. B. Estes, Judge.

Action by George W. Adams and others against J. M. Adams. Judgment for defendant, and plaintiffs bring error. Reversed.

G. S. Kytie and H. H. Dean, for plaintiffs in error. L. L. Oakes, for defendant in error.

COBB, J. George W. Adams and others brought their action against J. M. Adams, alleging that the plaintiffs were children and heirs at law of Harden Adams, deceased, and that the defendant was the administrator on his estate; that the defendant was insolvent, and that the only security on his bond was a nonresident of the state, who had no property within the limits of the state; that their father left as a part of his estate a tract of land, which the administrator was advertising for sale, and that it was his purpose to apply the proceeds of the sale to an invalid claim against the estate which he held, or in which he was interested; that an application was pending in the court of ordinary to have the defendant removed as administrator, but that the hearing upon this application could not be had until after the date of the sale. The prayer of the petition was that the defendant be enjoined from selling the land until after the application to remove pending in the court of ordinary had been determined, that the land be divided between the plaintiffs and the defendant as the heirs at law of their father, and for general relief. The petition waived discovery. In an amendment to the petition it was alleged that since the filing of the suit the widow of Harden Adams, who had had her dower set apart in the land referred to in the original petition, had died, and that the dower estate had determined; that the order obtained by the administrator to sell the land was an order authorizing the sale of the reversionary interest subject to the widow's dower, and that no evidence was introduced before the court of ordinary when this order of sale was obtained showing that there were any valid debts against the estate; that since the death of the widow there is no reversionary interest and no dower interest, and that a sale under the order would have the effect of misleading persons and depreciate the value of the property; that various items of personal and real property had gone into the possession of the administrator, the alleged value of each being set forth in the petition. The amendment then charges other acts of mismanagement on the part of the administrator, and alleges a willingness to pay to the administrator whatever amount may be necessary to pay off the debts of the estate, and, waiving discovery, prays that the administrator be brought to a full settlement and accounting. This amendment seems to have been allowed without objection. The defendant filed an answer in which he admitted various allegations in the petition and amendment to be true, denied the various charges of mismanagement, and denied that the plaintiffs were entitled to any of the relief sought. An interlocutory injunction was granted, which seems to have continued in force until the final hearing. When the case came on for a final hearing, at the conclusion of

the plaintiffs' evidence, upon motion of the defendant, the court granted a nonsuit. To this ruling, as well as to other rulings made during the progress of the trial, the plaintiffs excepted.

1. The plaintiffs introduced in evidence an order of the court of ordinary authorizing the sale of the land described in the petition, for the purpose of paying debts, and then offered testimony to the effect that at the time the ordinary granted the order there was before him no evidence whatever showing that any debts were due by the estate. The court refused to allow this testimony, and this is assigned as error. The judgment of a court of ordinary granting leave to sell land of an intestate is a judgment of a court of general jurisdiction, and, when duly granted in accordance with law, is binding upon all persons interested in the estate, and cannot be collaterally attacked in any court upon a ground of the character upon which the attack is made in the present case. See *Stuckey v. Watkins*, 112 Ga. 268, 37 S. E. 401, and cases cited.

2. The order above referred to was granted during the lifetime of the widow of the intestate, whose dower had been laid off in the land proposed to be sold, and the order granted authority to sell the land subject to the dower. It was contended that as the widow had died since the granting of the order, and before any sale had been had, the order was inoperative, and no sale could be had thereunder, and that even if it could be had, it should not be, for the reason that the order provided for a sale only of the reversion, and a sale under the order would be calculated to mislead bidders and deprecate the price of the property. The order authorized the sale of every interest in the property except the widow's dower, and we do not think that the death of the widow at all affected the validity of the order, or made a sale thereunder improper, when, with proper advertisements, and proper statements at the sale, informing the bidders that the widow was no longer in life, and that the administrator would sell the entire fee, any confusion about the matter would be relieved, and the property would be placed before the bidders in such a way that it would bring its full value.

3. The plaintiffs demurred to the answer of the defendant on the ground that it did not have attached thereto a schedule of the returns of the administrator. The court overruled the demurrer, and this ruling is assigned as error. As both the petition and the amendment expressly waived discovery, we do not know upon what principle it could be claimed that the defendant was required to attach to his answer a complete schedule of his returns. The defendant was not required to answer at all, but, of course, if he failed to answer any specific allegation of the petition, it would be taken as true. He has answered in detail every

paragraph of the petition, denying some and admitting others; and this is all the answer the plaintiffs were entitled to, in the absence of a prayer for discovery, intended to search the conscience of the defendant. Not having been willing to take the risk which a prayer for discovery would bring about, the plaintiffs must be satisfied to make out their case the best they can without the aid of the defendant.

4. There was evidence introduced by the plaintiff that property, real and personal, of several thousand dollars in value, had gone into the possession of the administrator. There was also evidence that he had sold realty and personalty for sums aggregating several hundred dollars, and there was evidence that the tract of land especially in controversy was still in his possession. We think this evidence was sufficient to cast upon the defendant the burden of showing what disposition he had made of the money received from the sale of property, and also what debts were still outstanding against the estate. It is true that there was a judgment of the court of ordinary that there were debts outstanding, and by this judgment the plaintiffs were bound; but there was nothing in the judgment to indicate the amount of these debts, and the plaintiffs, as heirs at law of the defendant's intestate, had a right, after the expiration of 12 months from the defendant's qualification, to call him to an account, and make him disclose what had been done with the proceeds of property which he had sold, and what was the amount of the valid debts outstanding against the estate, so as to determine how much of the property should still be retained by him to be administered for this purpose. Upon the evidence introduced in behalf of the plaintiffs, in the absence of any evidence by the defendant, the court would have been not only authorized, but required, to enter a decree in favor of the plaintiffs for their proportionate amount of the moneys which had been received by the administrator, belonging to the estate, and also a decree that the land still in the possession of the administrator be sold by him either under the order of the court of ordinary or the decree to be rendered in this case, and after paying the valid debts still due by the estate, the expenses of administration, and such other costs as the judge should see fit to tax against the estate, the remainder to be divided among the heirs at law in proportion to their interest in the estate. The superior court, as a court of equity, has concurrent jurisdiction with the court of ordinary in the matter of the settlement of estates; and the court of ordinary, under a citation for a settlement, would undoubtedly have had authority to have required the administrator to account for the moneys which the evidence shows he had received to have made a disclosure of the debts due by the estate, and to have made up the accounts and entered a judgment in favor of

the heirs for a sale of the property. If the court of ordinary had this authority, a court of equity, as a court of concurrent jurisdiction, had equal, if not greater, authority in the matter. The heirs at law have done all that is possible for them to do. They have brought the administrator at the proper time into a court of competent jurisdiction. They have introduced evidence showing that he is charged with having received property of the estate, and the evidence shows what property is in his hands still unadministered. Everything is before the court which would be necessary to authorize a complete settlement of the estate. Certainly, under such circumstances, it is not the law that the heirs at law shall be turned out of court, and the administrator allowed by his silence in court to obtain a judgment which means that he shall remain in the possession of property which is not wholly his own, but which belongs to him jointly with the heirs of the estate. Under the evidence introduced by the plaintiffs, the court should have entered a decree winding up the estate. If there are any claims against the estate, the administrator knows of them, and he should be made to disclose what they are. If he should not disclose, he should be made to bear the loss. Judgment reversed. All the justices concurring.

(113 Ga. 815)

RONEY v. TUTT et al.**TUTT et al. v. RONEY.**

(Supreme Court of Georgia. July 18, 1901.)

EXECUTION SALE—RATIFICATION—NONSUIT.

1. If a defendant's property be sold under a void judgment and execution, and she, with legal notice of all the material facts, receive from the sheriff, and retain, a portion of the proceeds of the sale, this amounts in law to a ratification, and she is bound by the sale.

2. Under the facts disclosed by the record, the judge did not err in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by Rosetta Roney against J. B. Tutt and others. From the judgment, both parties bring error. Affirmed on main bill of exceptions. Cross bill dismissed.

B. B. McCowen, for plaintiff. W. K. Miller and C. H. Cohen, for defendants.

PER CURIAM. Judgment on main bill of exceptions affirmed; cross bill dismissed.

(113 Ga. 725)

HARRIS v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL.

There was no merit in the motion for a continuance, the evidence warranted the verdict, and it was not erroneous to refuse a new trial.

(Syllabus by the Court.)

Error from superior court, Clarke county; R. B. Russell, Judge.

Will Harris was convicted of crime, and brings error. Affirmed.

Shackelford & Shackelford, for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 724)

LANE v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL—NEW TRIAL.

The only grounds of the motion for a new trial being that the verdict was contrary to the law and to the evidence, and the evidence being amply sufficient to sustain the verdict, the judgment of the court refusing a new trial is affirmed.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Joe Lane was convicted of crime, and brings error. Affirmed.

Howard & Armistead, for plaintiff in error. F. G. Corker and Griner & Williams, for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 690)

BRANCH v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—APPEAL—REVIEW.

No complaint being made of any ruling at the trial, and there being evidence warranting a finding that the accused was guilty of the offense with which he was charged, his conviction must stand, since the verdict of the jury has met with the approval of the presiding judge. It is, however, a case in which, apparently, his discretion would have been wisely exercised in granting a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Cicero Branch was convicted of crime, and brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 724)

GRAHAM v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL—NEW TRIAL.

No error of law was complained of: the evidence sustains the verdict; the newly-discovered evidence was merely cumulative, and does not authorize the granting of a new trial.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

C. S. Graham was convicted of crime, and brings error. Affirmed.

Howard & Armistead, for plaintiff in error. F. G. Corker, for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 704)

WILLIAMS v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence fully sustained the verdict of the jury. The error of the trial judge in inaccurately stating the contentions of the defendant, taken in connection with all the instructions given, was manifestly not harmful to the defendant, and therefore affords no legal cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Romulus Williams was convicted of crime, and brings error. Affirmed.

Duncan & Duncan, for plaintiff in error. Wm. Brunson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 698)

WASHINGTON v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—INDICTMENT—MISNOMER—QUESTION FOR JURY—CERTIORARI.

1. When, in an indictment, the given name of the defendant was so written that it was a matter of uncertainty whether it was "Surrena" or "Surrence," it was not erroneous, on the trial of a plea of misnomer alleging that the given name of the defendant was "Serena," for the judge to submit to the jury for their determination by personal inspection the question whether the name was "Surrena" or "Surrence"; and where the jury found the name to be "Surrena," and accordingly returned a verdict against the plea, the same will be upheld, "Surrena" and "Serena" being idem sonans. Construing language is for the judge, but determining what an obscurely written word is may be regarded as a proper matter for a jury. See, in this connection, Civ. Code, § 3672; Armstrong v. Burrows, 6 Watts, 266.

2. Where a petition for certiorari in a criminal case in effect alleged that it set forth all of the evidence introduced on the trial, and it does not appear therefrom that the venue was proved, it was erroneous to refuse to sanction the petition for certiorari assigning error upon the verdict as being contrary to the evidence and without evidence to support it.

(Syllabus by the Court.)

Error from superior court, Liberty county; P. E. Seabrook, Judge.

Serena Washington was convicted of crime, and brings error. Reversed.

B. A. Way and J. B. Hudson, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(113 Ga. 726)

PYNE v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS.

1. When one who is dissatisfied with a judgment rendered in a trial court seeks to bring the same to this court for review by a bill of exceptions in which he does not specify as material any portion of the record, no part thereof

should be sent to this court by the clerk of the trial court; nor will the plaintiff in error be allowed in this court to amend his bill of exceptions by inserting therein a specification of a portion or all of the record, and thus make valid an unauthorized act already committed by the clerk of the trial court in sending up a part or parts of the record. Hardee v. Lovett, 11 S. E. 1021, 85 Ga. 620; Alexander v. Williamson, 12 S. E. 182, 86 Ga. 13.

2. Where a bill of exceptions contains a recital that a copy of a petition for certiorari is thereto attached, and no such copy is in fact attached to the bill of exceptions itself, and only appears in a transcript of the record improperly sent to this court in the manner above indicated, and where such bill of exceptions contains no assignment of error except the overruling of the certiorari, it is fatally defective, and does not properly present any question for determination by this court.

(Syllabus by the Court.)

Error from superior court, Lowndes county; A. H. Hansell, Judge.

C. A. Pyne was convicted of crime, and brings error. Dismissed.

Jas. M. Johnson, for plaintiff in error. W. E. Thomas, Sol. Gen., and J. G. Cranford, City Sol., for the State.

PER CURIAM. Writ of error dismissed.

(113 Ga. 758)

SMITH v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

INTOXICATING LIQUORS—ILLEGAL SALE—LAGER BEER—INSTRUCTIONS.

1. While the words "lager beer," in their ordinary use and acceptance, may sufficiently indicate an intoxicating liquor to warrant a conviction of selling liquor of that character, when the proof shows a sale of lager beer and nothing more (Black, Intox. Liq. § 17), yet where, in a given case, there was affirmative testimony to the effect that a liquid which contained not exceeding 2 per cent. of alcohol would not intoxicate, and that the identical bottle of liquid which the accused sold, and upon the sale of which the question of his guilt or innocence turned, did not contain more than 2 per cent. of alcohol, it was, although there was other testimony to the effect, that this identical liquid was lager beer, erroneous to charge generally that all lager beer is intoxicating.

2. It was, in such a case, erroneous to admit hearsay testimony to the effect that lager beer contained from 2 to 6 per cent. of alcohol; but, in view of the ruling above announced, it would seem that admitting such testimony was not harmful to the accused.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Plummer Smith was convicted of illegal sale of liquors, and brings error. Reversed.

Howard & Armistead and W. C. Davis, for plaintiff in error. F. G. Corker, for the State.

PER CURIAM. Judgment reversed.

(113 Ga. 749)

BURGESS v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence, though entirely circumstantial, was amply sufficient to warrant the verdict.

This being so, and it not being alleged that any error of law was committed in the county court wherein the case was tried, the judgment of the superior court overruling the certiorari sued out by the accused will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Sidney Burgess was convicted of crime. From a judgment of the superior court overruling the certiorari, defendant brings error. Affirmed.

Duncan & Duncan, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 699)

MCDOW v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—NEW TRIAL—INSTRUCTIONS.

1. Errors alleged to have been committed upon the trial of a special plea of misnomer in a criminal case do not constitute, and cannot be considered as, proper grounds of a motion for a new trial in the main case; and this is so although the same jurors passed upon the special plea and upon the case in chief, it appearing that the two investigations were conducted independently of each other, that the jurors were separately sworn in each, and that there was no direct motion to set aside the finding on the special plea. *Kneeland v. State*, 62 Ga. 395; *Boisclair v. State*, 17 S. E. 270, 92 Ga. 453.

2. An instruction in a criminal case correctly explaining to the jury the elements of the offense for which the accused is on trial is not open to criticism on the ground that the state failed to make out its case. On the contrary, the jury should be informed of the crime charged, in order to enable them, by applying the law to the facts established by the evidence, to determine whether or not the accused is guilty.

3. The charges complained of which are not dealt with in the preceding note embraced correct and familiar principles of law, were fully warranted by the evidence, and were not, in any sense, prejudicial to the accused. There was ample evidence to sustain the verdict, and no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Tish McDow was convicted of crime, and brings error. Affirmed.

Henry Walker, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 721)

AYERS v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL—REFUSAL OF NEW TRIAL.

No error of law is assigned in the bill of exceptions. The evidence, although circumstantial, was sufficient, when taken all together, to warrant the conviction of the accused; and, the trial judge being satisfied with the verdict, this court will not control his discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Johnson county; B. D. Evans, Judge.

William Ayers was convicted of crime, and brings error. Affirmed.

A. L. Hatcher and J. L. Kent, for plaintiff in error. B. T. Rawlings, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 700)

STILES v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—APPEAL—REVIEW—EVIDENCE.

1. Whether the evidence for the state was overcome by that introduced in behalf of the accused, and whether the alibi sought to be proven was sufficiently made out, were questions properly left to the jury, which determined them adversely to the plaintiff in error; and, their finding being authorized by the evidence, the verdict will not be disturbed.

2. There was no error in the admission of the diagram, preliminary proof of its correctness having been made. It will not be presumed that the jury undertook to decipher words thereon which the court directed to be erased, and which, so far as appears, would not thereafter, on inspection, be readily deciphered.

3. The words "cotton press," written on the diagram as descriptive of an appliance located at a particular place thereon, did not render the diagram inadmissible in evidence, when the draftsman as a witness testified that it was correct, and in his evidence described the appliance as a cotton press.

(Syllabus by the Court.)

Error from superior court, Putnam county; John C. Hart, Judge.

William Stiles was convicted of crime, and brings error. Affirmed.

Allen & Pottle, Howard & Crawford, and W. F. Jenkins & Son, for plaintiff in error. H. G. Lewis, Sol. Gen., and J. B. Park, Jr., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 749)

DAVIS v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—APPEAL—REVIEW.

Where one on trial for carrying a concealed pistol stated to the jury in his defense that he "did not own a pistol, and never carried one in his life," and a witness in his behalf undertook to testify to the same effect, evidence that the accused had, on an occasion previous to that under investigation, openly carried a pistol, was irrelevant, for it related to a matter not germane to the issue; but admitting such evidence will not be held cause for a new trial, when the guilt of the accused was distinctly sworn to by eyewitnesses, and it is manifest from the record that the conviction rested upon the fact that the jury believed these witnesses in preference to others whose testimony related to the main fact, and the evidence illegally admitted could in no possible view have had the effect of impeaching or discrediting them.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

John Davis, Jr., was convicted of carrying concealed weapons, and brings error. Affirmed.

J. B. Park, Jr., for plaintiff in error. Jas. Davison, Sol., and H. G. Lewis, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 708)

JONES v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—APPEAL.

No error of law was complained of, and the evidence authorized the verdict. (Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

Hilliard Jones was convicted of crime, and brings error. Affirmed.

Robt. L. Rodgers, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 886)

JOHNSON v. STANCLIFF.

(Supreme Court of Georgia. July 19, 1901.)

CROSS BILL—EJECTION OF INTRUDER—RECEIVER.

1. An answer in the nature of a cross bill, which sets up matters of defense not germane to the case made by the plaintiff's petition, is not maintainable.

2. In view of the pleadings filed in the present case, and of the facts disclosed on the hearing thereof, the trial judge gave to it the proper direction.

(Syllabus by the Court.)

Error from superior court, Dekalb county; John S. Candler, Judge.

Suit by the National Railway Building & Loan Association against R. M. Johnson. D. B. Stancliff was appointed receiver. From an order ordering the receiver to turn over certain funds discharging him, and suspending further proceedings in the cause, Johnson brings error. Affirmed.

Burton Smith, J. W. Moore, and J. D. Kilpatrick, for plaintiff in error. King & Anderson, L. W. Thomas, and W. W. Braswell, for defendant in error.

LUMPKIN, P. J. The National Railway Building & Loan Association, claiming to be the owner in fee simple of a certain tract of land, instituted a summary proceeding to eject Johnson therefrom as an intruder. He met this proceeding with a counter affidavit. Subsequently the plaintiff filed an equitable petition against Johnson, in which, after setting forth the facts with regard to the pending action, it was, in substance, alleged: (1) That Johnson was wholly insolvent, and unable to respond to any judgment which might be obtained against him for the rent of the premises; (2) that he was committing waste

by cutting and marketing the timber thereon; and (3) that there were different persons who desired to rent portions of the land for the ensuing year, and, "if rented at all, it must be done within a few weeks, as in that time all desirable tenants will have secured homes for another year." The plaintiff prayed that a receiver be appointed to take charge of the land in controversy pending the litigation; that Johnson be required to yield possession to the receiver, and be enjoined from in any wise interfering with the property; and that the receiver should hold the proceeds derived from the renting of the same subject to the order of the court. Johnson filed an answer, in which he denied that he was insolvent, and in which he alleged that he was in possession of the premises under a claim of right as the tenant of another. He afterwards offered two amendments to his answer, the contents of which will be hereinafter briefly stated. To both the original answer and the amendments thereto the association demurred. Subsequently, upon a receiver being appointed to take charge of its affairs, he was made a party to the case, and adopted as his own the pleadings theretofore filed by the association. At the interlocutory hearing of the case the court appointed a receiver to take charge of the land in controversy. At the final hearing the demurrer interposed to Johnson's original answer was overruled, but the amendments thereto were stricken. The plaintiff thereupon filed an amendment in the nature of a supplemental bill, averring that the statutory proceeding to eject Johnson as an intruder had been tried in the superior court, and finally disposed of by the rendition of a verdict and judgment against him, whereby it was determined that he was an intruder, and that the plaintiff was entitled to the possession of the premises in dispute. It was accordingly prayed that the receiver appointed to take charge of the same and collect the rents and profits arising therefrom be directed to turn over to the plaintiff the funds in his hands, and that, upon his so doing, he be discharged, and further proceedings in the case be suspended. Upon considering this amendment, together with the record of the statutory action therein referred to, the court gave to the pending case the direction prayed for. Johnson subsequently sued out a bill of exceptions, in which he assigned error upon the action thus taken by the court, as well as upon its ruling sustaining the plaintiff's demurrer to the amendments which he had filed in his original answer. The case necessarily turns upon the question whether or not these amendments were properly stricken.

1. The defense thereby sought to be interposed was, in substance, as follows: The association claimed title under a deed from one Alice J. Mehaffey, given to it to secure loans made to her at usurious rates of interest, and such deed was, therefore, void. John-

son was a bona fide judgment creditor of Miss Mehaffey, and the only property owned by her which was subject to his judgment was the property in question. Accordingly, his claim against her was superior to that held by the association, and he was entitled to have the property sold, in order that he might realize upon his judgment.

Among other objections urged against this proposed defense was one which was certainly well taken, viz. that the matters thus set up were not germane to the issue in controversy, which was whether or not Johnson was an intruder, and was wrongfully withholding from the association the possession of the land in dispute. It is manifest that Johnson's alleged rights as a creditor could not properly be pleaded in justification of any wrong which, as a mere intruder, he may have committed. He was called upon by the plaintiff to assert whatever claim of right, if any, he had to the possession of the premises. His reply that, as a creditor of a common debtor, he had a right to have the land sold, and the proceeds thereof first applied to the payment of his judgment, was not responsive to the plaintiff's petition, had not the slightest bearing upon the issue in controversy, and afforded no basis for any prayer for counter relief against the association. See *Ray v. Agency Co.*, 106 Ga. 495, 496, 32 S. E. 603, and authorities cited.

2. As, prior to the final hearing of the case, that issue had been definitely settled adversely to Johnson by a judgment rendered in the statutory proceeding originally instituted by the association, nothing remained for the court to do save to direct what disposition should be made of the fund in the hands of its receiver. It does appear that, after the plaintiff's equitable petition was filed, Johnson "did not further defend the common-law case, and was not present or represented when judgment was taken." But this does not alter the fact that he was conclusively bound by that judgment nevertheless. The disposition made of the equitable proceeding was proper, and in no way injuriously affected the rights of the defendant in the premises. Judgment affirmed. All the justices concurring.

(113 Ga. 927)

WOODY v. STATE.

(Supreme Court of Georgia. July 20, 1901.)

NAMES—IDEM SONANS—GAMING—COMPLAINT—EVIDENCE.

1. "Gittings" and "Giddans" are idem sonans.
2. An accusation for gaming "with cards and dice" need not, more particularly than as indicated by the words quoted, describe "the game played or the manner of playing same."
3. The evidence in the present case did not support the accusation.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Joe Woody was convicted of gaming, and brings error. Reversed.

M. Felton Hatcher, for plaintiff in error.
Wm. Brunson, Sol. Gen., for the State.

LUMPKIN, P. J. The plaintiff in error, Joe Woody, was convicted in the city court of Macon upon an accusation charging that he and others named "did unlawfully and wrongfully play and bet for money and other things of value at a game of faro, klondyke, crapps, poker, skin, and other games played with cards and dice." In the affidavit upon which the accusation was founded it was recited that "Frank Gittings" appeared before the judge of the city court, and on oath deposed that Joe Woody and others named committed the acts above mentioned. This affidavit purported to have been signed by "Frank Giddans." The accusation appears to have been made by "Frank Gittings," though signed by "Frank Giddans." Before pleading to the merits, the accused filed a demurrer, the grounds of which were as follows: (1) "There is no affidavit upon which accusation could issue, the affidavit having been signed and sworn to by Frank Giddons, when the accusation is issued in the name of Frank Gittings;" (2) "there is no legal affidavit upon which said accusation could issue, the said affidavit purporting on its face to be made by Frank Gittings, and being signed by Frank Giddons;" and (3) the "accusation is void because it does not set out with the particularity required by law the game played, or the manner of playing same, nor does it follow the Code section in reference to gaming." To the overruling of this demurrer, and the denial of a new trial, the accused excepted.

1. A name spelled "Gittings" is susceptible of a pronunciation so similar to that of a name spelled "Giddans," it certainly requires no strain to hold that they are idem sonans. At any rate, it is safe to say that the person who signed his name "Frank Giddans" was the individual intended to be designated in those portions of the affidavit and accusation respectively describing the affiant and the accuser as "Frank Gittings." We therefore hold that the first and second grounds of the demurrer were without merit, especially so as they erroneously stated that the signature affixed to the affidavit and the accusation was that of "Frank Giddons," when, as has been seen, it was really that of "Frank Giddans." It seems, therefore, that there was almost, if not quite, as much inaccuracy in framing the demurrer as there was in stating the name of the affiant in the affidavit and accusation.

2. It was not essential that the accusation should minutely describe the games played, or the manner of playing them. The accused was sufficiently informed of the nature of the charge preferred against him, the material portions of which are quoted above.

8. The evidence did not warrant a verdict of guilty, for at least two reasons: (1) There was no proof whatever that the accused ever played any game of any description with any one or more of the persons named as co-defendants in the accusation; and (2) while, as has been seen, the accusation charged that the accused played for money and other things of value at divers games "played with cards and dice," there was no evidence that he ever at any time played for money or other thing of value in any game answering the description embraced in the words last quoted. At most, the evidence showed that the games at which he hazarded anything were played with dice only. Judgment reversed. All the justices concurring.

(113 Ga. 857)

WELLS et al. v. COKER BANKING CO.

(Supreme Court of Georgia. July 19, 1901.)
CONSOLIDATION OF CAUSES—SINGLE BILL OF EXCEPTIONS.

The mere fact that several separate and distinct cases "arising under the same contract," and being between the same parties, were, "by agreement, * * * tried together," before the judge, "presiding as judge and jury," did not have the effect of consolidating these cases into one, so as to authorize the losing party, by a single bill of exceptions, to bring to this court for review the judgments severally rendered in such cases in the court below.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Actions by the Coker Banking Company against H. T. Wells and others before a justice. The cases were appealed to the superior court, wherein separate judgments were rendered in each case in favor of plaintiff against all the defendants, except one Harris, and the other defendants bring error. Dismissed.

B. J. Conyers, for plaintiffs in error. J. L. Hopkins & Sons, for defendant in error.

FISH, J. The Coker Banking Company brought three separate suits in a justice's court against Wooten, as maker, and Harris, Bedford, Joiner, Wells, Dobbins, Boone, and Hewitt, as indorsers. Two of the suits were, respectively, on three, and the other on four, promissory notes, each of the notes being for \$24.55. The notes were executed as part of one transaction, being given by the defendants to the plaintiff for the loan of a certain sum of money made by plaintiff to the defendant Wooten. Wooten, Bedford, and Joiner made no defense to the suits. The other defendants filed a joint plea in each case, setting up the same defense in each plea. All the suits were appealed to the superior court, where, "by agreement [as recited in the bill of exceptions], the three cases were tried together before his honor J. H. Lumpkin, presiding as judge and jury." Upon plaintiff's motion, the judge struck the defendants' pleas, except as to the defend-

ant Harris, and rendered a separate judgment in each case, relieving Harris, and in favor of the plaintiff against the defendants Wells, Dobbins, Boone, and Hewitt. The defendants against whom the judgments were rendered excepted to the rulings of the judge in striking their pleas, in disallowing amendments offered by them, and in rendering the judgments against them, and they assign error upon such rulings in a single bill of exceptions. Upon the call of the case in this court the defendant in error moved to dismiss the writ of error because "three separate and distinct cases, in which separate and distinct judgments were rendered, are embraced in the bill of exceptions, and plaintiffs in error are attempting to review by one writ of error the three distinct decisions and three distinct judgments rendered in the three distinct cases." This motion must be granted, and the writ of error dismissed. The three cases were never really consolidated. There was simply an agreement that they be tried together—that is, at the same time, in one trial—by the presiding judge of the superior court, without the intervention of a jury. There was no order that the cases be consolidated, and, though tried at the same time, they were not tried as one case. The judge treated them as three separate cases, and rendered a separate judgment in each case. This exact question was ruled in *Erwin v. Ennis*, 104 Ga. 861, 31 S. E. 444, where it was held: "An agreement between counsel that 'three causes be submitted to the finding and decision, as to all facts and law, of [the presiding judge], without the intervention of a jury,' did not amount to a consolidation of the cases, and did not authorize the losing party, who was a party to all three of the cases, to make only one motion for a new trial, and, upon the same being overruled, to file one bill of exceptions to this court, attempting to bring all three of the cases for decision here. This court has no jurisdiction to entertain such a bill of exceptions, and therefore in such a case the writ of error will be dismissed, notwithstanding the fact that it appears that the three cases relate to the same fund or property, each case being between different parties." It is true that there each case was between different parties, but the question decided was not that the cases could not have been consolidated because between different parties, but that the agreement entered into by counsel for the respective parties did not amount to a consolidation. Mr. Justice Cobb, in rendering the opinion, said: "Whether it was in the power of the judge of the superior court to consolidate the three cases into one, so far as to authorize one motion for a new trial and one bill of exceptions, is a question not necessary to be decided in the present case." Neither do we now pass on the question whether or not the three cases sought to be brought here in the present writ of error

could have been consolidated, so as to have been properly brought here in a single bill of exceptions, because that point is not before us for decision. All we do decide is that there was no consolidation, and consequently this court has no jurisdiction to entertain the bill of exceptions attempting to bring the three cases here for review. Writ of error dismissed. All the justices concurring.

(113 Ga. 832)

BLACKSHER v. STATE.

(Supreme Court of Georgia. July 19, 1901.)

MANSLAUGHTER—INSTRUCTIONS—EVIDENCE.

The evidence in the present case warranted the court in instructing the jury on the subject of voluntary manslaughter, and was amply sufficient to support the verdict convicting the accused of that offense. The charge upon reasonable fears was a correct presentation of the law on that subject, and the other charges complained of were free from error, and appropriate to the issues involved. It does not for any reason appear that the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Monroe Blacksher was convicted of manslaughter, and brings error. Affirmed.

John R. Cooper, for plaintiff in error.
Wm. Brunson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 715)

SURRELS v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

INTOXICATING LIQUORS—ILLEGAL SALE.

The only point presented by the bill of exceptions in this case is, in principle, controlled by the decision in *Williams v. State*, 33 S. E. 641, 107 Ga. 693 (1). See, also, *Brown v. State*, 34 S. E. 1031, 109 Ga. 570 (2).

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Erskine Surrels was convicted of illegal sale of intoxicating liquors, and brings error. Affirmed.

W. D. Tutt & Son and Sam O. Oliver, for plaintiff in error. T. J. Brown, Sol., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 867)

GEORGIA R. & BANKING CO. v. GARDNER.

(Supreme Court of Georgia. July 19, 1901.)

ADVERSE POSSESSION—TRESPASS—ANSWER—AMENDMENT.

1. The verdict was sustained by the testimony. The defendant in error having gone into possession of the land in dispute under a deed, inclosed it by a fence, and held the undisturbed possession of it for more than 20 years, he had a complete prescriptive title, and there-

fore the right to resist the trespass of the employes of the railroad company upon the land thus held and occupied.

2. A defendant may amend an answer by withdrawing an admission therein made, and after so doing may introduce testimony tending to support the allegations of such answer as it stands after the amendment has been allowed.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by the Georgia Railroad & Banking Company against M. G. S. Gardner. Judgment for defendant, and plaintiff brings error. Affirmed.

Jos. B. & Bryan Cumming, for plaintiff in error. Wm. H. Fleming, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 815)

PORTWOOD et al. v. HUNTRESS et al.

(Supreme Court of Georgia. July 18, 1901.)

EQUITY—JOINDER OF CAUSES—INJUNCTION—ACTIONS AT LAW.

Where one person is interested in maintaining against several a contention or contentions which they have a community of interest in resisting, or several persons have a community of interest in maintaining against one a contention or contentions which he is interested in resisting, or there are several who have a community of interest in maintaining a contention or contentions against several who have a community of interest in resisting the same, and such contention or contentions is or are involved in two or more pending suits, equity will consolidate them, and bring to trial in one action the disputed issues. But this will not be done as to cases the consolidation of which would bring about a promiscuous struggle, in which parties on one side, with no such community of interest as to the one point in controversy, when only one, or in all the disputed points, when there are more than one, would be compelled to litigate with another or others. (a) The petition in the present case was not, as against the special demurrers thereto, maintainable; and consequently there was no error in denying the interlocutory injunction.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; E. L. Brinson, Judge.

Action by Jesse Portwood and others against C. W. Huntress and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

Cloud & Jennings and S. H. Sibley, for plaintiffs in error. A. H. Davis and W. O. Mitchell, for defendants in error.

LUMPKIN, P. J. On August 28, 1876, a judgment was rendered by the superior court of Taliaferro county in favor of T. M. Bryan, as administrator of the estate of J. B. Hart, against Absalom G. Evans. This judgment and the execution issued thereon were subsequently assigned to John C. Hart. A constitutional homestead, containing 307½ acres of land in that county, was in August, 1877, duly set apart to Evans, as the head of a family consisting of his wife, Mary E., and

several minor children. By a deed dated March 14, 1882, and recorded April 1, 1882, Evans and his wife undertook to convey to R. O. Evans, in fee simple, 200 acres of the land embraced in the homestead. On April 18, 1882, he executed and delivered to Ellen E. Huntress a mortgage by which it was intended to create in her favor a lien on the land described in the deed just mentioned. Mrs. Evans died March 12, 1894, and Absalom G. Evans died March 12, 1897. M. F. Griffith was appointed administrator on his estate. On the first Tuesday in January, 1898, the homestead estate having previously terminated, the administrator sold the entire tract of 307½ acres to G. T. Edwards for \$755, and made him a deed thereto on the 15th day of that month. On the same day Edwards conveyed a portion of the tract to E. L. Anderson, and the balance of it to Jesse Portwood. Thereafter C. W. Huntress, as guardian of Ellen E. Huntress, who had obtained a judgment of foreclosure upon the mortgage of R. O. Evans to her, caused an execution issued upon such foreclosure to be levied upon 200 acres of land as described in that mortgage. Separate claims were filed by Edwards, Anderson, and Portwood. Upon a trial of Anderson's claim, the superior court rendered a judgment in his favor. That judgment was reversed by this court at the March term, 1900. See 110 Ga. 427, 35 S. E. 671. Subsequently all of the claims were withdrawn, and Huntress, guardian, was again proceeding to enforce the collection of the execution in his favor by a sale of the mortgaged premises. New claims were filed by Anderson and Portwood. In the meantime R. O. Evans had brought against them, respectively, separate actions of ejectment for the recovery of described parcels of land which he alleged constituted portions of the 200 acres which had been conveyed to him by Absalom G. and Mary E. Evans in 1882. While these four cases were pending, Portwood and Anderson filed against C. W. Huntress, as guardian, Ellen E. Huntress, his ward, R. O. Evans, John C. Hart, and the sheriff of Talliaferro county, an equitable petition, returnable to the February term, 1901, of the superior court of that county. Griffith, as administrator of the estate of Absalom G. Evans, was subsequently made a party defendant. In this petition the facts above recited were set forth, and it also contained numerous other allegations, of which those now material were to the following effect: The deed from Absalom G. Evans and his wife to R. O. Evans, and the mortgage executed by him to Ellen E. Huntress, were, because of indefiniteness and uncertainty in the descriptive terms therein used with respect to the land to which they referred, and for other stated reasons, absolutely null and void. R. O. Evans never in fact set up title in himself to the 200 acres of land which Absalom G. and Mary E. Evans undertook to convey

to him, but on divers occasions made declarations and did acts (all of which were particularly set forth) which in law and in equity estopped him, as against Portwood and Anderson, from claiming title to any portion of the land originally constituting the Evans homestead. The judgment on which the Hart execution was issued was, next to the expenses incident to the burial of Absalom G. Evans and certain expenses of administration, the highest lien upon that land. Of the proceeds of the sale thereof which was made by the administrator, he paid \$520 on that execution, leaving a balance still due thereon. The estate of Absalom G. Evans, consisting entirely of the 307½ acres of land, is insolvent.

The prayers of the petition, in substance, were (1) that R. O. Evans be enjoined from the further prosecution of his actions of ejectment; (2) that Huntress, guardian, be enjoined from "proceeding further with the two claim cases"; (3) that the sheriff be enjoined from selling under the mortgage execution any of the lands mentioned in the petition; (4) that all of the issues involved in the four pending cases be determined and disposed of by an appropriate judgment to be rendered upon the plaintiffs' petition; (5) that accordingly the deed from Absalom G. Evans and his wife to R. O. Evans, and the mortgage from him to Ellen E. Huntress, be declared null and void, and that the same be delivered up and canceled; or (6) that if those instruments are valid, and the land covered by the mortgage shall be sold thereunder, the plaintiffs, by equitable subrogation to the rights of John C. Hart, be paid from the proceeds of the sale \$520, or such proportions thereof as they may, under the facts set forth, be entitled to receive.

A restraining order was granted, and a day in advance of the appearance term was set for the hearing of an application for an interlocutory injunction. That hearing was afterwards postponed, and did not take place till March 13, 1901, which was after the adjournment of the appearance term of the case. At that term Huntress, guardian, and R. O. Evans each demurred generally and specially. One of the guardian's special grounds of demurrer was that "there is a misjoinder of causes of action, this defendant having no interest in the ejectment suits brought by R. O. Evans"; and one of the grounds of his special demurrer was that "there is a misjoinder of causes of action, in that the actions of ejectment brought by this defendant have no connection with the proceeding by Huntress to foreclose his mortgage." The judge passed an order dissolving the restraining order and denying an injunction, and this is the main error assigned in the bill of exceptions sued out by Portwood and Anderson. If the special grounds of demurrer set forth above were well taken, this, of course, would afford an all-sufficient reason for upholding the judg-

ment under review. That they were well taken, we have no doubt.

If this petition did not seek to join several distinct and incongruous causes of action, it would be difficult to conceive of one having such a defect. R. O. Evans was endeavoring, by separate actions at law against two persons, to recover two parcels of land. In these controversies Huntress, guardian, had not the slightest concern. It was, under the facts alleged, entirely immaterial to him whether R. O. Evans did or did not prevail over Portwood and Anderson. On the other hand, it is equally clear that there was no equitable reason for complicating the litigation between Huntress and either of the claimants, which simply involved in each claim case the question whether or not the parcel of land therein claimed was subject to the execution, with a settlement of the disputes between R. O. Evans and either of these same persons over their respective rights of title or possession. R. O. Evans was seeking to recover these lands, and Huntress was seeking to sell the same. It is certain that they had no common purpose in view. While the question of the sufficiency of the descriptive portions of the deed under which R. O. Evans claimed title and of his mortgage to Huntress might be involved in all four of the cases, the question whether R. O. Evans had by his declarations or conduct estopped himself from setting up title against Portwood and Anderson could in no possible way be injected into the claim case. While, therefore, on separate trials of the ejectment actions, or a trial of both together, R. O. Evans might be defeated solely on the ground that he was so estopped, Huntress, on separate trials of the claim cases, or a joint trial of the two, would have no such difficulty to contend with. Obviously, it would be subjecting Huntress to an unnecessary hazard to compel him to try his issues with Portwood and Anderson along with other issues in which he had no interest. He might, with two good cases lose both by being forced into bad company. It may be true that each of the four cases involves an issue or issues common to all; but it is certainly not true that all of the issues in each case are identically or even substantially the same. It is only when this latter condition exists that equitable consolidation can be demanded as matter of right. When one person is interested in maintaining against several a contention or contentions which they have a common interest in resisting, or when several have a like interest in maintaining against one a contention or contentions which he is interested in resisting, or when several have a common interest in maintaining against several a contention or contentions which they have such an interest in resisting, and such contention or contentions is or are involved in two or more pending suits, an appropriate equitable pro-

ceeding will lie to bring the issues in dispute to a determination by one trial. But this remedy is not available when consolidation would simply bring about a pellmell struggle in which parties on the one side, with no community of interest among themselves as to the one point in controversy, when there is only one, or as to all the disputed points, when there are more than one, would be compelled to contend with a single party on the other side, or with parties thereon who are also lacking in such a community of interest among themselves. This doctrine is illustrated by the decision of this court in *Smith v. Dobbins*, 87 Ga. 308, 18 S. E. 496, and supported by the authorities there cited. It was applied in *Webb v. Parks*, 110 Ga. 639, 38 S. E. 70. And see *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Stuck v. Alloy Co.*, 96 Ga. 95, 22 S. E. 592. The first of these cases is easily distinguishable from the case in hand, and the other is on the same line with the decision now rendered.

While the order of the judge denying the injunction was not expressly based upon the question of law dealt with in the foregoing discussion, the fact that the plaintiffs' petition was not, as against the special demurrers above mentioned, maintainable, leads inevitably to the conclusion that the action taken by the judge should not be disturbed by this court. See, in this connection, *Ripley v. Eady*, 106 Ga. 423, 32 S. E. 343, and *Coker v. Montgomery*, 110 Ga. 22, 35 S. E. 273. Judgment affirmed. All the justices concurring.

(113 Ga. 701)

GAMBLE v. STATE. LEE v. STATE. McMICHAEL v. STATE. SEARCY v. STATE. WILLIAMS v. STATE. WILCOX v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—APPEAL—AFFRAY—EVIDENCE.

1. This court cannot deal with the assignments of error made in an amendment to a motion for a new trial which has upon it an entry to the effect that it has been allowed by the trial judge, with nothing else to indicate an approval of its grounds.

2. Where persons are accused of an affray, and there is no evidence that the fighting occurred at a public place, a verdict of guilty is contrary to law.

(Syllabus by the Court.)

Error from criminal court of Atlanta; A. E. Calhoun, Judge.

Son Gamble, John Lee, J. D. McMichael, Cynthia Searcy, George Williams, and Annie Wilcox were each severally accused and convicted of an affray, and bring error. Reversed in each case.

F. R. Walker, A. R. Bryan, and S. C. Crane, for plaintiff in error. E. R. Black, for the State.

SIMMONS, C. J. Six persons were separately accused of an affray alleged to have

been committed at a certain time and place in Fulton county, Ga. The cases were tried together, and the defendant in each case found guilty. Each defendant moved for a new trial upon the grounds that the verdict was contrary to law and evidence, and without evidence to support it. Subsequently five of these motions were amended by adding special grounds. The court overruled all of the motions for new trial, and each movant excepted to the order overruling his motion. The cases were argued at the same time in this court, and will be considered together.

1. In each case in which an amendment was made to the original motion for new trial, the amendment was "allowed" by the court and ordered filed, but further than this there is nothing in the record or in the bill of exceptions to indicate an approval of the grounds of the amendment. These special grounds are therefore not sufficiently verified to authorize this court to deal with them. *Merritt v. Merritt* (Ga.) 88 S. E. 973.

2. From the evidence in the records it appears that certain officers of Fulton county, learning that there would be a dance at a certain place in the county, went to that place. As they approached the house, they heard several pistol shots, and saw the man who had done the shooting run off. They also saw five men (among them four of the defendants) engaged in a general fight. These men were placed under arrest. Then another of the defendants had a fight with a certain person in the house, and they were arrested. The remaining defendant then became engaged in a fight with still another person, and they also were placed under arrest. This fighting was attended with much noise and disorder. It took place in the front room and on the front porch of a house which had been rented for the occasion. From the briefs of evidence in some of the cases, it would appear that the house was a vacant one; from those in the others, that the house was composed of two rooms, and that the back room was occupied by a negro family. The house was in the country, was one of a row of negro houses, and was about 200 yards from any other residence. It was "near" a public road, which was in front of it; but what was the distance from the road, and whether the defendants' fighting could be seen or heard from the road, the evidence does not disclose. The Code section under which the defendants were accused defines an affray as "the fighting of two or more persons in some public place, to the terror of the citizens and disturbance of the public tranquillity." Pen. Code, § 355. Thus, in this state, as at common law, there cannot be a conviction for an affray unless the fighting occurs in a public place. See 4 Bl. Comm. 145; 2 Bish. New Cr. Law, §§ 1, 2; Bish. St. Crimes (3d Ed.) § 298; 2 McClain, Cr. Law. §§ 1006, 1008; *State v. Heflin*, 8 Humph. 84. Unless the defendants were fighting in a public place, their convictions were illegal. The

house in which they fought appears to have been a private one, rented by the defendants. There is no suggestion in the evidence that it possessed at ordinary times any of the elements which characterize a public place. It is true, it was near a public road, and that a public road is, *prima facie* at least, a public place, and may give that character to places in sight and hearing from the road. *State v. Moriarty*, 74 Ind. 103; *Carwile v. State*, 85 Ala. 392; *Henderson v. State*, 59 Ala. 89; *Ford v. State* (Ala.) 26 South. 503. It is also true that a road which, though not a regular public highway, is used and traveled, is a public place. *Mills v. State*, 20 Ala. 86. But the evidence in the present case fails to show how "near" or how far it was from the road to the house, or that the defendants could be seen or heard from the road. So far as appears, the house may have been quite a distance from the road, and so situated that the defendants could not have been seen, or their noise heard, by persons in the road. Under such circumstances, the existence of the road cannot be held sufficient to supply the necessary element of a public place. See *Reg. v. Hunt*, 1 Cox, Cr. Cas. 177; *Gerrells v. State* (Tex. Cr. App.) 26 S. W. 394; *Graham v. State*, 105 Ala. 130, 16 South. 934. The judge below seems to have taken the position that the place was made public, for the time being, by the gathering of persons there for the purpose of dancing. This we think is not tenable. A place ordinarily private may become public, within the law of affrays, by being thrown open to the public upon a particular occasion. *Sewell v. Taylor*, 7 C. B. (N. S.) 160; *Turbeville v. State*, 37 Tex. Cr. R. 145, 38 S. W. 1010. Permitting only a certain class of the public to enter will not prevent the place from assuming the character of a public place. *Smith v. State*, 52 Ala. 384; *Nickols v. State*, 111 Ala. 58, 20 South. 564. It has been held that an assemblage may make a place temporarily public (*Finnem v. State*, 115 Ala. 108, 22 South. 593); but it has also been held that the assemblage of a few persons at a place not open to the public will not so operate (*Taylor v. State*, 22 Ala. 15; *Coleman v. State*, 20 Ala. 51), nor the assemblage of persons at a social party by express invitation (*State v. Sowers*, 52 Ind. 311). "In general, the place must be one to which people are at the time privileged to resort without an invitation." Bish. St. Crimes (3d Ed.) § 298. In the present case it does not appear how many persons attended the dance, or were in and about the house at the time of the fighting. The evidence does not show certainly the presence of more than a dozen or fifteen people. So far as appears, the dance was entirely private, and none allowed to attend except by express invitation or previous arrangement. We believe, therefore, that the place was not shown to be open to the general public, or to any portion of the public, as to constitute it a public place, within the meaning of the law of af-

frays. So believing, we are constrained to hold that the evidence failed to make out this essential element of an affray,—that the fighting was in a public place,—and that the verdicts of guilty were contrary to law. Judgment in each case reversed. All the justices concurring.

(113 Ga. 958)

PERKINS v. DUNN.

(Supreme Court of Georgia. July 20, 1901.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

The evidence was sufficient to support the verdict, and there was therefore no error in refusing to grant a new trial upon the ground that the verdict was contrary to law and contrary to the evidence.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between J. E. Dunn and E. A. Perkins. From the judgment, Perkins brings error. Affirmed.

O. E. & M. C. Horton, for plaintiff in error. Shepard Bryan and A. G. Powell, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 946)

FOOTE v. KENDALL.

(Supreme Court of Georgia. July 20, 1901.)

CONTRACTOR'S LIEN—ACTION TO ENFORCE—EVIDENCE.

Viewed in the light of the pleadings upon which this case went to trial, the evidence demanded a verdict in favor of the plaintiff for a portion, at least, of the amount for which he sued; and a general finding for the defendant was therefore unwarranted.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by G. W. Foote against Lillian A. Kendall. Judgment for defendant. Plaintiff brings error. Reversed.

Jas. K. Hines, for plaintiff in error. L. B. Austin, for defendant in error.

LUMPKIN, P. J. It appears from the record that Foote built a house for Mrs. Kendall under a written contract which provided that he was to furnish the material and do the work, according to certain plans and specifications, for \$1,100. Of this amount she paid him upwards of \$1,095.10. He claimed that, in addition to a balance of \$4.90 still due upon the contract price of the house, she owed him a specified sum for constructing at the same time a private sewer extending from her premises to a city street, and there connecting with a public sewer. He accordingly brought suit to recover the amounts claimed, and to foreclose a contractor's lien upon the premises. Mrs. Kendall filed an answer in which she denied that she owed him anything, and in

which she alleged that the work had not been completed according to contract. On the trial, Foote testified that he had fully complied with his obligations under the contract, and introduced in evidence, as a part thereof, certain specifications in which was a clause as follows: "Sewer and other connections: Owner is to pay the city for water tap, sewer frontage, and for two hundred and twenty feet of sewer not estimated in contract." The defendant introduced evidence to the effect that at the time the written contract was signed this clause was not embraced in the specifications, that the sewer connections were to be put down and paid for by Foote, and that he was to turn over the house completed for \$1,100. As a witness in her own behalf, Mrs. Kendall testified: "He did not complete this house by March 1, 1899. There was some work to be done on the doors and locks, and after that date he sent back there and had this work done. He has never completed my house,—never finished it." She did not, however, undertake to specify wherein the house was incomplete, nor to assert that she had paid in full the contract price therefor. Indeed, she admitted that she still owed Foote "three dollars and fifty cents of this amount." On being recalled to the stand, he testified, in rebuttal, that the clause above referred to was in the specifications at the time the contract was executed. In this connection, he further said: "I never heard this contention until the defendant and her mother swore to it in this case. In our efforts to settle this matter before suit was brought, the defendant contended that she had paid for this 220 feet of sewerage. She never contended that this item in the specifications was not there, before to-day, to me." The trial resulted in a verdict in favor of the defendant. The plaintiff made a motion for a new trial, which was overruled, and the case is now here for review.

Granting that the jury was warranted in finding that, under the contract actually made, there could be no recovery of the amount claimed as just compensation for constructing the sewer, it is nevertheless true that the plaintiff was entitled to a verdict for the sum which, under the contract as thus construed, still remained due as part of the price which Mrs. Kendall conceded she had agreed to pay Foote for the work done and materials furnished by him. She did make the assertion that he had never completed the house according to contract, but she gave no data upon which the jury could base an estimate of the loss, if any, which she in consequence sustained. Furthermore, she did not in her answer allege she had suffered any damages by reason of his failure to comply fully with his obligations, nor did she therein pray that she might, by way of recoupment, recover of him a single cent. Obviously, there-

fore, a general finding in her favor was wholly unwarranted. Judgment reversed. All the justices concurring.

(113 Ga. 859)

HART v. PHENIX INS. CO. OF BROOKLYN.

(Supreme Court of Georgia. July 19, 1901.)

ACTION ON NOTES—ANSWER—SUFFICIENCY—ACT OF CORPORATION—ULTRA VIRES—APPEAL—WAIVER—ASSIGNMENTS OF ERROR.

1. A defense the validity of which depends upon the terms and conditions embraced in a written contract is not well set forth by an answer which does not, even in substance, state the contents of that contract.

2. A mere general averment that a given act of a corporation was ultra vires is not, as against a proper special demurrer, good.

3. Points made in a bill of exceptions, but not insisted upon in the supreme court, will be treated as having been abandoned, the more especially when the brief of counsel for the plaintiff in error indicates an actual intention to abandon.

4. An assignment of error which is so general that, even when considered in connection with the record, it does not present for decision a particular question, is insufficient to invoke from the supreme court a ruling upon that question.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Phenix Insurance Company of Brooklyn against B. D. Hart. Judgment for plaintiff. Defendant brings error. Affirmed.

John B. Suttles and Felder & Rountree, for plaintiff in error. Slaton & Phillips, for defendant in error.

LUMPKIN, P. J. The Phenix Insurance Company of Brooklyn brought against Mrs. B. D. Hart an action upon promissory notes payable to the Southern Messenger Service or order, to which the plaintiff claimed title as assignee. One of these notes was for a stated principal sum, and the others were coupon interest notes. The main note contained a stipulation that a specified default in paying interest would, at the holder's option, mature the whole debt; and the petition alleged that such default had occurred. Mrs. Hart filed an answer which embraced nothing more than a general denial of the plaintiff's demand, and averments of inability, from want of sufficient information, to answer paragraphs which related to matters apparently within her personal knowledge, with no explanation of her alleged ignorance with respect thereto. This answer was met by a proper demurrer, and counsel for the defendant, evidently recognizing that the demurrer was good, filed, under leave of the court, and subject to demurrer, an amendment to the answer. To this amendment counsel for the plaintiff demurred, both generally and specially; and the court, after allowing further opportunity to amend, of which the defendant's counsel declined to

avail themselves, passed an order striking the answer and rejecting the amendment, and also rendered a judgment in the plaintiff's favor. The defendant thereupon sued out a bill of exceptions, specifically assigning error upon the order just mentioned, and in the most general terms complaining of the judgment. Briefly stated, the substance of the proposed amendment to the answer was: Defendant held a policy in the plaintiff company, which she delivered to the Messenger Service to secure the payment of the notes sued on. The insured property was destroyed by fire, and the insurance company, under an agreement with the Messenger Service, by the terms of which proof of loss was dispensed with, paid to the Messenger Service the amount of the notes, which were delivered to the company, and subsequently assigned to it without recourse on the Messenger Service. By reason of these facts, and others set forth, the defendant was prevented from presenting to the insurance company within 60 days after the occurrence of the fire a proof of loss. The acquirement by the insurance company of the notes in question was an ultra vires act. In point of fact, the company did not purchase the notes, but paid them off, and taking the assignment thereof was an afterthought. The terms and conditions of the insurance policy were not set forth, nor was there any allegation of liability by the company to the defendant upon the policy.

1. It is obvious from the foregoing that the amendment to the answer did not show that Mrs. Hart suffered any injury, or was deprived of any right by the plaintiff. She could not do this without first showing what, relatively to both the insurance company and the Messenger Service, her rights in the premises were. This she could not possibly do without setting forth the terms and conditions of the policy itself. The privilege of so doing was embraced in the court's offer to which allusion is made above. This offer was declined, and the proper result followed.

2. The loose and general allegation that the plaintiff's act in requiring the notes was ultra vires was not sufficient to withstand the plaintiff's special demurrer on this point, whereby the defendant was distinctly called upon to show how this act was ultra vires. Even if it was the right of the defendant to raise this question at all, certainly it was incumbent upon her to meet the special demurrer by setting forth at least one good reason why the plaintiff could not lawfully purchase the notes. The court extended to the defendant an opportunity to do this, but it was not acted upon.

3. If there was any merit in the averment that the insurance company did not really purchase the notes, but, after paying off and discharging them, took the alleged assignment as an afterthought, the point was not insisted on in this court. On the contrary, counsel of Mrs. Hart in their brief treat the

assignment as actual. We quote from it the following expressions: "The insurance company stands upon the same footing as the payee of the note." "The note was assigned, and not indorsed, in this case." "The coupon notes, which were a part of the note, were past due and unpaid at the time of the transfer of said notes and said coupons." "The whole debt was due, therefore, when the insurance company bought the note." The word "note," as used in the above extracts, was evidently intended to designate the principal or main note.

4. Under the general exception to the judgment to which we referred above, it was argued here that it was not correct as to amount, and also that, as the contract sued on was not unconditional; the court had no authority to render a judgment thereon without the intervention of a jury. The bill of exceptions fails signally to show that any such points were made in and passed upon by the trial court. But for the statements in the brief of counsel for the plaintiff in error, there would be no ground for even surmising that anything of the kind occurred. *Collins v. Carr*, 111 Ga. 867, 38 S. E. 959, and cases cited. Judgment affirmed. All the justices concurring.

(113 Ga. 861)

FISHER et al. v. GRAHAM.

(Supreme Court of Georgia. July 19, 1901.)
INJUNCTION—RECEIVER—SUIT IN AID OF
EXECUTION.

Under the allegations in the pleadings and the facts disclosed at the hearing, the court did not abuse its discretion in granting an injunction and appointing a receiver.

(Syllabus by the Court.)

Error from superior court, Wilcox county;
D. M. Roberts, Judge.

Action by Benjamin Graham against A. K. Fisher and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Eldridge Cutts and Hal Lawson, for plaintiffs in error. W. C. Worrill, for defendant in error.

COBB, J. The petition set forth a cause of action, and no sufficient reason was stated in the demurrer, either of Fisher or his wife, why the injunction should not have been granted. It was distinctly provided in the agreement which was a part of the verdict and judgment rendered against Fisher that "if, after the last installment becomes due as aforesaid, there shall be any balance due on said indebtedness, plaintiffs may levy and sell whatever remains unsold of said lands, or any other property of said defendant." The last installment fell due in 1899, and was not paid. The present petition was filed in 1901, at which time, under the very terms of the agreement, Graham had a right to proceed to sell, for the purpose of paying the debt due him, all of the property described

in his security deed. In any manner authorized by law, provided the sale of the whole of it was necessary for the purpose of paying his debt. Under the allegations in the petition, it is necessary to sell all of the lands still unsold, and it certainly does not lie in the mouth of Fisher to say that Graham shall not proceed to collect his debt in the manner authorized by law, when, under the averments in the petition, he and his wife have interposed every obstacle within their power to the collection of his debt when he was seeking to collect the same in the manner in which it was provided in the agreement that it should be collected before the maturity of the last installment. There was equity in the petition, and the court did not err in so holding.

In the demurrer of Mrs. Fisher, it was set up that as she had interposed a claim to a portion of the land levied on, and had given the bond required by the statute in claim cases, conditioned to pay to plaintiff such damages as the jury might assess in the event they should reach the conclusion that the claim was filed for delay only, she was entitled to a trial of her claim case, and the remedy of the plaintiff, if she was not the owner of the land, and the claim was interposed for delay only, was to ask for damages when the claim case should be tried. It was said in the argument that a receiver to collect the rents of the property in such a case was not necessary, and that this court had never held that a receiver would be appointed for the purpose of collecting the rents, except in a case where the claimant had not given the bond, and had interposed her claim in forma pauperis. We do not think that in a case in which a claim is interposed to property levied on, where the plaintiff in execution is in equity entitled to the rents of the property, the remedy upon the claim bond to ask that the jury assess damages for the delay is at all adequate for the plaintiff in execution. It is legally possible for the jury to find that the claim is unfounded, and at the same time to reach the conclusion that the claim was interposed in perfect good faith. In such a case, if the litigation is protracted, and the claimant is insolvent, the plaintiff has no remedy whatever for the loss resulting to him from the rents being collected by a person who was not able to respond. We think that the right of the plaintiff in execution to a receiver in such cases is dependent, not upon the ability of the claimant to give the claim bond to answer for damages in the event the claim was filed for delay only, but upon the ability of the claimant to respond in an action for the rents, issues, and profits collected by him, which in equity belonged to the plaintiff in execution. This we think was the view entertained by this court in the case of *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, where the claim was interposed by persons who were perfectly solvent; and, while it was held

that the plaintiff in execution was entitled to an accounting, it was ruled that a receiver would not be appointed, because the claimants were solvent, thus clearly intimating that if the claimant was insolvent the court would be authorized to appoint a receiver to collect the rents pending the litigation.

It is contended that the court erred in granting an injunction and appointing a receiver, because the equitable petition of the plaintiff was one merely in aid of his levy; that to this levy an affidavit of illegality had been filed, which was overruled at the trial, and that a bill of exceptions was pending in this court, assigning error upon the judgment overruling the illegality; and that, so long as the case was undisposed of, the plaintiff in execution had no right to proceed with any other remedy. We do not think this position is well taken. The fact that an affidavit of illegality has been overruled, and a bill of exceptions filed, carrying the case to the supreme court, where there will necessarily be delay in determining the question, instead of being a reason why equity would not interfere in behalf of the plaintiff, is itself a good reason for its interference by the granting of an injunction and appointing a receiver, in view of the allegations made in the petition.

It is also claimed that the plaintiff in execution is estopped from claiming that the value of the land is less than the amount of the debt, by the stipulation in the agreement that the defendant in execution should have a right to sell portions of the land at private sale at four dollars per acre; the price so fixed being, as contended, the true value of the land, and both parties being bound by the stipulation that the land is worth that much. Even if the parties were bound by this stipulation at the time the agreement was entered into, and could not say that the land was worth less than the amount so fixed, they were not bound by that stipulation certainly after the last installment became due and remained unpaid. At that time, as has heretofore been shown, the plaintiff in execution was entitled to pursue any remedy to collect his debt which the law provided. While the evidence on the question of the insolvency of Fisher was directly conflicting, we think that there was evidence from which the judge could find that he was insolvent, within the meaning of the rule laid down in *Cohen v. Parish*, 100 Ga. 338, 28 S. E. 122, which was, in substance, that, if the value of the person's property is not sufficient to discharge all of his debts, such person is insolvent. It is true that some of the witnesses for the plaintiff based their opinion on the value of the property upon what it would bring at judicial sale, and it is contended by counsel for plaintiff in error that this is not a correct test to be applied. It seems to us, however, that, where the person who is to be affected by the question as to whether an-

other is solvent or insolvent is compelled to resort to a judicial sale in order to realize on his debt, the value of the property, as tested by a judicial sale, is a very important matter to be inquired into in determining whether his debtor is solvent or insolvent. While what the property would bring at judicial sale is not absolutely controlling on the question of what is the market value of the property, still it is a circumstance to be considered in determining the question as to what is the market value, and in a case like the present is a very important one to be considered. Under this view of the case, there was abundant evidence from which the judge could find that the market value of the property was less than the debt for which it stood as security.

After a careful examination of the record and the briefs filed, we are satisfied not only that the judge did not abuse his discretion in granting an injunction and appointing a receiver, but that this was a proper judgment to be rendered in the case. Judgment affirmed. All the justices concurring.

(113 Ga. 706)

WESTERN & A. R. CO. v. FERGUSON.

(Supreme Court of Georgia. July 17, 1901.)

INJURY TO PERSON ON TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence.

2. Failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should have been reasonably apprehended will not preclude a recovery, but will authorize the jury to diminish the damages in proportion to the fault attributable to the person injured.

3. The evidence authorized the verdict, and the discretion of the trial judge in refusing a new trial will not be controlled.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by George D. Ferguson against the Western & Atlantic Railroad Company. Verdict for plaintiff. Defendant brings error. Affirmed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Hoke Smith and H. C. Peoples, for defendant in error.

COBB, J. Ferguson sued the railroad company for damages alleged to have resulted from personal injuries received by him on account of the negligent operation of one of the defendant's trains. The plaintiff recovered a verdict, and the defendant's motion for a new trial, based on the general grounds only, having been overruled, it excepted.

The evidence introduced in behalf of the plaintiff made substantially the following case: On October 7, 1899, plaintiff was struck and injured by one of the defendant's trains

On the date named the plaintiff desired to take this train for Atlanta, which was due at Dalton at 7:10 in the morning; plaintiff knowing that the train was due to arrive at that time. A short time before the train was due, plaintiff came out of a barber shop, and started to walk obliquely along a footpath towards the depot to take the train. It was raining slightly, and plaintiff was carrying a raised umbrella over his head. There was a side track along by the side of the defendant's freight depot, between the barber shop and the main track, and extending a few feet beyond the freight depot. It was necessary to cross the main track in order to reach the passenger depot, and plaintiff intended crossing the main track lower down than the end of the side track beyond the freight depot. Walking in an oblique direction, plaintiff's face was in a direction diagonally across the track, and his side was towards a train which would approach from the north. There were some freight cars on the side track. When plaintiff reached a point 10 or 12 feet beyond these cars, from which he could see 150 to 200 feet up the main track, he looked up the track, and saw no train approaching. His watch indicated that it would be four minutes before the train was due, though plaintiff was unable to say whether the engineer had the same time he did. After looking up the main line, and seeing no train approaching, plaintiff walked casually along towards the main track, at the rate of $2\frac{1}{2}$ to 3 miles an hour, 8 or 10 steps, or about 30 feet, and, without looking further to see if a train was approaching, stepped upon the main track at a place where it was usual and customary for foot passengers to cross, and was struck by the train, which had run 150 to 200 feet while plaintiff walked 30. There was an ordinance of the city of Dalton prohibiting the running of trains at the place where the plaintiff was struck at a greater speed than 4 miles an hour, and the train which struck the plaintiff was running at a speed greatly in excess of that limit. Had the train been run at 4 miles an hour, the plaintiff could have gotten safely across the track before the train reached the point where he was injured. Plaintiff was given no warning of any kind of the approach of the train.

In the case of *Railroad Co. v. Luckie*, 87 Ga. 7, 13 S. E. 105, Mr. Justice Lumpkin used the following language: "It seems to be the clear meaning of our law that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows he could, by ordinary care, after the negligence of the defendant began or was existing, have avoided the consequences to himself of that negligence." This language can convey no other impression than that, in cases of the character referred to, the duty on the part of the plaintiff to use ordinary care for his protection against the consequences of the defend-

ant's negligence does not arise "until after the negligence began or was existing." The ruling in the *Luckie* Case was approved in terms in the case of *Railroad Co. v. Gibson*, 97 Ga. 497, 25 S. E. 484, where Mr. Chief Justice Simmons used the expression above referred to, saying that "the plaintiff in an action against a railroad company for personal injuries cannot recover, even though the company may have been negligent, if, after the negligence of the defendant began or was existing, the person injured could, by ordinary care, have avoided the consequences to himself of that negligence." In the case of *Railroad Co. v. Attaway*, 90 Ga. 661, 16 S. E. 958, the present chief justice used the following language: "The rule which requires one to avoid the consequences of another's negligence does not apply until he sees the danger, or has reason to apprehend it." In the case of *Comer v. Barfield*, 102 Ga. 489, 31 S. E. 90, Mr. Justice Fish says, in substance, that if one who was injured by the negligence of another used proper diligence, as soon as his peril was apparent, to avert the catastrophe, it could not be said that by ordinary care he might have avoided the consequences of the other's negligence. In *Railway Co. v. Holmes*, 103 Ga. 658, 30 S. E. 565, Mr. Justice Lewis says: "A party cannot be charged with the duty of using any degree of care or diligence to avoid the negligence of a wrongdoer until he has reason to apprehend the existence of such negligence. No one can be expected to guard against what he does not see and cannot foretell. The rule, therefore, which requires one to exercise ordinary care and diligence to avoid the consequences of another's negligence, necessarily applies to a case where there is opportunity of exercising this diligence after the negligence has begun and has become apparent." From the expressions used and the rulings made in the cases cited,—and there are many others where similar expressions are used and similar rulings made,—the rule of force with reference to the subject under investigation seems to be well settled, and may be thus stated: The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. In such cases, and in such cases only, does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases (that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when, as an ordinarily prudent person, it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent

person) such fault or failure to exercise due care and diligence at such a time would not entirely preclude a recovery, but would authorize the jury to diminish the damages "in proportion to the amount of default attributable to" the person injured. *Comer v. Barfield*, supra; *Railroad Co. v. Holmes*, supra; *Railroad Co. v. Johnson*, 38 Ga. 409. In some jurisdictions the mere failure to stop, look, and listen by one who is about to cross a railroad track is negligence per se; and this is true notwithstanding that at the place where the person was about to cross there is imposed upon the railroad company, by statute or otherwise, the duty of giving signals as to the approach of trains to such places. In other jurisdictions it is held that the mere failure to stop, look, and listen will not amount to negligence per se, but the question whether it is such negligence as will defeat a recovery is one of fact, to be determined by a jury, after taking into consideration all of the circumstances of the case. 2 Am. & Eng. Enc. Law, 429 et seq. Even in the jurisdictions last referred to—among them being our own state—the rule is settled that one about to cross a railroad track must use his senses in the way that an ordinarily prudent person would under similar circumstances use them, in order to determine whether it would be safe to cross at that time and place; and this is true notwithstanding the company may be by law required to give signals, slacken speed, or do such other acts as would, if faithfully performed, render improbable, if not impossible, injury to any one crossing the track. At common law, if the negligence of the plaintiff contributed to the injury, he could not recover. This doctrine referred to usually as that of "contributory negligence" is not the law of this state; but the doctrine referred to often as that of "comparative negligence" is the rule of force here. This rule authorizes a recovery by the plaintiff, although he was at fault, provided he was injured under circumstances where, by the exercise of ordinary care on his part, he could not have avoided the consequences of the defendant's negligence. See Civ. Code, §§ 2322, 3830. If the plaintiff knows of the defendant's negligence, and fails to exercise that degree of care and caution which an ordinarily prudent man would exercise under similar circumstances to prevent an injury which will result from such negligence, it is well settled that he cannot recover. See *Railroad Co. v. Neely*, 56 Ga. 544; *Railroad Co. v. Harris*, 76 Ga. 508; *Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Briscoe v. Railway Co.*, 103 Ga. 224, 227, 28 S. E. 638; *Railroad Co. v. Dorsey*, 106 Ga. 826, 828, 32 S. E. 873; *Hopkins v. Railway Co.*, 110 Ga. 85, 88, 35 S. E. 307.

If the negligence of the defendant was existing at the time that plaintiff was hurt, and he, in the exercise of that degree of care and caution which an ordinarily prudent person would exercise under similar circum-

stances, could have discovered the defendant's negligence, and when discovered could, by the exercise of a like degree of care, have avoided the same, then he cannot recover. See *Railroad Co. v. Loftin*, 86 Ga. 43, 46, 12 S. E. 186; *Railroad Co. v. Luckie*, supra; *Railroad Co. v. Gibson*, 97 Ga. 489, 497, 25 S. E. 485; *Cain v. Railway Co.*, 97 Ga. 298, 22 S. E. 918; *Railroad Co. v. Bradford* (Ga.) 38 S. E. 823. If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would have reasonably apprehended that the defendant might be negligent at the time when and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to have prevented the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed. See *Railroad Co. v. Bloomington*, 74 Ga. 604, 611; *Smith v. Railroad Co.*, 82 Ga. 801, 10 S. E. 111; *Jenkins v. Railroad Co.*, 89 Ga. 756, 15 S. E. 635; *Railroad Co. v. Attaway*, 99 Ga. 657, 661, 16 S. E. 956; *Railway Co. v. Holmes*, 103 Ga. 655, 30 S. E. 563; *Lloyd v. Railway Co.*, 110 Ga. 167, 35 S. E. 170. If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained; and if he fails to do this, and is injured, he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury. A railroad track is a place of danger, and one who goes thereon is bound to know that he is going into a place where he is subject to the dangers incident to the operation of trains upon that track. See, in this connection, *Comer v. Shaw*, 98 Ga. 545, 25 S. E. 733; *Lloyd v. Railway Co.*, 110 Ga. 167, 35 S. E. 170. This is true, without regard to the place where the track is,—whether in the country, where pedestrians are not expected to be, or at a public road crossing, or at a street crossing, or at the stations and depots of railroad companies, where persons are expected and invited to be present. No matter where the track is located, any person who goes upon the same is bound to know that he is going upon a place where his presence would be attended with more or less danger. What would or would not amount to negligence in the manner in which a person entered upon a railroad track would depend to a large extent

upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight, if not that of hearing, to determine whether at the time and place he was about to cross the same there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend. In *Railroad Co. v. Smith*, 78 Ga. 700, 3 S. E. 399, it was, in effect, held that one is not bound to anticipate negligence when the law commands diligence for his protection at the hands of another; Mr. Chief Justice Bleckley, in the opinion in that case, saying: "If [the plaintiff] had been on the crossing, or at any place he was by right entitled to be, he would have been warranted in assuming that the whole world would be diligent in respect to him and his safety." We do not understand this rule to mean that it is an act of ordinary prudence for a person to go blindly into a place which may or may not be dangerous, simply because the law has commanded those in charge of such place to do certain things, which, if faithfully performed, would render improbable, if not impossible, injury to any one at that place. Ordinary care would itself require the use of the senses to ascertain whether there was at the particular time any danger in going into the place. An ordinarily prudent person would necessarily apprehend the possibility of danger, and would always act on such apprehension, and use his senses to determine whether or not it was safe to go into the place at the time that he was seeking to enter the same.

Applying the principles above referred to to the facts of the present case, we find that the plaintiff was about to cross a railroad track at a place where he was entitled to cross; that he knew that it was near the time for a train to approach; that he looked up the track in the direction from which the train was expected, and saw no train approaching; that he could see such a distance along the track that it would be impossible for a train, if running within the limit of speed prescribed by the ordinance of the city in which the track was located, to reach the place at which the plaintiff intended to cross the track before the plaintiff reached that point; that, acting upon the assumption that the train would approach in the manner prescribed by the ordinance, he walked a very short distance, being occupied only a few moments in doing so, and, without looking again to see if the train was approaching, stepped upon the track, and was struck by a train running at a high rate of speed. While there was a conflict in the evidence on some points, there was evidence from which the jury could find the facts to be as above stated, and we must deal with the case in its most favorable light for the plaintiff. It was the duty of the plaintiff,

before he attempted to cross the railroad track, to at least use his senses to determine whether there was any danger in such act. He complied with this duty, and the circumstances surrounding him were such that if the employees in charge of the train had operated it as they should have done, in conformity to the city ordinance, injury to the plaintiff at the time and place that he stepped upon the track was an impossibility. After having looked up the track, and being able to see the distance that he said he could see, the plaintiff (there being no evidence showing that he had any reason to anticipate the contrary) had a right to assume that the persons in charge of the train would not violate the city ordinance regulating the rate of speed; and, in acting upon this assumption, it would seem that he was not guilty of negligence when he stepped upon the track. But, even if it cannot be said that he was entirely free from fault, neither can it be said that he failed entirely to exercise the care and prudence which an ordinarily prudent person would exercise for his own protection under similar circumstances.

There was no error of law complained of, and the verdict in the plaintiff's favor has met with the approval of the trial judge, and we cannot say that it is entirely unsupported by evidence. For this reason, we will not interfere with the discretion of the trial judge in refusing to grant a new trial. Judgment affirmed. All the justices concurring.

(112 Ga. 310)

BRIGHAM et al. v. BRIGHAM.

(Supreme Court of Georgia. July 13, 1901.)

PARTITION—OWELTY—WIDOW'S SUPPORT—PRIORITIES.

Upon the application of the heirs at law, the lands of a deceased intestate were appraised and divided under section 3480 of the Civil Code. By the judgment of the court, the heir drawing a certain lot was required, before taking possession, to pay a named amount of money to the other heirs, to make them equal. This heir was already in possession of the lot set apart to him, and was allowed to remain in possession upon giving notes to the others for this amount, secured by mortgage upon his lot. Subsequently he died, leaving the notes unpaid. His widow applied for a year's support, and all of the lot was set apart to her, whereupon the mortgagees filed a caveat to the return of the appraisers setting aside the year's support. *Held*, that the mortgage, having been given upon the whole lot for the purchase money of an undivided interest in it, was a purchase-money mortgage, and that the right of the widow to a year's support in the lot was inferior to the lien of the mortgage, and to the caveaters' lien for owelty of partition.

(Syllabus by the Court.)

Error from superior court, Burke county; W. M. Henry, Judge.

In the matter of the estate of William Brigham, deceased. The appraisers set apart certain property to Mollie Brigham, his widow, for a year's support. To the return of the appraisers a caveat was filed by W. H.

Brigham and others. Judgment of the court of ordinary on appeal was affirmed by the superior court, and the caveators bring error. Reversed.

Johnston & Fullbright, for plaintiffs in error. S. H. Jones and Lawson & Scales, for defendant in error.

SIMMONS, C. J. The record discloses that William Brigham died intestate, leaving a large quantity of land and nine children. The children applied to the court of ordinary, under section 3479 et seq. of the Civil Code, to have the land divided in kind. Appraisers were appointed, who divided the land into nine shares, and estimated the value of all of the land and of each of the shares. The appraised values of the shares were not equal, and the appraisers recommended that the heirs who drew the more valuable shares should pay designated sums of money to the others, in order to equalize them. There appear to have been no objections to this report, which was made the judgment of the court of ordinary in February, 1894. T. R. Brigham drew the most valuable share. In order to equalize the heirs, it was recommended by the appraisers and adjudged by the court that he should pay to the others \$453.56. It appears from the record that he was already in possession of the lot which he drew. The other heirs who drew lots worth more than their distributive shares paid the amounts adjudged against them. In the distribution of the sums thus paid, some of those drawing small shares were, by the consent of all the parties, including T. R. Brigham, paid up in full, while the others who had drawn small shares were assigned the money to be paid by T. R. Brigham. The latter in June, 1894, agreeing to this arrangement, but being unable to pay the amount assessed against him, made and executed his notes, secured by mortgage upon the whole of the lot drawn by him, to cover this amount. The notes and mortgage also included some \$77 for certain personal property he had purchased at the administrator's sale, but at the time of the execution of the notes and mortgage he paid on the notes \$156, which was credited on the notes the day they were executed; the agreement being that the money thus paid should go first to discharge the debt for the personal property. In 1898 T. R. Brigham died, and his widow applied for a year's support for herself and her minor children. The appraisers set apart as a year's support all of the land drawn by T. R. Brigham as his share of the estate of his father, and also all of his personal property. To the return of the appraisers a caveat was filed by the brothers and sisters who held the notes and mortgage above mentioned. From the judgment of the court of ordinary an appeal was taken to the superior court. On the trial of the appeal the jury found a verdict sustaining and set-

ting up the return of the appraisers. The caveators made a motion for a new trial, which was overruled by the court. The movants excepted.

One of the grounds of the motion complained that the trial judge erred in charging the jury that "the caveators have no lien of owelty upon the land in question, for any amount, superior to the applicant's right to year's support," and that "the mortgage held by the caveators upon the land is not superior to the applicant's right of year's support in the land. You have, therefore, nothing to do with these questions, and your investigation is restricted solely to the issue as to whether or not the amount and value of the property set apart by the appraisers is excessive." The question thus made is controlling in the case. The equitable doctrine of owelty is fully recognized in our Civil Code (section 3480). This doctrine is applied in partitions between heirs at law of an intestate or other tenants in common, and means that where one of the heirs or tenants in common receives, in a division in kind of the lands of the estate, a share more valuable than his due portion of the estate, he should pay a certain ascertained sum to the others, in order to equalize the distribution. In some states the lien of owelty is enforced in equity courts only, while in others, as in Georgia, the legislature has made provision for it. In this state it can be enforced upon the application of any of the distributees or of the administrator in the court of ordinary. The doctrine is purely equitable, and the lien cannot be enforced in courts of law, except by statute. The principle established is so just that courts of equity began at an early day to enforce the lien. It has always been held by these courts that this lien for owelty is superior to almost every other lien. In one case it was held that where one of the heirs of an intestate gave a mortgage upon his undivided interest in the estate, and subsequently he drew a share charged with owelty, the lien for owelty established by the court in favor of the co-heirs was superior to the lien of the mortgage. This lien for owelty should be superior to all other liens imposed by the distributee; for in this state land descends to the heirs, and each of them owns an equal interest in it, and when, by a partition, either in equity or under the statute, a decree or judgment is rendered dividing the lands so that one of the heirs gets more than his proper share, the others must be paid for the surplus in value before the title passes to the heir drawing such valuable share. In the present case the judgment of the court of ordinary appears to have made provision for this very thing. The return of the appraisers, which was made the judgment of the court, declared that T. R. Brigham should pay the sum of \$453.56 before the delivery of the land to him. Thus the payment of this amount seems to have been made a condition

precedent to his obtaining possession of the land. He was unable to pay the amount charged against his portion of the land, and four of the other heirs, who had drawn smaller shares, were willing to wait upon him for the money. The remaining heirs who had drawn small shares were unwilling to postpone the payment of the amounts due them. All of the parties, therefore, entered into the agreement set forth above, by which some of the heirs were fully equalized by payment of the money paid in by others who had drawn large shares, while the caveators agreed to look to T. R. Brigham, taking from him his notes and mortgage for the amount assessed against his share. The mortgage thus given was for the same debt or claim, and, under the facts recited, between the same parties as the lien for owelty of partition. The lien of owelty or equalization was for the purchase money of that portion of the lot drawn by T. R. Brigham which was in excess of the share to which he would have been entitled upon an exactly equal division. Had the heirs proceeded to enforce this lien for owelty, it might be said that it extended only to the part which he acquired by purchase, and not to that to which he acquired title by descent. As far as our research has extended, the better opinion is that the lien attached to the whole of the tract or purpart; the portion acquired by purchase being an undivided interest in all parts of the whole. However this may be, when T. R. Brigham gave a mortgage upon the entire tract, including the interests acquired by purchase and by descent, the mortgage lien certainly attached to the whole. It was argued that we have another statute which makes the claim for year's support superior to all debts; that this debt is simply a claim in the nature of a vendor's lien, and is not superior to the claim for year's support. In reply it may be said that section 3472 of the Civil Code declares, in substance, that where land is sold, and the vendor makes a deed and takes a mortgage for the purchase money, this mortgage lien shall be superior to the claim for year's support. The facts of the present case bring the lien of the caveators' mortgage within the principle of that section. It may not be strictly within its letter, for in this case there was no deed made by the caveators to T. R. Brigham; but in such a case no deed is necessary. Had the tenants in common themselves divided the land and sold it to each other, no deeds would have been necessary. Releases would have sufficed. In the present case the action of the parties amounted to releases to each other, if not, indeed, to the giving of deeds. They applied to the court for a division of the lands, the lands were divided by a judgment of the court, and the parties entered into the agreement hereinbefore recited. Had T. R. Brigham taken a deed from the other heirs, or obtained a release from them, and given his notes and mortgage for their interests in the land, could

he have said that the notes did not represent the purchase money of a part of the land? Clearly not. If he could not set up such a defense, his widow, standing in his shoes, cannot do so, under the section of the Code last alluded to. It is clear that the note and mortgage represented the purchase money of that part of the land he drew which was in excess of the value of his proportionate part. To hold that, before section 3472 of the Civil Code can apply, there must be a bargain and sale, and a deed and a mortgage back, would be sticking in the bark. Our constitution provides that homesteads and exemptions shall be exempt from levy and sale, except for purchase money, improvements, etc. This court has several times held that, where a factor sells to the head of a family fertilizers or supplies which enter into the making of his crops, the claim is in the nature of a purchase-money debt, and the crop is subject. *Stephens v. Smith*, 62 Ga. 177; *Cook v. Roberts*, 69 Ga. 742. If these things are in the nature of purchase money, how much stronger is the case made where an heir obtained land worth \$453 more than his share of the estate, where the court adjudged that he was not to go into possession as owner of the land until he had paid the money, where he recognized the claim as a purchase-money debt in a mortgage given upon the lot, and where such mortgage described the lot as the land he had drawn in the distribution of his deceased father's estate! The case is, we think, within the spirit and principle, if not within the letter, of section 3472 of the Civil Code. And "if the debt * * * was for any part of the purchase money of all the land, * * * then all the land is subject until the whole debt is paid." *Cook v. Cook*, 67 Ga. 381. To hold that this widow can, by application for a year's support, get not only her husband's estate, but the interest of his brothers and sisters in the identical land, would be contrary to all principles of justice and equity.

The other questions made in the record are such as will probably not arise upon the next trial, and it is therefore unnecessary to decide them. Judgment reversed. All the justices concurring.

(113 Ga. 942)

JOHNSON et al. v. JOHNSON.

(Supreme Court of Georgia. July 20, 1901.)

APPEAL FROM JUSTICE—AMENDMENT OF SUMMONS.

When a suit brought in a justice's court upon a promissory note for \$100 principal and 10 per cent. attorney's fees is appealed to the superior court, the summons may be so amended in that court as to show that the amount really due upon the note at the time the summons was issued was less than \$100, inclusive of attorney's fees.

(Syllabus by the Court.)

Error from superior court, Spalding county; E. J. Reagan, Judge.

Action by Rosa P. Johnson against C. H. Johnson and another. Judgment for plaintiff was affirmed on appeal. Defendants bring error. Affirmed.

T. E. Patterson, for plaintiffs in error.
Lloyd Cleveland, for defendant in error.

COBB, J. The verdict in favor of the plaintiff was for an amount less than that admitted by the defendant in his plea to be due, and therefore he has no right to complain unless he can establish that the court was without jurisdiction to render any judgment in the case. The case made by the original summons and the copy note attached thereto was beyond the jurisdiction of the justice's court. The attorney's fees stipulated for in the note were a part of the principal, and attaching a note containing such a stipulation as an exhibit to the summons, when there is nothing in the summons to indicate that there was any intention on the part of the plaintiff to abandon his right to claim attorney's fees, made the suit one for the largest amount that might be claimed by the owner of the note under the stipulations thereof. See *Peeples v. Strickland*, 101 Ga. 829, 29 S. E. 22, and cases cited; *Morgan v. Kiser*, 105 Ga. 104, 31 S. E. 45, and cases cited. In *Pickett v. Smith*, 95 Ga. 757, 22 S. E. 669, it was held that, while any amount due as attorney's fees stipulated for in a promissory note was a part of the principal, the principal and attorney's fees stipulated for were "distinct and severable demands"; that the payee in the note was not compelled to claim attorney's fees unless he desired to do so; and that therefore an attachment founded upon a note for \$100, containing a stipulation for 10 per cent. attorney's fees, was within the jurisdiction of the justice's court, when it distinctly appeared from the affidavit on which the attachment issued that there was no intention on the part of the plaintiff in attachment to claim any amount other than the principal and interest on the note. The principle ruled in that case is that, where there is an express abandonment of the attorney's fees, the suit will be treated as one for the amount due on the claim, with no sum added for attorney's fees. So construing that decision, it is manifestly not in conflict with the principle just above laid down, which is that the suit will be treated as one claiming attorney's fees, unless the contrary intention is distinctly stated in the summons or affidavit, as the case may be. The trial in the justice's court resulted in a verdict in favor of the plaintiff, and the defendant entered an appeal to the superior court. When the case came on to be tried on the appeal the defendant made a motion to dismiss the case on the ground that it appeared upon the face of the summons and exhibit thereto attached that the suit was one for an amount beyond the jurisdiction of the justice's court. That an appellant may move to dismiss the case on appeal for want

of jurisdiction in the tribunal from which the appeal was taken is settled by the decision of this court in the case of *Austell v. City of Atlanta*, 100 Ga. 182, 27 S. E. 983 (4). In reply to the motion to dismiss the case, the plaintiff offered the amendment referred to in the foregoing statement of facts. The court allowed this amendment. It appears from the record that after the allowance of the amendment the case was postponed until a subsequent term of the court. When it came on for trial again the defendant moved to strike the amendment upon the ground that, the case as originally brought being beyond the jurisdiction of the justice's court, the superior court on appeal had no right to allow any amendment which would have the effect of giving the court jurisdiction. This motion was overruled, and to this ruling exception was taken by the defendant.

The plaintiff in error relies upon the decision made in the case of *Cox v. Stanton*, 58 Ga. 406, to support his contention that the court had no right to allow the amendment. In that case it was ruled that a creditor could not bring his claim within the jurisdiction of the justice's court by entering a credit thereon without the consent of the debtor. The reason for the ruling there made is thus stated by Mr. Chief Justice Warner: "The note was an entire contract between the plaintiffs and defendant. It took two parties to make it, and required the consent of both parties to the contract to alter and reduce the amount of it so as to bring it within the jurisdiction of a justice of the peace. The defendant may not have been willing to have made a contract which would have authorized a justice of the peace to adjudicate his rights under it; and shall the plaintiffs be allowed, without his consent, to force him to litigate his rights in that tribunal, by reducing the amount of the contract, under the pretext that they do not claim but one hundred dollars under that contract? In our judgment, they could not legally have done so. The attempt to reduce the amount of the note by the act of the plaintiffs alone, without the consent of the defendant, did not alter or change the contract as it was originally made by the parties to it." If the contract made by the parties was one which, although apparently for more than \$100 principal, was really one for less than that amount, neither the ruling nor the reasoning in the case cited above is applicable. When the note and the contemporaneous written agreement in the present case are taken together, and in the light of the averments in the amendment as to the amount due upon the counterclaim referred to in the written agreement, it is clear that there never was at any time a right in the plaintiffs to claim from the defendant a debt, the principal of which, either with or without attorney's fees added, would exceed the sum of \$100. In such a case the justice's court would undoubtedly have jurisdiction to enforce the demand. There is a clear distinction between

reducing a claim for an amount exceeding \$100 by voluntarily remitting a portion of the same, and showing that a claim apparently for an amount exceeding \$100 was really one, by express agreement between the parties, for a sum less than \$100. If the claim sued on in the present case was really one in which the largest sum that could be in any event collected was less than \$100, the justice's court had jurisdiction of a suit to enforce the same; and there is no sufficient reason why an amendment to the summons could not have been allowed in the justice's court, setting up facts which would show this to be true, and thus relieve the apparent defect in the summons as originally framed. See, in this connection, *Gates v. Jones*, 1 Root, 238; *Epperly v. Little*, 6 Ind. 344; *Collins v. Collins*, 37 Pa. 387. The law of amendments is very broad. Civ. Code, § 5097. It is expressly provided that, where there is a failure to allege facts sufficient to show jurisdiction in the court, this omission may be cured by amendment. Civ. Code, §§ 5098, 5107. If the omission to show jurisdiction may be supplied by amendment, we see no good reason why an amendment might not be allowed showing that the claim sought to be enforced is one really within the jurisdiction of the court. While nothing that happens after the suit has been begun can be relied upon to give the court jurisdiction of a case of which it had no jurisdiction at the time the suit was brought, still, if at the time the suit was brought the court had jurisdiction of the subject-matter of the claim, and there was enough in the summons to amend by, we know of no good reason why an amendment relieving the summons of the apparent defect might not be properly allowed. If the amendment could have been allowed in the justice's court, the same right to amend existed when the case was on the appeal in the superior court. In the case of *Reynolds v. Neal*, 91 Ga. 614, 18 S. E. 580, Mr. Chief Justice Bleckley said: "When a case is on the appeal in the superior court from a justice's court, any amendment of the summons, whether in matter of form or of substance, may be made which could have been made whilst the case was pending in the primary court. The only restriction on either court is that there must be enough to amend by." See, also, Civ. Code, § 4469; *Burns v. Chandler*, 61 Ga. 385. The court did not err in refusing to strike the amendment offered by the plaintiff. Judgment affirmed. All the justices concurring.

(113 Ga. 1063)

VINCE et al. v. STATE.

(Supreme Court of Georgia. July 19, 1901.)

RESISTING OFFICER—INDICTMENT— DEMURRER.

Under a special act creating a city court, and providing for the appointment of a sheriff thereof, that officer may, though such act does not, even in general terms, prescribe or define his powers and duties, execute processes of

that court or perform any other duty necessarily incident to his position as its ministerial officer; but he cannot, under such act, lawfully execute processes issued from other courts, or by judicial officers, other than the judge of the city court in question. Applying this principle to the present case, it follows that the court below erred in not sustaining the demurrer to the accusation.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Rosa Vince and others were convicted of resisting an officer, and bring error. Reversed.

Akerman & Akerman, for plaintiffs in error. F. Y. Corker, for the State.

LEWIS, J. The accused was tried in the city court of Dublin upon an accusation charging that on a named day, in Laurens county, she and three other named females did "unlawfully, knowingly, and willfully obstruct, resist, and oppose an officer of this state, to wit, J. D. Prince, sheriff of the city court of Dublin, in serving a state warrant issued by J. B. Wolfe, a N. P. and ex off. J. P. of the 342d district G. M., Laurens county, Georgia, for the arrest of one Rosa Vince, charged in said warrant with a misdemeanor, said warrant dated Feb. 25, 1901, by then and there striking the said J. D. Prince, and thereby attempting to prevent said officer from making said arrest." The defendants demurred to the accusation on the grounds (1) that it did not state facts sufficient to constitute a crime under the laws of this state; (2) that the act constituting the city court of Dublin is unconstitutional, in that it embraces more than one subject, to wit, the establishment of the city court of Dublin and the abolition of the city court of Laurens county, and (3) that the sheriff of the city court of Dublin has no authority in law to execute a state warrant issued by a justice of the peace or a notary public who is ex officio justice of the peace. To the overruling of this demurrer the defendants except.

In the view which we entertain of this case, it is only necessary to consider the last of the grounds of demurrer set forth above; for, if the sheriff of the city court of Dublin had no authority to serve the warrant for obstructing the execution of which the accused was tried, it is at once apparent that the accusation cannot stand. The city court of Dublin was established in pursuance of an act approved December 6, 1900. Acts 1900, p. 117. Section 16 of that act provides for the appointment by the judge of a sheriff, and for the appointment by the sheriff of a deputy or deputies. The act nowhere sets forth what shall be the duties of the sheriff or his deputies. In the absence of such a provision in the law creating the court, the sheriff will not, of course, be deprived of authority to do any official acts whatever, but he will be held to be empow-

ered to do those things, and those things only, which are necessary to the performance of his duties as sheriff of the court under which he serves. The statute creating his office gives him no power to execute warrants issued from any other court, and there is no general law of force in this state which can be construed to give him such authority. Had he been serving a warrant issued from the city court of Dublin at the time the alleged offense was committed, the defendants could very properly have been held under this accusation; but he was engaged in a service which he had no authority to perform, and the defendants were not, therefore, liable to punishment for the offense with which they were charged. Sections 895 and 898 of the Penal Code, cited in the brief of the solicitor, refer to the duties of officers generally and of arresting officers, and necessarily relate to such officers as are by law charged with the duty of making arrests upon the warrants placed in their hands. It would simply be begging the question to apply the rules in regard to these officers to the sheriff of the city court of Dublin. We must, therefore, hold that the court below erred in overruling the demurrer to the accusation. Judgment reversed. All the justices concurring.

(113 Ga. 563)

WILLINGHAM v. STERLING CYCLE WORKS.

(Supreme Court of Georgia. July 20, 1901.)

APPEAL—SECOND TRIAL—LAW OF CASE—ASSIGNMENTS OF ERROR—CONTRACT—INTENT OF PARTIES.

1. Points decided by the supreme court in a given case must, upon another hearing thereof, be treated as settled.

2. Assignments of error in admitting testimony must disclose with reasonable certainty what the alleged objectionable testimony was.

3. Proof of the secret intention or purpose of the writer of a document as to what he "meant" to express thereby is not admissible to bind another.

4. None of the grounds of the motion for a new trial filed in the present case disclose the commission of material error in any of the rulings or charges complained of, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Sterling Cycle Works against E. G. Willingham. Judgment for plaintiff. Defendant brings error. Affirmed.

Culberson & Willingham and Westmoreland Bros., for plaintiff in error. Mayson & Hill, for defendant in error.

LUMPKIN, P. J. This case was here at the October term, 1899, at which time it was held that the trial court erred in rejecting certain testimony and in granting a nonsuit. See 109 Ga. 559, 35 S. E. 55. Another trial was had in the city court, resulting in

a verdict for the plaintiff, the Sterling Cycle Works; and the defendant, E. G. Willingham, is now here as plaintiff in error, excepting to a judgment overruling a motion for a new trial filed in his behalf. Some of the points made in this motion are fully covered by the rulings made when the case was first before this court. These were, in substance: (1) That evidence of the alleged parole promise of E. G. Willingham to pay for all goods ordered by Willingham & Castle was admissible; (2) that the testimony offered on this point warranted a finding that such a promise was made after the execution of the written contract, and was supported by a valid consideration; and (3) that the evidence as a whole was sufficient to carry the case to the jury.

1. It would be useless and unprofitable to again enter upon a discussion of these matters. We will therefore pass, without further notice, such grounds of the motion for a new trial as relate thereto, and will deal specifically with those grounds only which present new questions of enough practical importance to merit attention. Before proceeding to do so, it is proper to state certain facts not distinctly made apparent in the headnotes and opinion heretofore filed, but in the light of which what was therein laid down should be understood and interpreted. The defendant's answer did not, either directly or indirectly, set up as a defense that the alleged promise of E. G. Willingham to pay for all goods ordered by the firm of Willingham & Castle, and which the plaintiff insisted was made after the execution of his written contract of guaranty, was within the operation of the statute of frauds. This statement will, we trust, suffice to explain what may heretofore have been regarded as an oversight on the part of this court, in failing in its previous dealing with this case to give proper effect to the provisions of that statute. It is also pertinent to state that the defendant's original answer has never been, so far as relates to this matter, amended.

2. In some of the grounds of the motion for a new trial complaint is made that the court erred in not ruling out the answers to certain interrogatories. The answers themselves are not set out in the motion, nor is the substance thereof stated with sufficient fullness to enable this court to pass upon their admissibility or materiality. The rule that grounds of a motion for a new trial assigning errors of this kind must disclose with reasonable certainty what the alleged objectionable evidence was is settled so far as anything can be established by oft-repeated judicial utterances.

3. While on the stand testifying as a witness in his own behalf, E. G. Willingham was asked by his counsel what he meant by certain language appearing in one of his letters to the plaintiff. The answer was properly excluded. The secret intention of

a party in employing given words in a written communication addressed to and acted on by another is not binding upon the latter. See *Harris v. Lumber Co.*, 97 Ga. 465, 469, 25 S. E. 519, and authorities cited.

4. Several other grounds of the motion contain exceptions to the admission of testimony. We are not prepared to say that all of the same was relevant, but none of it which was irrelevant was of sufficient materiality to have affected the result. One ground complains of the refusal to give in charge to the jury a specific request, but does not disclose that this request was in writing. Complaint is also made of certain charges. It is enough to say that they were in substantial accord with the law as laid down by this court in this very case. A careful examination of the brief of evidence discloses that the jury were warranted in finding that the plaintiff proved its case as laid. Judgment affirmed. All the justices concurring.

(113 Ga. 386)

PERRY v. STATE.

(Supreme Court of Georgia. July 20, 1901.)

CRIMINAL LAW—BILL OF EXCEPTIONS—ENTICING AWAY SERVANT—CONTROL OF BASTARD CHILD.

1. A bill of exceptions which recites that "at the April term, 1901, of the city court of Bainbridge, his honor B. B. Bower, judge of said court, presiding," a designated case came on to be tried, and was tried, and which is duly certified by the judge named, sufficiently shows that the case was tried in the city court of Bainbridge, in the state of Georgia.

2. The control of a minor bastard child who has not been legitimated by his father belongs exclusively to his mother, and even if he could, where she abandoned him or refused to support him, make a valid contract of service with another, he certainly cannot against her consent do so, when she has neither abandoned nor refused to support him.

3. It results from an application of the principle laid down in the note immediately preceding to the facts of the present case that the verdict of guilty was contrary to the evidence.

(Syllabus by the Court.)

Error from city court of Bainbridge; B. B. Bower, Judge.

John Perry was convicted of enticing away the servant of another, and brings error. Reversed.

W. D. Sheffield and Harrison & Bryan, for plaintiff in error. Albert H. Russell, for defendant in error.

COBB, J. Perry was tried upon an accusation charging him with the offense of enticing away the servant of another, and was convicted. His motion for a new trial, based upon the general grounds only, having been overruled, he excepted.

1. When the case was called in this court a motion was made to dismiss the writ of error on the ground that the bill of exceptions did not show in what state and county

the case was tried. The bill of exceptions recites that "at the April term, 1901, of the city court of Bainbridge, his honor B. B. Bower, judge of said court, presiding, there came on to be tried the case of the state against John Perry." It nowhere appears affirmatively in the bill of exceptions in what state or county the case was tried. The courts of Georgia will take judicial cognizance of the fact that a named county is within the state. *Wright v. Phillips*, 46 Ga. 197. And, when it is shown that a given town is in the state, the court will take judicial notice of the county in which such town is located. *Clayton v. May*, 67 Ga. 769; *Railroad Co. v. De Bray*, 71 Ga. 406; *Cooper v. State*, 106 Ga. 120, 32 S. E. 23. But the courts cannot know judicially that a named town is in the state, for there may be towns of the same name in other states. In order, therefore, for this court to acquire jurisdiction of a bill of exceptions, it must appear at least either in what county the case was tried, or, if it is stated that the case was tried in a given town, it must appear that the town was in this state. We think sufficient appears in the present bill of exceptions to give the court jurisdiction. While we cannot know that Bainbridge is in Georgia, we can take judicial cognizance of the fact that Hon. B. B. Bower is judge of a court in this state known as the "City Court of Bainbridge," and located at Bainbridge, Ga. This is matter of public record. A simple recital that the case was tried in the city court of Bainbridge would probably have been insufficient, because there may be such a court in another state; but, when that recital is coupled with a statement that a judge of this state presides over that court, we can with certainty locate it in this state, and, once located in this state, we can know that the town where the court is held is in Decatur county. Counsel for movant relied on the case of *English v. Bryan*, 66 Ga. 574, but we think that case is distinguishable from this. There the bill of exceptions simply recited that a certain case was tried before "Hon. A. C. Pate, judge of the Oconee circuit, presiding instead of Hon. H. V. Johnson, hindered from providential cause." It was ruled that, where a bill of exceptions failed to state either the court or county in which the case was tried, the writ of error would be dismissed, and that the certificate of the clerk could not be looked to to determine where the case was tried. That decision was manifestly right. The court would take judicial cognizance of the fact that Judge Johnson was judge of the Middle circuit, but there was absolutely nothing to show in which of the several counties in that circuit the case was tried. Had there been but one county in that circuit, as in the Atlanta circuit, the rule would be different. The motion to dismiss the writ of error in the present case must be overruled.

2, 3. The evidence shows that the person

whom the accused was charged with having enticed away from his employer was a minor illegitimate child, and there was no evidence that he had ever been legitimated by his father. Civ. Code, § 2509, provides that "the mother of a bastard is entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the parental power." It follows, therefore, that the mother of a minor bastard child has absolute control over him, and is entitled to his services. Such a child could not, therefore, against the consent of his mother, any more than a minor legitimate child could against the consent of his father, enter into a valid contract of service. As it appears in this case that the boy ran away from home, and, without his mother's consent and against her wishes, entered into the employment from which it is charged he was enticed away, the conviction of the accused was not warranted by the evidence. It may be that, if the mother of a minor bastard child abandoned him or refused to support and maintain him, he could make a binding contract of service with another, but the present record presents no such case. Judgment reversed. All the justices concurring.

(113 Ga. 948)

ROUGHTON v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 20, 1901.)

CITY STREETS—CHANGE OF GRADE—DAMAGES—TORTS OF SERVANTS.

1. When a city, in the exercise of its corporate powers, changes the grade of one of its streets, and as a result the premises of an adjoining lot owner are rendered less valuable, he is entitled to just compensation for the injury thus sustained; the measure of damages being the diminution in the market value of his property.

2. A municipality is not, however, in such a case, liable in damages for tortious acts of its servants which are not proximately connected with the work incident to the making of the public improvement.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by J. F. Roughton against the city of Atlanta. Judgment for defendant, and plaintiff brings error. Reversed.

Roughton sued the city of Atlanta, alleging, in substance, in his petition that the defendant had damaged him by reason of the following facts: On a given day the defendant changed the grade and filled in on a designated public street in its charge and control in the city, on which was the plaintiff's lot, where he resided, and it made a fill on the front end of his lot and fence about 4 feet, and damaged the lot and fence in a sum stated; and, having made the fill, the defendant undertook to "jack up" his house to come above the fill, and did so, about 4 or 5 feet, so that the house was about 11 or 12 feet from the ground in the rear of it. In raising

the house the timbers in it were torn loose and disturbed, the plastering broken, and the roof made to leak, whereby the house was damaged in a stated sum. The making of the change in the lot and the house rendered the place unfit for occupancy as a home, and its rental value was thereby destroyed, thus damaging him in a sum stated. To the allegation that the defendant undertook to jack up the house, etc., the plaintiff added, by amendment, that the defendant entered on his premises and undertook to do this without his knowledge or consent. He alleged also, by amendment, that the defendant ratified and adopted as its own the acts of its agents and employes in raising the house, after it was done, and by so ratifying became liable to pay all damages arising therefrom; also that it ratified these acts by paying for them. To the petition as amended the defendant demurred generally, and the court dismissed it, assigning as the reason for dismissal that it set forth no cause of action, because the acts complained of were ultra vires.

H. M. Patty, for plaintiff in error. J. A. Anderson, J. T. Pendleton, J. L. Mayson, and W. P. Hill, for defendant in error.

LUMPKIN, P. J. The sole question which this case presents for determination is whether or not the petition filed by the plaintiff was capable of withstanding a general demurrer. We hold, without hesitation, that it was.

1. If, as alleged, the city undertook to change the grade of one of its streets by making "a fill on the front end of plaintiff's lot," and as a consequence his fence was damaged and his premises rendered less valuable, his right to compensation for the injury thus sustained is beyond question. City of Atlanta v. Green, 67 Ga. 388. In such a case the measure of damages is the difference between the market value of the property injuriously affected, before and after the change in the grade of the street was made. City Council v. Schrameck, 96 Ga. 426, 23 S. E. 400; Hurt v. City of Atlanta, 100 Ga. 274, 281, 28 S. E. 65.

2. In so far, however, as the plaintiff sought to recover damages for the tortious acts of the city's servants in subsequently undertaking, without his knowledge or consent, to "jack up" his house so that it would be on a level with the fill made in the street, we are equally confident that the petition did not set forth a cause of action. We fully recognize the doctrine that a municipality is subject to the rule of respondeat superior when, in the prosecution of a public enterprise within the scope of its corporate powers, its authorized agents negligently or unskillfully conduct the work in hand so that damage is done to adjacent private property. See, in this connection, Barfield v. Macon Co., 106 Ga. 386, 34 S. E. 596, and cases cited. But where "the act complained of necessarily lies

wholly outside of the general or special powers of the corporation, as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages," notwithstanding its governing body "directly commanded the performance of the act." 2 Dill. Mun. Corp. (4th Ed.) § 968. And, of course, an act which is ultra vires in the sense that it is beyond the corporate powers of a municipality cannot become the legitimate subject-matter of ratification, since its officials are without authority to ratify an act which they could not in the first instance have legally authorized. As a city has no right to commit a trespass, it cannot be held liable for the tortious acts of its servants, in no way connected with the prosecution of public improvements which it has power to make, whereby private property is either damaged or destroyed. Tied. Mun. Corp. p. 677, § 338. The trespass complained of in the present case was not committed during the progress of the work done in effecting a change in the grade of the street, but was wholly disconnected therewith. It may safely be assumed, as a general proposition, that tortiously entering upon private grounds and jacking up the dwelling of the owner is neither a necessary nor usual incident to the grading of a street in front of the premises. Certain it is that the plaintiff does not undertake to charge that, as a result of the unskillful or negligent manner in which the work of making the fill referred to was conducted, his house acquired its unwonted and unwanted elevation. Nor is there in his petition so much as a hint that this particular municipality had corporate authority to effect any such perpendicular change with respect to his habitation. That this could possibly be true passes understanding and belief. Judgment reversed. All the justices concurring.

(113 Ga. 746)

BRADDY, Sheriff, v. WHITELEY.

(Supreme Court of Georgia. July 17, 1901.)

MANDAMUS TO SHERIFF—OFFICIAL ADVERTISEMENTS.

1. The proprietor of a newspaper, having the legal right to publish therein the official advertisements of the county in which it is published, may by mandamus compel the sheriff to insert his official advertisements in that paper.

2. A sheriff must publish such advertisements in a newspaper published at the county site of his county, if one there be, the proprietor of which is willing to do the advertising at the rates prescribed by law. As between two or more papers so published, the publishers of which will accept those rates, he has the discretion of making a selection.

(Syllabus by the Court.)

Error from superior court, Glascock county; H. M. Holden, Judge.

Application by J. W. Whiteley for a writ of mandamus against E. L. Braddy, sheriff. Writ granted, and defendant brings error. Affirmed.

B. F. Walker, for plaintiff in error. K. J. Hawkins, for defendant in error.

LUMPKIN, P. J. Upon the petition of J. W. Whiteley, the proprietor of the Gibson Record, the only newspaper published at the county site of Glascock county, the judge of the superior court granted a mandamus absolute compelling the sheriff of that county to insert his legal advertisements in that newspaper, although there was another newspaper published in the same county, at a place other than the county site, which, according to the sheriff's answer, had a larger circulation than the Gibson Record. It appeared that each paper offered to do the sheriff's official advertising at the rates prescribed by law. The judge based his decision upon the act of November 8, 1899 (Acts 1899, p. 40), amending section 5462 of the Civil Code. The sheriff excepted to the judgment rendered, and his bill of exceptions presents for determination here only the two questions dealt with below:

1. Was Whiteley entitled to the remedy of mandamus? This question is answered by the decision of this court in the case of Coffee v. Ragsdale, 112 Ga. 708, 710, 37 S. E. 968.

2. The remaining question is, does the law imperatively require the sheriff to do his official advertising in a newspaper published at the county site of his county, the proprietor of which is willing to accept the legal rates, or has the sheriff the discretionary right of placing his advertisements in some other newspaper published in the county, if, in his opinion, it has a larger circulation, and its proprietor is likewise willing to publish official advertisements at the prescribed rates? Construing all together sections 5457 and 5462 of the Civil Code of 1895 and the amendatory act of 1899, we are of the opinion that the trial judge reached the right conclusion upon this question. Section 3647 of the Code of 1873 provided that "it shall be the duty of the sheriffs and coroners to publish weekly, for four weeks, in some newspaper published in their counties, respectively,—and if there be no such paper published in the county, then in the nearest newspaper having the largest or a general circulation in such county—notice of all such sales of land and other property executed by him," etc. Thus stood the law until October 15, 1879, when the general assembly passed an act "to regulate the rates and manner of legal advertising in this state." See Acts 1878-79, p. 81. It provided that "if the ordinary, sheriff, or other officer is unable to procure the advertisements at the rates [therein] prescribed in the newspaper published in the county, then he shall be, and is hereby, authorized to have said advertisements published in any newspaper in this state having

the largest general circulation in the county." The above-cited section of the Code of 1873 appears, with the same number, in the Code of 1882, and the provision of the act of 1879 just quoted was codified in section 3704c of that Code. The law as embraced in these sections was carried forward into the present Civil Code, and may be found in sections 5457 and 5462. It is therefore apparent that these sections should be construed in pari materia; and, pursuing this course, it results that the sheriff, before the passage of the act of 1899, was authorized to insert his official advertisements in any newspaper published in his county, the proprietor of which would accept the rates prescribed by the act of 1879, and only in the event no such proprietor could be found in that county was the sheriff at liberty to do his legal advertising in a newspaper published beyond its limits. Thus stood the law at the time of the passage of the above-mentioned act of 1899. By this act it was declared that section 5462 of the Civil Code of 1895 should read as follows: "If the ordinary, sheriff, or other officer is unable to procure the advertisements at the rate herein prescribed, in a newspaper published in the county at the county site of said county, then he is authorized to have said advertisements published in any newspaper in this state having the largest general circulation in the county: provided, said rates are agreed upon: provided, further, if contracts cannot be made with newspapers at the rates aforesaid, then the sheriff and ordinary, or other advertising officers, shall post their advertisements in the court-house and in a public place in each militia district in the county for the length of time required by law for advertising in newspapers: provided, there is no newspaper published at the county site, then any paper published in the county shall be next entitled to the public advertisements." Manifestly, therefore, under this section as amended, the sheriff must select as the organ of his official advertising a newspaper published at the county site of his county, if such a one there be, whose proprietor will accept the legal rates. If there be only one such newspaper, as in the present instance, the sheriff's legal advertisements must be published in it; if more than one, he has the right of selection.

On the argument here, and in the brief of counsel for the plaintiff in error, it was insisted that the act of 1899 was, for reasons assigned, void and unconstitutional. Inasmuch, however, as the bill of exceptions presents no question involving the points thus sought to be made upon this act, we cannot undertake to pass upon the same. See *Hill v. State*, 112 Ga. 400, 37 S. E. 441; *White v. Screven Co.*, 112 Ga. 804, 38 S. E. 89. Judgment affirmed. All the justices concurring.

EAVES v. STATE.

(113 Ga. 749)

STATE v. EAVES.¹

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—BILL OF EXCEPTIONS—WRIT OF ERROR BY STATE—INTOXICATING LIQUORS—ILLEGAL SALE—INDICTMENT—DIRECTING VERDICT—NEW TRIAL.

1. Where, in a criminal case, the bill of exceptions complains of the overruling of a motion for a new trial, the writ of error will not be dismissed because the motion was made and filed before sentence was pronounced upon the accused, such sentence having been pronounced prior to the suing out of the bill of exceptions.

2. No writ of error lies in favor of the state in a criminal case. Where, in such case, the accused, by bill of exceptions, complains of the overruling of his motion for new trial, this court is without jurisdiction to consider a cross bill of exceptions, sued out by the solicitor general in the name of the state, and complaining that the court erred in refusing to dismiss the motion for new trial filed by the accused.

3. The indictment charged definitely the state and county wherein the crime was alleged to have been committed.

4. Where one is indicted by the name of "W. H. Eaves," and he files a plea in abatement on the ground of misnomer, alleging that his name is, and has always been, "Wallace H. Eaves," and that he is not, and never has been, called or known by the name of "W. H. Eaves," it was not error to strike such plea upon demurrer thereto.

5. Where a statute makes penal the unlicensed sale of spirituous, vinous, or malt liquors, the offense is committed by one who sells any one or more of such specified liquors. Where an indictment charges the accused with the sale of all three, it is sufficient to support a conviction if the evidence shows the sale of any one of the liquors charged.

6. Where one is indicted under a statute making penal the unlicensed sale of malt liquors, the court may properly charge the jury that it is not essential that the liquor sold should be proven to have been intoxicating, and that the jury need only "consider the evidence as to whether the liquor was intoxicating in determining whether it was a malt liquor." Courts cannot know judicially whether all malt liquors are intoxicating.

7. If an indictment be on its face fatally defective, because based on a statute no longer in force, advantage of the defect should be taken by demurrer or by motion in arrest of judgment. In the absence of a demurrer, such defect is not ground for asking the direction of a verdict of acquittal, or, in a motion for a new trial, for setting aside a verdict of guilty as contrary to law.

8. The verdict was authorized by the evidence.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

W. H. Eaves was convicted of crime, and brings error, and the state assigns cross error. Judgment affirmed, and cross bill dismissed.

J. M. Neel, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

SIMMONS, C. J. In this court motions were made to dismiss both the main and the cross bills of exceptions.

¹ Rehearing denied July 23, 1901.

1. The motion to dismiss the main bill of exceptions was upon the ground that there had been no final disposition of the case in the court below at the time the motion for new trial was made and filed. It appears that this same reason was advanced in the court below for dismissing the motion for new trial, and that the trial judge pronounced sentence upon the accused, and then refused to dismiss the motion for new trial. There was, therefore, a final disposition of the case in the court below before the bill of exceptions was sued out to this court. Even if the bill of exceptions complained of nothing except the overruling of the motion for new trial, we think it is no sufficient ground for dismissing it that there had been no final disposition of the case at the time the motion for new trial was made. Before a writ of error can be sued out to this court, the case must be finally disposed of in the court below, unless the decision complained of would, if rendered as claimed by the plaintiff in error, have finally disposed of the cause. But our attention has been called to no requirement of this sort in connection with the making of a motion for a new trial. Such a motion seeks merely to set aside the verdict, and does not go to errors in the sentence or judgment. Under the common-law practice it had to be made before sentence or judgment (14 Enc. Pl. & Prac. 863), but under our system it is in time if filed during the term, and within 30 days from the date of the verdict (*Castellaw v. Blanchard*, 106 Ga. 97, 31 S. E. 801), whether it be before or after sentence or judgment. Certainly there was a final disposition of this case before the bill of exceptions was sued out, and the motion to dismiss the writ of error must be overruled.

2. The motion to dismiss the cross bill of exceptions was upon the ground that the "state is not entitled to have and maintain [a] writ of error, or to be plaintiff in error in a criminal case, or to be heard on its bill of exceptions therein, under the laws of this state." That, in this state, a writ of error does not ordinarily lie in favor of the state, or of a municipal corporation of the state, in a criminal case, is established. *State v. Jones*, 7 Ga. 422; *State v. Lavinia*, 25 Ga. 311; *Cranston v. Mayor, etc.*, 61 Ga. 572; *State v. Johnson*, Id. 640; *Mayor, etc., v. Ethridge*, 96 Ga. 326, 22 S. E. 985; *Mayor, etc., of Macon v. Wood*, 109 Ga. 149. In fact, that question is settled by the Civil Code, which provides (section 5527) for a bill of exceptions by "either party in any civil cause and the defendant in any criminal proceeding;" and by the Penal Code, which provides (section 1070) for exceptions by "the defendant in any criminal proceeding." The Civil Code does further declare (section 5527) that, "when the successful party to any cause, * * * which is carried to the supreme court by the unsuccessful litigant, files a cross bill of exceptions," the questions therein made shall be, with certain exceptions, heard and determined;

and (section 5535) "if a defendant in error excepts in any case by bill of exceptions, he shall prepare his bill of exceptions and proceed" much as does the plaintiff in error in the main bill of exceptions. These sections, however, seem clearly to refer to cross bills in civil cases only. Judge Nisbet, in *State v. Jones*, 7 Ga. 423, said: "In criminal trials, the state—the supreme authority; that authority which makes the law, and prescribes its penalty, and executes its judgments—moves against the citizen. The court, the jury, and the solicitor general are its agents. The state is not a party. The state is rather an accuser. She charges crime, arrests, tries, convicts, and executes. In criminal causes the state, through her agents, is the judge who tries the accused. In civil cases she stands aside, and leaves the parties to litigate upon equal terms before a tribunal independent of both. Thus unequally do the state and the defendant enter upon an issue, the result of which may involve the liberty or life of the one, and no sensible consequence to the other." "The law * * * declares that 'any criminal cause may be carried up to the supreme court on a bill of exceptions * * * to be drawn up by the party, his counsel or attorney,' etc. If the view I have taken, that in a criminal cause the state cannot, in any just sense, be considered a party [be correct], then the word 'party' does not embrace the state, and applies alone to the defendant. The use of the personal pronoun 'his' indicates a person, to wit, the defendant. Neither in law language nor in common parlance is it usual to indicate a state by the use of a personal pronoun of the masculine gender." And in *State v. Lavinia*, 25 Ga. 311, the court, after expressing the opinion that the act giving a right to certiorari to "either party" did not give such right to the state, but only to a party defendant in a criminal proceeding, followed *State v. Jones*, supra, and ruled "that a writ of error does not lie to this court, in a criminal case, at the instance of the state." Much of the above reasoning applies to the question now under discussion. The language of the Code as to the "successful party to any cause" is evidently used with reference to civil causes only, for, as pointed out by Judge Nisbet, the state is not, within the meaning of the law giving the right to a writ of error, a "party" to a criminal case. It is also significant that, while the Penal Code (section 1076) declares that in a criminal case the copy bill of exceptions shall be served upon the solicitor general, no provision is made for service of a cross bill of exceptions, or of any bill of exceptions, by the solicitor general upon the accused. In view of the general law which denies the right of the state to a writ of error in a criminal case, of the absence of any express provision for a cross bill of exceptions in behalf of the state in such a case, and of the use of such language with reference to cross bills of exceptions generally as would seem to exclude the

state in criminal cases, we hold that the state is without any right to a writ of error in a criminal case by either main or cross bill of exceptions. The cross bill filed in the present case was not authorized by law, and this court is without jurisdiction to entertain the writ of error.

3. The indictment in this case had not the prescribed caption giving the state and county, but instead gave the state and the name of the court. It was contended that the allegation that the offense was committed "in the county aforesaid" had nothing to which to relate, and that for this reason the indictment failed to set forth the state and county in which the crime was alleged to have been committed. An examination of the indictment will show that, preceding the expression "in the county aforesaid," there were recitals that the grand jurors were selected for the county of Bartow, and that the charge was in the name and behalf of the citizens of Georgia. These recitals, taken in connection with the caption, "State of Georgia, Bartow Superior Court," were sufficient to show clearly that the words "in the county aforesaid" related to Bartow county, state of Georgia. This state and county had been set out, and no other state or county mentioned or referred to. It was, therefore, proper to overrule the motion to quash the indictment on this ground.

4. The plea in abatement on the ground of misnomer was stricken upon demurrer thereto. The indictment set out the initials only of the given names of the accused. It is, of course, best that an indictment should set forth the full Christian name and surname of the accused; but there are cases in which this cannot be done. It may be necessary to rely upon another form of description, or a fictitious name may have to be employed. "If part only of a name is known, it should be given, supplemented by the due excuse for not stating the rest." 1 Bish. New Cr. Proc. § 676, note 4. Instead of the true name, the indictment may employ any name by which the accused is commonly called or known. *Wilson v. State*, 69 Ga. 224; 14 Enc. Pl. & Prac. 277. "In this state men are frequently as well known by their initials as by their given or Christian names in full. * * * The rule of law as to two names for the same person is that either is sufficient when the individual is equally well known by the one as by the other, and there is at this day no substantial reason for not applying the rule between two usual and customary forms of writing the name. Without shutting our eyes to all the light that surrounds us, there can be no presumption that particular men are less known by their initials than by their given names in full." *Minor v. State*, 63 Ga. 318. See, also, *State v. Johnson*, 93 Mo. 317, 6 S. W. 77. We are aware that in some of the states it has been held that an indictment setting forth by initials only the Christian name of the accused

is subject to a plea in abatement. We think, however, that these cases should not now be followed. They are based upon English cases of early date, and the reasons for them do not apply at the present time. In this state men are commonly known by the initials of their Christian names as well as they are by those names in full. Such initials, followed by the surname in full, are held to constitute a sufficient description when used in deeds, wills, and other writings. Signatures and addresses in this form are in much more frequent use than those setting forth the full name. We cannot see why the same reason by which such a statement of a name is held good in a deed should not be applied in case of a criminal indictment. If, as matter of fact, the grand jury intended to indict some person other than the one arrested and put upon trial, this can be shown under a plea of not guilty. The person arrested would be in a position exactly similar to that of a person arrested for another person against whom an indictment has been found, giving his full name, which is identical with respect to the Christian name as well as the surname with that of the person arrested. The substantial question, after all, is as to the identity of the person indicted and the one on trial. If there is no such identity, an acquittal must follow, for there would be a failure to make out the charge. If the person is the same, then a conviction should not be postponed or averted by showing merely that the grand jury described the accused without giving more than the initials of his Christian name. We still think it best that the indictment should, where no reason to the contrary exists, set forth the full name; but we think that a failure to state the Christian name more fully than by initials should not be good ground for a plea in abatement where those initials are correctly stated, and are the initials of the person accused and tried. For these reasons we think that the trial judge did not err in striking, upon demurrer, the plea of misnomer filed in the present case.

5. The law under which the accused was indicted makes penal the unlicensed sale of spirituous, vinous, or malt liquors. Under this act the offense is committed by one who sells either spirituous liquors, vinous liquors, or malt liquors, or any two of such liquors, or all three of them. See *Hardison v. State*, 95 Ga. 339, 22 S. E. 681. An indictment charging the accused with having sold spirituous, vinous, or malt liquors would have been bad for uncertainty. *Grantham v. State*, 89 Ga. 121, 14 S. E. 892. The indictment should charge the sale of one of these liquors, or, conjunctively, of two or of all of them. 1 Bish. New Cr. Proc. § 436. The indictment in the present case charged the sale of spirituous, vinous, and malt liquors. Under this indictment it was not necessary to prove that all of these liquors were sold by the accused, but merely to prove the sale of any one of

the three. The plaintiff in error contended that the words "spirituous, vinous, and malt" are used in the indictment as adjective and descriptive terms, and not as substantive terms, and that it was, therefore, necessary to prove them as laid. In this we cannot agree. While the terms are adjectives, and descriptive, it is evident that each is used as separately relating to the term "liquors," so that the indictment really charged the accused with selling spirituous liquors and vinous liquors and malt liquors. This being true, it was necessary only to prove the sale of one of such liquors. "The indictment may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." 1 Bish. New Cr. Proc. § 436. See, also, Bish. St. Crimes (3d Ed.) § 244; Wingard v. State, 13 Ga. 397.

6. Complaint is made that the court charged that the state did not have to prove that the liquors sold were intoxicating, and that it made no difference whether the liquors were intoxicating or not. This, we think, was not error. The statute made penal the unlicensed sale of malt liquors, and the offense would be established if the state proved such a sale. We cannot see what relevancy the intoxicating qualities of the liquors could have, save in determining whether or not they were malt liquors; and as to this the court charged the jury to consider the evidence as to whether the liquors sold were intoxicating in determining whether they were malt liquors. The point is made that the court should take judicial cognizance that malt liquors are intoxicating, and that a liquor not intoxicating is not a malt liquor. Courts are not agreed as to whether judicial notice should be taken that beer is intoxicating (*Blankenship v. State*, 93 Ga. 814, 21 S. E. 130), and certainly courts cannot know judicially that all malt liquors are intoxicating. What numerous forms and kinds of malt liquors there may be, and whether all of them are intoxicating, we cannot know judicially. The statute under which the accused was indicted was designed to prevent an unlicensed sale of spirituous and vinous liquors and of all malt liquors, whether intoxicating or not. Even if all malt liquors are, as matter of fact, intoxicating, the state need not show the intoxicating qualities of the liquors sold if it can show in other ways that such liquors were malt liquors.

7. From the indictment it may be ascertained that the accused is charged with the violation of a certain penal statute. The accused contended that this act was no longer in force in Bartow county, having been superseded by another act. He sought to make the question in the lower court by requesting the judge to instruct the jury that a conviction could not be had under the indict-

ment. In the motion for new trial complaint is made that the judge refused to so charge. The motion also sets up that the verdict is contrary to law, in that the indictment was based upon this inoperative statute. The question was not raised by demurrer to the indictment, the allegations of which were sufficiently established by the evidence. There was no motion to quash the indictment. The question was never properly raised. If the plaintiff in error was indicted under a law no longer in force, and the indictment is fatally defective, he does not want a new trial under that indictment. "In such a case the remedy is by general demurrer before a trial on the merits, or by motion in arrest after verdict." *Roberts v. Keeler*, 111 Ga. 186, 36 S. E. 617. After going to trial upon the merits without objection to the indictment, the accused could not properly ask the direction of a verdict in his favor because of the insufficiency of the indictment. See *Bray v. Railroad Co.*, 113 Ga. 308, 38 S. E. 849; *Strouse v. Kelly*, 113 Ga. 575, 38 S. E. 957. Nor can this point be made in a ground of a motion for a new trial complaining that the verdict is contrary to law and the evidence. See *Phillips v. Railway Co.*, 112 Ga. 197, 37 S. E. 418; *Roberts v. Keeler*, supra. In the absence of objection to such an indictment, a conviction is authorized if the evidence sustains the allegations of the indictment as laid. Without regard, therefore, to the merits of the point sought to be raised, we must affirm the overruling of these grounds of the motion for new trial.

8. The verdict was authorized by the evidence. Judgment affirmed. Cross bill dismissed. All the justices concurring.

(113 Ga. 939)

HART v. STATE.

(Supreme Court of Georgia. July 20, 1901.)

CONSTITUTIONAL LAW—TITLE OF ACT.

Act Dec. 16, 1897, "to amend section 413 of the Penal Code" of this state, is not unconstitutional, in that it "contains matter different from what is expressed in the title thereof." Const. art. 3, § 7, par. 8.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Henry Hart was convicted of a misdemeanor, and brings error. Affirmed.

Robt. Hodges, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

LUMPKIN, P. J. The question upon which this case turns is whether or not the act of December 16, 1897, which declares a purpose to amend section 413 of the Penal Code, is unconstitutional, in that it "contains matter different from what is expressed in the title thereof." Const. art. 3, § 7, par. 8. See Acts 1897, p. 37. That section reads as follows: "An owner, or person controlling a billiard

table, or ten-pin alley, who shall permit any minor to play or roll on the same, without the consent of the parent or guardian, shall be guilty of a misdemeanor." The title of the amending act discloses that the legislative intent was to pass "An act to amend section 413 of the Penal Code * * * so as to make said section apply to any owner or owners, or persons controlling any pool table in this state, by adding after the words 'billiard table' and before the words 'or ten-pin alley,' in the second line of said section 413, the following words, to-wit, 'pool table,' and for other purposes." The enacting clause, after providing that this amendment to the above-mentioned Code section shall be made, proceeds to declare that "said section, when thus amended, shall read as follows: Any owner or owners, or persons controlling billiard table, pool table, or ten-pin alley, that shall or may permit any minor to play or roll on the same, without the consent of the parent or guardian, shall on conviction of the same, be fined in a sum not to exceed one hundred dollars for each and every offense, or imprisonment twenty days, or both, at the discretion of the court." As is obvious, the proposed amendment was not such as would make "said section, when thus amended," so read. But, as the legislative intent is clear that the amendment referred to should bring about the result stated, effect must be given to such intent. *Gilbert v. Railroad Co.*, 104 Ga. 412, 30 S. E. 673; *Ryle v. Wilkinson Co.*, 104 Ga. 476, 30 S. E. 934.

The inquiry, therefore, arises: Was so sweeping a charge in the provisions of the Code section sought to be amended authorized by the title of the amending act? Its title gave notice that a statute was to be enacted, not only with a view to introducing into the Code section the words "pool table," but "for other purposes." "Provisions germane to the general subject-matter embraced in the title of an act, and which are designed to carry into effect the purpose for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words, 'and for other purposes.'" *Burns v. State*, 104 Ga. 544, 30 S. E. 815. It follows that, in passing the statute now under consideration, "any legislation could constitutionally be embodied in the act which was germane to the general subject of amending the" Code section to which its title made reference. *Mayor, etc., v. Hughes*, 110 Ga. 795, 796, 36 S. E. 247. The controlling question which the case now in hand presents for our determination therefore is, were all the changes wrought in that section by the enacting clause of the above-cited act of 1897 "germane to the general subject-matter embraced in the title" thereof?

On the argument here, our attention was called to the fact that in the body of this act the general assembly undertook to prescribe an entirely new and essentially differ-

ent punishment; and counsel for the plaintiff in error strenuously insisted that, as the title of the amending act made no mention whatever of any such proposed change in the law as it previously stood, the statute should be declared wholly inoperative and of no effect. We think otherwise. Our conclusion is supported, if not constrained, by several adjudications of this court. See cases cited in *Mayor, etc., v. Hughes*, supra. A decision peculiarly in point was rendered in the case of *Plumb v. Christie*, 103 Ga. 700, 30 S. E. 759. There an act relating to the sale of intoxicating liquors in Terrell county was upheld, notwithstanding it was attacked as unconstitutional, "because in the title there was no allusion to the penalty provided for in the body of the act for a violation of its terms." The case of *Brown v. State*, 73 Ga. 38, in which this court made a similar ruling, was cited approvingly. The title of the act therein referred to stated its purpose to be "to provide for the collection of the special taxes imposed by law on dealers in spirituous or malt liquors, or intoxicating bitters, and for other purposes"; and this title was held to be broad enough to cover a provision in the body of the act declaring that a dealer who failed to pay his tax should be punished as for a misdemeanor. To the same effect, see *Burns v. State*, 104 Ga. 544, 30 S. E. 815, hereinbefore cited, wherein it was said: "This case differs from that of *Sasser v. State*, 99 Ga. 54, 25 S. E. 619, in which this court dealt with a similar act relating to the sale of liquors in the county of Bulloch, the title of which, however, did not contain the words, 'and for other purposes.'" For a like reason, the present case is distinguishable from that of *Johnson v. Jones*, 87 Ga. 85, 13 S. E. 261, upon which counsel for the plaintiff in error mainly relied. There are other cases in which certain legislative enactments have been held to be violative of the above-mentioned constitutional inhibition. *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596; *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *Elliott v. State*, 91 Ga. 694, 16 S. E. 1004; *Dempsey v. State*, 94 Ga. 766, 22 S. E. 57; *Frazier v. Railroad Co.*, 101 Ga. 77, 28 S. E. 662; *Harris v. State*, 110 Ga. 867, 36 S. E. 232. But suffice it to say that, if the statutes therein dealt with be examined in the light of the foregoing discussion, it will readily be perceived that nothing ruled in any of these cases militates against the decision herein announced. Judgment affirmed. All the justices concurring.

(113 Ga. 957)

KAHN et al. v. THOMSON et al.

THOMSON v. KAHN et al.

(Supreme Court of Georgia. July 20, 1901.)
PLEADING—AMENDMENT OF ANSWER—PARTNERSHIP NAME—PROCESS—RETURN.

1. Allowing an amendment good in substance to an answer will not by the supreme court be held erroneous, when it does not appear that

any valid objection to its allowance was presented to, and passed upon by, the court below.

2. Unless restricted by statute, the parties to a partnership may give thereto such name as they please,—even one that is purely fanciful. (a) A disregard of the rule here stated led to the commission of divers errors in the present case.

3. When, in a petition against a partnership, it is alleged to be composed of Mrs. J. G. Gause and Mrs. J. L. S., a return thereon by the sheriff that "the defendant J. L. S." is not to be found indubitably refers to Mrs. S.

4. When an offered amendment to an answer does not, even if taken alone or in connection with the answer, contain any good defensive matter, there is no error in refusing to allow it.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Kahn Bros. against Mrs. J. G. Gause and Mrs. J. Lynn Smith, partners under the name of Gause & Smith, and W. S. Thomson. Judgment against Gause & Smith and in favor of Thomson, and plaintiffs appeal, and Thomson files a cross bill of exceptions. Judgment on main bill of exceptions reversed; on cross bill, affirmed.

Slaton & Phillips, for plaintiffs. J. L. Hopkins & Sons, for defendants.

LUMPKIN, P. J. Kahn Bros. brought in the city court of Atlanta an action against Mrs. J. G. Gause and Mrs. J. Lynn Smith, as partners under the firm name set forth below, and W. S. Thomson as surety. There was an entry of service upon the firm and Mrs. Gause, showing personal service upon her, and an entry of non est inventus as to "the defendant J. L. Smith." It appears from the record that the initials "J. G." and "J. L." were those, respectively, of the husbands of the members of this partnership. The suit was predicated upon a written contract dated August 3, 1896, and an account thereto attached. This contract recited that the parties thereto were "Kahn Bros., merchant tailors, of the first part, and Gause and Smith, Agts. (J. G. Gause, J. Lynn Smith), of the second part, and W. S. Thomson, surety, of * * * the third part." It was signed thus: "Gause & Smith, Agts. [Seal.] W. S. Thomson. [Seal.]" It, in substance, stipulated that Kahn Bros. were to fill orders for clothing sent to them by Gause & Smith, and that Thomson was to guaranty payment for the goods shipped under such orders. In the first paragraph of the plaintiffs' petition it was alleged "that Mrs. J. G. Gause and Mrs. J. Lynn Smith are partners doing business under the firm name of Gause & Smith, Agents." The third paragraph of the petition was as follows: "Your petitioner shows that on the 3d day of August, 1896, a contract was entered into between plaintiffs and said defendants Gause & Smith, and W. S. Thomson, surety. A copy of said contract is hereto attached, and marked 'Exhibit A,' and made a part of this declaration." The defendants Gause & Smith,

Agents, filed an answer, which was stricken on demurrer, and to this they did not except. Thomson also filed an answer, in the first and third paragraphs of which he admitted, respectively, the truth of the allegations contained in the above-mentioned paragraphs of the petition. At the trial he tendered an amendment to his answer, striking the first and third paragraphs thereof, and substituting for the same averments to the effect that the partnership which entered into the contract with Kahn Bros. was not composed of Mrs. Gause and Mrs. Smith, and that Thomson did not, in signing that instrument, undertake or intend to become surety for them. This amendment also undertook to set up divers reasons why, even upon the assumption that Mrs. Gause and Mrs. Smith were members of that partnership, and as such entered into the contract, the same should not be enforced against Thomson. The court, on demurrer to his original answer and objection to the offered amendment, struck the answer, and allowed so much only of the amendment as was designed to set up the defense embraced in the matter substituted for the first and third paragraphs of the answer. The trial proceeded, and Thomson in open court admitted the correctness of the account sued on, and that it was "due by the defendants and unpaid." The original contract was introduced in evidence, and also the first and third paragraphs of Thomson's original answer. J. G. Gause testified that the partnership was in fact composed of Mrs. Gause and Mrs. Smith. Subsequently the court ruled that the contract was not admissible in evidence against Thomson, and refused to admit testimony showing that it was in fact executed in behalf of Mrs. Gause and Mrs. Smith, and so treated by them; that the business under the contract was conducted by their husbands in their behalf and as their agents; and that these things were well known by Thomson when he signed the contract. These rulings were all predicated upon the idea that the contract affirmatively and unequivocally showed on its face that the partnership therein named was composed of Mr. Gause and Mr. Smith, and not their wives, and that the contrary could not be shown by parol. The trial was concluded by the direction of a verdict against Mrs. Gause and the partnership of Gause & Smith, Agents (they having interposed no valid defense), and in favor of Thomson. Kahn Bros. sued out a bill of exceptions, and Thomson a cross bill of exceptions, and the case is here for review on the points thus presented for our consideration.

1. The first complaint made in the main bill of exceptions is that the court erred in allowing any portion of the amendment to Thomson's answer. Several reasons why, in the opinion of counsel for Kahn Bros., the amendment should have been rejected, are set forth. It does not, however, appear

that these reasons were stated to the court below and insisted upon as objections to the amendment. This being so, and the amendment being obviously good in substance, we cannot say allowing it was erroneous.

2. Kahn Bros. also except to the various other rulings indicated above, and they were plainly erroneous, if our second headnote lays down good law. We think it does. "The parties to a partnership may give it such name as they see fit." 17 Am. & Eng. Enc. Law, 913. "This name may contain the name of one or more or all the partners, or the names of one or more with a collective designation, or may be purely fanciful, and in this country may be a corporate name." 1 Bates, Partn. § 191. There may, of course, be statutory restrictions upon the general rule, but we know of none applicable in the present instance. If Mrs. Gause and Mrs. Smith wished to do a partnership business under the firm name and style of "Gause & Smith, Agts. (J. G. Gause, J. Lynn Smith)," and actually did so, it was nobody's business but theirs. Our very able and learned Brother of the trial bench was probably misled into the view he took because of the fact that the initials of the husbands appeared in that part of the contract which designated the parties of the second part. This fact made no difference, if the husbands were willing; and perhaps not, in this day, if they were unwilling. If the wives desired to operate under the partnership name they chose, and Thomson, knowing this fact, signed as their surety, he ought to be held to his contract, unless he shows some good reason to the contrary; and certainly Kahn Bros. ought to be allowed to show what the real truth of these matters is. The direction of the verdict in favor of Thomson was, of course, a necessary sequence of the ruling that the contract was not admissible in evidence against him; but the error committed in making that ruling and the others will doubtless be corrected at the next hearing.

3. The first point raised by the cross bill of exceptions is whether or not the return of non est inventus was applicable to Mrs. J. Lynn Smith. As the petition alleged that the partnership declared against was composed of Mrs. J. G. Gause and Mrs. J. Lynn Smith, and did not refer to any other Smith, we think the return that "the defendant J. L. Smith" was not to be found in Fulton county indubitably indicated Mrs. Smith.

4. In his cross bill of exceptions Thomson also assigns error upon the striking of his answer, and the refusal to allow that portion of the offered amendment thereto which reference is made in our preliminary statement. It is quite certain that the answer did not set forth a good defense, and the rejected portion of the proposed amendment amounted to no more than a volumi-

nous amplification of the averments of the answer. Taken all together, they so obviously related either to matters which were merged in the written contract, or which did not, as alleged, increase or tend to increase the risk of Thomson as a surety, we do not think it necessary to state their contents, which would occupy much space, or to enter upon an argument to prove their want of merit. Judgment on main bill of exceptions reversed; on cross bill, affirmed. All the justices concurring.

(113 Ga. 334)

FAMBROUGH v. STATE.

(Supreme Court of Georgia. July 20, 1901.)

SOLICITOR OF CITY COURT—DUTIES—FALSE PRETENSES—EVIDENCE.

1. The city court of Griffin being a court from which writs of error lie direct to the supreme court, and the act establishing the city court creating the office of solicitor thereof, and providing, in effect, that he should represent the state in all criminal cases prosecuted in that court, it is his duty to represent the state in the supreme court in criminal cases brought there from the city court. The case of Cooper v. State, 30 S. E. 249, 103 Ga. 405, upon a review thereof, is affirmed.

2. An accusation charging that the accused falsely represented that another had promised to pay for goods sold and delivered to the former is not supported by proof showing merely that the accused falsely represented that another had promised to become security for the payment of the goods.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Will Fambrough was convicted of obtaining goods on false pretenses, and brings error. Reversed.

T. W. Thurman, for plaintiff in error. O. H. P. Slaton and O. H. B. Bloodworth, Sol. Gen., for the State.

COBB, J. An accusation brought in the city court of Griffin charged that Fambrough, the accused, procured from Sears certain articles of merchandise by falsely representing to him that another person had promised to pay for the goods. The proof showed that Sears furnished the goods to the accused upon his representation that the person referred to had promised that he would "stand security" for the goods. The accused was convicted, and his motion for a new trial, based on the general grounds only, having been overruled, he excepted.

1. The bill of exceptions in the present case was served upon the solicitor of the city court of Griffin and the solicitor general of the Flint circuit. Both of these officers appeared at the bar of this court and announced themselves ready to represent the state in the case. The solicitor general has filed a formal application, praying that the clerk of this court be required to issue him the certificate of appearance in the case, in order that he may receive the fee for representing

the state in this court. The city court of Griffin was established by an act approved December 14, 1897. Acts 1897, p. 462. In the act it was provided that writs of error from the city court should lie direct to the supreme court. The act further provided for the appointment of a solicitor of the court, and declared, in effect, that it should be his duty to represent the state in all criminal cases prosecuted in the city court. While the act does not expressly declare that the solicitor shall represent the state in the supreme court in criminal cases brought here from the city court, it is clear that such was the intention of the general assembly, as the act does not provide that the state shall be represented in such cases by the solicitor general of the circuit. *Cooper v. State*, 103 Ga. 405, 30 S. E. 249. The case cited is directly in point, and is controlling on the question. The solicitor general was granted permission to review this decision, and he requested that the same be overruled. We are, however, after due reflection, entirely satisfied with this decision, and must therefore affirm the same. The solicitor general contended that it was his duty, under the constitution, to represent the state in this court; that instrument providing that "it shall be the duty of the solicitor-general to represent the state in all cases in the superior courts of his circuit, and in all cases taken up from his circuit to the supreme court, and to perform such other services as shall be required of him by law." Civ. Code, § 5862. As this was a case "taken up from his circuit to the supreme court," he claims that it was his constitutional duty to appear here and represent the state. We do not think that the provision of the constitution makes it the duty of the solicitor general to represent the state in any case in this court unless it is a case which the constitution requires him to prosecute in the trial court; and certainly it is not the duty of the solicitor general, under the constitution, to appear in this court and represent the state in a case brought from a city court embraced within the territory of his circuit, when there is not only nothing in the statute creating the city court requiring him to do so, but, on the other hand, the statute expressly provides for the appointment of an officer whose duty it shall be to represent the state in the city court; and therefore, by a necessary inference, it is the duty of that officer to represent the state in this court in cases prosecuted in his court, as was held in the *Cooper Case*. The application of the solicitor general must be denied.

2. The state must prove every offense substantially as laid in the indictment or accusation. There was a fatal variance between the accusation and the proof in this case. There is a substantial difference between promising to pay for an article, and promising to pay in the event somebody else fails to do so. It is the difference between mak-

ing a debt of your own and promising to become responsible for somebody else's debt. In the present case the representations of the accused were based on supposed verbal promises. He offered no writing to corroborate his statement. If he had actually stated to the seller of the merchandise that another person had promised to pay for the goods, then the seller would have been defrauded; for this would have been a promise which, if made, would have been enforceable against the promisor. But the representation which the accused actually made to the seller could not have, in legal contemplation, deceived him; for the promisor would not be bound thereby, under the statute of frauds. The promise laid in the accusation could, in law, amount to a deception. The promise shown by the proof could not. We think, therefore, that the variance between the allegation and the proof was substantial, and that the accused is entitled to a new trial. Judgment reversed. All the justices concurring.

(113 Ga. 965)

SESSIONS v. PAYNE et al.

(Supreme Court of Georgia. July 20, 1901.)

PRINCIPAL AND AGENT—DUTIES.

It is contrary to public policy for an agent, without the full knowledge and consent of his principal, to do any act or make any contract in carrying out the business of his agency, the effect of which will be to bring the personal interests of the agent in antagonism with those of the principal. Thus, where one was employed as agent for another to engage the professional services of an attorney at law, such agent could not lawfully, without the assent of the principal, contract with the attorney to receive from him a portion of the fee to be paid to him for such services by the principal; and the law will not, at the instance of the agent, enforce a contract of this nature against the attorney.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by M. M. Sessions against Payne & Tye. Judgment for defendants, and plaintiff brings error. Affirmed.

Z. D. Harrison, Shepard Bryan, and J. E. Mozley, for plaintiff in error. Spencer R. Atkinson, for defendants in error.

OOBB, J. Sessions sued Payne & Tye in the city court of Atlanta, setting forth in his petition what was claimed to be two distinct causes of action. The first cause of action alleged was upon a demand arising ex contractu for \$44.52 principal. For a reason which will hereafter appear, it is unnecessary to further refer to the allegations of this portion of the petition. The second cause of action alleged was contained in averments, the substance of which is as follows: Wolcott and Paige turned over to the petitioner certain bonds, and mortgages to secure them, against the Marietta Paper Manufacturing Company, and asked him to employ counsel to foreclose the mortgages, and to have a re-

celver appointed to take charge of the property of the company until it could be sold; and they requested that the petitioner act as receiver, and he agreed to do so, and to charge only a nominal sum for his services as receiver. He then proposed to Tye, one of the defendants, to turn over the case to him if he would divide the fees in the case with petitioner, which was agreed to by Tye. The defendants took charge of the case, filed the bill, had petitioner appointed as receiver, took the final decree, and sold the property of the company mentioned, for which services Wolcott and Paige paid the defendants \$2,500, a half of which sum is due to petitioner from the defendants, as his part of the fee under the said contract. The defendants filed a general demurrer to the petition, and also demurred to the second cause of action alleged, upon the ground that the contract therein set forth was against good morals and contrary to public policy, and hence not enforceable at law.

Mr. Mechem, in his work on Agency, says: "A person will not be permitted to take upon himself the character of an agent, where, on account of his relation to others, or on account of his own personal interest, he would be compelled to assume incompatible and inconsistent duties and obligations. An agent owes to his principal a loyal adherence to his interests, and it would be a fraud upon the principal, and would contravene the public policy, to permit an agent, without the full knowledge and consent of his principal, to enter into a relation involving such a duty, when his allegiance had already been pledged to one having adverse interests, or when his own personal interests would be antagonistic to those of his principal." The rule has also been thus stated: "An agent will not be allowed to place himself in a position in which his duty and interest conflict, or be permitted to make a secret profit out of his agency." 1 Am. & Eng. Enc. Law (1st Ed.) 372. See, also, the same work, volume 1 (2d Ed.) 1071, 1072; Story, Ag. (9th Ed.) §§ 210, 211; Civ. Code, §§ 4030, 4031; Ramspeck v. Pattillo, 104 Ga. 772, 30 S. E. 962. A contract by which an agent places himself in a position where his interests conflict with a duty he owes to his principal is contrary to the policy of the law, and not enforceable at the instance of the agent. Civ. Code, § 3608. The law will leave the parties to such a contract where it finds them. Applying these principles to the second cause of action alleged by the plaintiff in his petition, it will be at once seen that the contract therein set up cannot be enforced, and that consequently the judge did not err in sustaining the demurrer to that part of the petition. The city court of Atlanta has no jurisdiction in any case "where the principal sum claimed, exclusive of interest, does not exceed one hundred dollars, in cases where the jurisdiction is now vested in the justice courts." Acts 1894, p. 206, § 1. The first cause of action al-

leged being one founded on a contract, and the principal sum claimed, exclusive of interest, being less than \$100, the city court of Atlanta had no jurisdiction of this cause of action standing alone; and, after the conclusion was reached that the second cause of action alleged should be stricken, it was proper to strike the whole petition and dismiss the case, without regard to the merits of the controversy set forth in the first cause of action alleged. Judgment affirmed. All the justices concurring.

(113 Ga. 369)

BERGER v. SAUL et al.

(Supreme Court of Georgia. July 19, 1901.)

MALICIOUS PROSECUTION—FALSE IMPRISONMENT—EVIDENCE.

1. Neither the institution nor the prosecution of a civil suit in a court which has no jurisdiction thereof affords ground for the bringing by the defendant of an action against the plaintiff for malicious prosecution.

2. Where, however, such a suit is brought maliciously and without probable cause, and the defendant is in consequence restrained of his liberty, he may maintain against the plaintiff an action for false imprisonment, without regard to whether final judgment was entered in the unauthorized suit or not.

3. The evidence in the present record was sufficient to carry the case to the jury on the count for false imprisonment.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Abraham Berger against J. Saul and others. Judgment for defendants. Plaintiff brings error. Reversed.

S. C. Crane and Jas. K. Hines, for plaintiff in error. A. Heyman and Dorsey, Brewster & Howell, for defendants in error.

COBB, J. 1. The justice's court was without jurisdiction to hear and determine the issues raised in the bail trover proceeding. Blocker v. Boswell, 109 Ga. 230, 34 S. E. 289; Casey v. Wagon, 111 Ga. 874, 36 S. E. 949, and cases cited. Where the court is without jurisdiction of the subject-matter, there is no "prosecution," and consequently the proceeding cannot be made the basis of an action for malicious prosecution. Such is the rule laid down by the authorities, with few, if any, exceptions. See Newell, Mal. Pros. p. 351; Bixby v. Brundige, 2 Gray, 129, 61 Am. Dec. 443; Painter v. Ives, 4 Neb. 122, 127; Whiting v. Johnson, 6 Gray, 247; Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; Turpin v. Remy, 3 Blackf. 210, 216. Indeed, the question seems to have been in principle decided by this court. In Manufacturing Co. v. Cason, 98 Ga. 14, 25 S. E. 909, it appeared that the proceeding complained of as the basis for the action of malicious prosecution constituted no offense against the criminal laws of this state; and it was ruled that, inasmuch as such a proceeding did not amount to a prosecution, it could not be made

the basis of an action for malicious prosecution. To the same effect is *Collum v. Turner*, 102 Ga. 534, 27 S. E. 680. The analogy between those cases and the present one is apparent. In none of them was there a "prosecution." In all of them, at most, there was nothing but a malicious attempt to prosecute, and such an attempt will not serve as the foundation for an action of malicious prosecution.

2, 3. The petition, however, contained a count for false imprisonment. The Code provides that, where the imprisonment is by virtue of a "warrant" void for want of jurisdiction in the court to issue it, an action for false imprisonment will lie, if the warrant is sued out in bad faith, and that in such a case good faith must be determined from the circumstances of the case. Civ. Code, § 3852. We would be inclined to hold, if it were necessary, that the terms of the section cited are broad enough to cover an imprisonment brought about by the issuance of a void order of arrest based on an affidavit in a bail trover proceeding; but, as we shall hereafter show, the present case was made out, so far as the count in question was concerned, without regard to the applicability of this section. Under the section but two things are necessary to be shown,—void process and bad faith. See *Page v. Banking Co.*, 111 Ga. 86, 36 S. E. 418. It is contended by counsel for Saul & Co. that Berger must show that final judgment was entered in his favor in the bail trover proceeding; but, even if this be true in any case, it is manifestly not true when the whole proceeding is void. In such a case there is nothing to terminate, the whole proceeding is a nullity, and neither a favorable nor an unfavorable judgment could affect the question. As a general rule, the person who procures an arrest and imprisonment under a void process, as well as the magistrate who issues and the officer who executes it, are liable to the injured party in an action of false imprisonment, without regard to the question of good or bad faith in the premises. See 12 Am. & Eng. Enc. Law (2d Ed.) pp. 754 (3), 760 (3), 762 (2). Our Code, however, as above shown, changes the rule, and makes good faith the test in such a case. The defendants in error contend that the evidence conclusively showed that they acted in good faith, and with probable cause to believe that a recovery could be had against Berger in the bail trover proceeding. There is, it is true, no evidence to show that they had actual knowledge of the want of jurisdiction in the magistrate, but the evidence is clear that the goods in question had been disposed of by Berger, and the jury could have well found that the goods were sold to Berger on credit and title acquired by him, and that Saul & Co. knew that he had disposed of them. It is said, however, that the judgment of the magistrate, on Berger's application for discharge from imprisonment, was conclusive on the question of good faith and probable cause. We do not

think this is true. In the first place, this judgment of the magistrate was itself a nullity, and established nothing; and, in the second place, he was called on to determine simply whether Berger could "produce the property" or "give the security." Civ. Code, § 4608. The magistrate simply rendered a judgment refusing the application, and recommitting Berger to jail. For aught that appears, he was of opinion that the applicant was able to give the security, and did not pass on his ability to produce the property. In any event, the judgment was certainly no adjudication that Berger did not have title to the property, and that was the real question in issue in the bail trover proceeding.

It was further contended that before the action for false imprisonment could be maintained Berger should have procured the judgment of a court of competent jurisdiction setting aside the judgment of the magistrate in the bail trover proceeding. This probably would have been true had the magistrate's judgment been merely voidable for some irregularity (12 Am. & Eng. Enc. Law [2d Ed.] 753); but a judgment absolutely void can be attacked in any proceeding and by anybody with whose interests it conflicts (Civ. Code, § 5373). The court erred in granting a nonsuit. Judgment reversed. All the justices concurring.

(113 Ga. 833)

SMITH et al. v. MAYOR, ETC., OF CITY OF DUBLIN et al.

(Supreme Court of Georgia. July 19, 1901.)

MUNICIPAL BONDS—ELECTION—SUFFICIENCY OF NOTICE—EVIDENCE.

1. Notice given by the municipal authorities that an election will be held in a named city on the question of issuing bonds by that city, and which contains no information as to the amount of the bonds sought to be issued, or of the purpose for which the proceeds thereof are to be used, save as expressed in the following language: "Said bonds to be known as 'School and City Improvement Bonds,' and to be issued to the aggregate amount of \$25,000, in denominations of from \$1,000 to \$5,000 each, as purchasers may desire, and not more than \$20,000 of the amount realized therefrom to be used for the purpose of building and erecting a school house, and not more than \$5,000 for the purpose of enlarging and improving the light and water plant of said city, and the surplus, if any, to be used by the mayor and council in such other manner as they may see fit,"—does not meet the legal requirement that a notice of this character shall "specify what amount of bonds are to be issued, [and] for what purpose."

2. Before a judgment validating bonds sought to be issued by a municipal corporation can lawfully be rendered, sufficient facts affirmatively showing that such issue was sanctioned by two-thirds of the qualified voters of such municipality must appear.

(Syllabus by the Court.)

Error from superior court, Laurens county; John C. Hart, Judge.

Action by the state against the city of Dublin and others. C. C. Smith and others intervened. From a judgment sustaining the

issue of certain bonds by the city of Dublin, interveners bring error. Reversed.

Akerman & Akerman, for plaintiffs in error. S. B. Baker, H. G. Lewis, Sol. Gen., and Jas. K. Hines, for defendants in error.

LITTLE, J. 1. There are two points made in the record of this case: The plaintiffs in error contend that the court erred in entering a judgment validating and confirming the bonds proposed to be issued, because the notice calling the election did not specify for what purpose the bonds were to be issued, and that it does not state with sufficient definiteness when they are to be paid, or when the principal and interest is to be paid; and because the notice leaves to the discretion of the mayor and council the amount to be expended for the purpose of erecting and building a school house, and the amount to be used in enlarging and improving the light and water plant. Section 377 of the Political Code, which is copied from an act of the general assembly of 1878 to carry into effect the constitutional provision forbidding the creation of a debt by a municipal corporation without the assent of two-thirds of the qualified voters, declares that the officers of the municipality shall give notice of such election by the publication of a notice in a newspaper for a given time, notifying the qualified voters that on a day named the election will be held. It further provides that "in said notice he [the officer] shall specify what amount of bonds are to be issued, for what purpose," etc. It has been more than once ruled by this court that, in order to render the issue legal, this requirement as to notice must be strictly complied with. See *Bowen v. Mayor, etc., of Greensboro*, 79 Ga. 715, 4 S. E. 159; *Mayor, etc., of City of Athens v. Hemerick*, 89 Ga. 674, 16 S. E. 72; *Ponder v. City of Forsyth*, 96 Ga. 572, 23 S. E. 498. An examination of the notice now being considered discloses that the bonds proposed to be issued aggregated in amount the sum of \$25,000, which is a literal compliance with the statute. In notifying the voters of the purpose for which the bonds were to be issued, it is stated in the notice that of this sum of \$25,000 not more than \$20,000 of the amount realized therefrom shall be used for the purpose of building and erecting a school house, and not more than \$5,000 for the purpose of enlarging and improving the light and water plant of the city. To say the least, the notice is very indefinite as to what amounts would be used for these two purposes. When the people are told that not more than \$20,000 should be used for the erection of a school house, they could from the notice itself form no reasonable idea how much would in fact be so used. True, by the notice a greater sum than \$20,000 was not to be used for that purpose, but, if \$1,000 of the sum was so applied, the requirements of

this notice would have been met. The same may be said with reference to the amount to be used in enlarging and improving the light and water plant. The notice in this respect in neither case informed the voters how much of the sum, if voted, would be used for either purpose. If \$500 had been used in enlarging the light and water plant, and \$1,000 in building the school house, it would seem that the terms of the notice would have been complied with; but then there would remain \$23,500 of the bonds whose use and disposition had not been directed by the voters. That this is a legitimate criticism as to the meaning and effect of the notice is found in the fact that the notice contains this further provision, that the surplus of the \$25,000 which remains after completing and erecting the school house and enlarging the light and water plant shall be used by the mayor and council in such other manner as they might see fit. The power given to a municipal corporation to create a new debt, and issue bonds in payment thereof, is an important one to the taxpayer; so much so that the framers of the constitution have declared that such a debt should not be created without the assent of two-thirds of the qualified voters of the municipality proposing to issue the bonds. In the same spirit, the legislature, which was charged with passing laws to carry this provision into effect, declares specifically that before the election is held the municipal authorities by publication shall inform the voters for what purpose the bonds are to be used. In the notice under consideration the general purpose is stated, but the amount to be devoted to this purpose is left indefinite, and provision is made therein that the mayor and council may use such part of the proceeds of the bonds as remains in any other manner they may see proper. The notice was not a legal one, and from it the voters of the city of Dublin were not legally notified of the purpose for which the amount to be realized from the proposed issue of \$25,000 of bonds was to be used. It follows, therefore, that the election held under the notice was void, the bonds could not have been legally issued, and they should not have been confirmed and validated. In this connection, it may not be irrelevant to call attention to a further provision in the notice. After naming the rate of interest the bonds should bear, how and where it was to be payable, it is further recited in the notice that "none of the principal amount of said bonds to become due and payable annually, but the entire principal amount of said bonds to become due and payable in gold at Hanover National Bank of New York after the expiration of thirty years from the date of issue, when said bonds shall be fully paid off." Paragraph 2, § 7, art. 7, of the constitution of this state seems to contemplate that the principal and interest of all bonds issued by a municipality shall be paid off

within 30 years from the date of issuance, because it declares that at or before the time a municipality shall incur any bonded indebtedness it "shall provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." Without specifically determining that the notice in this regard is defective for a noncompliance with the statute, we content ourselves, in passing, by calling attention to this constitutional provision.

2. It is further contended by plaintiffs in error that the judge erred in rendering a judgment confirming and validating the bonds, because they say that the judgment is contrary to law and without evidence to support it. It is our opinion that this contention must be sustained. By the terms of an act approved December 6, 1897, provision was made for the confirming and validating of all bonds which might thereafter be issued for counties and municipalities under the constitution of this state. It is therein declared that, when the returns of the election shall show prima facie that it resulted in favor of the issuance of bonds, the officers of the municipality charged with the duty of declaring the result shall notify the solicitor general of the judicial circuit in which the municipality lies of the fact that such election was held, and resulted in favor of the issuance of bonds. It is prescribed that, after having been so notified, the solicitor general shall file a petition in the superior court in the name of the state of Georgia against the municipality desiring to issue bonds, setting out certain facts, to which petition the municipality is required to make answer. The act further provides that after proper notice the judge of the court shall proceed to hear and determine all of the questions of law and of fact in the case, and shall render judgment thereon, and that this judgment, if it confirmed and validated the issue of bonds, shall never be called in question in any court in this state. In the present case a notice was given to the solicitor general of the circuit in which the city of Dublin is situated, and in the name of the state of Georgia he filed a petition in the superior court of Laurens county, in which he recited the fact that the election was held, and that the returns showed prima facie that the election resulted in favor of the issue of bonds, etc., and prayed for an order requiring the city of Dublin to show cause why the bonds should not, by the judgment of the court, be confirmed and validated. To this petition the city of Dublin filed an answer, in effect, admitting the allegations of the petition. It is to be noted, however, that in neither the petition nor answer was it shown or intimated how many votes were cast at the election in favor of the issuance of bonds, nor how many against such issue, nor does that fact, nor the fact of the num-

ber of qualified voters residing in the city of Dublin, appear either in the petition, answer, or by evidence. Nevertheless, by judgment and order of the court, the bonds were validated. The petition merely states "that the returns of said election showed prima facie that said election had resulted in favor of the issuance of said bonds," and the answer admits this to be true, and says "that the returns of said election showed prima facie that the result was as aforesaid." These are but conclusions of the pleader, without the facts upon which they are based, and are not sufficient, even though admitted in the answer, to base affirmative action upon in a case of this character. It could never have been within the contemplation of the general assembly that a judgment validating an issue of bonds should be made without due inquiry into the facts, to ascertain whether their issuance had been authorized by an affirmative vote of two-thirds of the qualified voters of the municipality seeking to issue the bonds. It is contended on the part of the defendants in error that the notice given to the solicitor general was in all respects that required by the act of 1897 (Acts 1897, p. 82), and that the petition which was filed also contained the data which that act prescribes, and we presume that the judgment of validation was given on the admission by the city that the allegations in the petition were true. It will be noted that by the first section of the act of 1897 the officers of the municipality who were charged by law with the duty of declaring the result of said election shall within 20 days after so declaring the same inform the solicitor general. It is true that the act prescribes that the notification shall consist of the fact that an election for the issuance of bonds was held, and that it resulted in favor of the issuance of bonds; but the fact that the consolidating officers are required, after declaring the result, to inform the solicitor general, would seem to indicate that it was in contemplation that he should be informed of the result, and not merely of the fact that the election was in favor of the issuance of bonds. However this may be, the meaning of the constitution is plain when it declares that the bonds shall not be issued without the assent of two-thirds of the qualified voters; and when the act of 1897 provides that the judge of the superior court shall hear and determine all of the questions of law and of fact in the case, and shall render judgment thereon, certainly the act must be construed in the light of the constitutional provision, and the judgment which is rendered must adjudicate the underlying question of validity, whether the requisite number of voters sanctioned the issue. Certainly, it was never the intention of the general assembly that bonds which had not received the assent of the number of voters, as required by the constitution, could be validated. Taking the constitutional requirement

as to what shall make the issue of such bonds legal and the terms of the act together, it is a fair conclusion that the law requires that before judgment of validation shall be made sufficient facts must be made clearly to appear to the satisfaction of the judge that the election was in all respects regular, and that the issue of bonds was in fact authorized by the requisite constitutional majority. While the proceeding to validate a proposed issue of bonds is, of course, a judicial one, it is a prescribed method to ascertain in advance of the issue whether the bonds when issued shall bear on their face the imprint that they have been tested, and not found wanting in any particular. This imprint renders further inquiry into their validity unavailing, and the property of the taxpayer must be the source of payment. It is fair and right, then, that his assent must be obtained. If he gives it, he is bound by it; if the requisite number do not give it, none are bound by it. In adjudicating their validity, his rights are passed on. He may or may not be a party, but, whether he is or not, the constitution, for his protection, fixes a condition precedent to the issue. An admission, by the corporation seeking to make the issue, that the notice was regular, or that the requisite number of voters assented to the issue, is good as far as it goes; but, to irrevocably bind the taxpayer,—and that is what "validation" means,—chances of mistake of either law or fact must be eliminated, and without the ascertainment and finding that the particular facts necessary to render the issue of bonds legal under the constitutional requirement exist validation should be refused. When the facts appear in such a manner as to evoke a judgment that the requirements of the law have been met, validation follows, under the terms of the act, but general admissions in pleadings do not authorize a judgment of validation.

Such we take to be the spirit and meaning of the constitutional and statutory requirements incident to the issue of bonds by a county or municipal corporation. In this case certain citizens of Dublin intervened in the exercise of the right given by the act of 1897, and denied that the returns of the election showed prima facie that the election had resulted in favor of the issue of bonds. These interveners were made parties, and in the judgment validating the bonds the judge recites that, upon considering the petition together with the petition and evidence of the interveners, the bonds were validated. Undoubtedly, as we have before said, the order of validation was made because of the admission by the city of Dublin that the allegations set out in the petition of the solicitor general were true; but, inasmuch as no information appeared either in the petition or answer which affirmatively showed that the bonds had been sanctioned as a matter of fact by two-thirds of the qualified voters of the city of Dublin, the order of validation

could not follow the admissions made. We are therefore of opinion that the judgment and order of validation was rendered without evidence to support it. Judgment reversed. All the justices concurring.

(112 Ga. 929)

KNOX v. STATE.

(Supreme Court of Georgia. July 20, 1901.)
CRIMINAL LAW—APPEAL—REMITTITUR—JURISDICTION OF TRIAL COURT—NEW TRIAL.

The filing of a remittitur from the supreme court in the office of the clerk of a trial court immediately reinvests it with jurisdiction for all purposes over the case to which such remittitur relates, though good practice requires that the trial court cause the remittitur to be entered upon its minutes. (a) If, where a new trial has been granted by the supreme court, the remittitur is not so entered before the new trial is had, it is proper to pass a *nunc pro tunc* order directing that the remittitur be entered as of the date when that trial began. (b) While the practice of promptly having remittiturs entered upon the minutes of trial courts should be followed, and in so doing trial courts should pass such orders as are appropriate to effectuate the judgments of the supreme court, an order formally making a judgment of that court the judgment of the trial court is not an indispensable prerequisite to proceeding with a new trial, when, under the judgment of the supreme court, a new trial is to be had.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Franklin county; R. B. Russell, Judge.

Ed Knox was found guilty of murder, and brings error. Affirmed.

W. R. Little and A. G. McCurry, for plaintiff in error. C. H. Brand, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. At the March term, 1900, of the superior court of Franklin county, Ed Knox was found guilty of the crime of murder. He made a motion for a new trial, which was overruled, and he excepted. On November 30, 1900, this court rendered a judgment reversing that of the trial court. See 112 Ga. 373, 37 S. E. 416. The remittitur was duly transmitted to the clerk of the court below, and received by him. On December 21, 1900, in vacation, he entered the remittitur upon the minutes of that court. At the March term, 1901, thereof, Knox was again tried, found guilty, and sentenced. He thereupon filed a motion in arrest of judgment on the ground that the judgment of the supreme court had never, by any order of the superior court, been made its judgment. The judge of that court passed an order reciting the facts above mentioned as to the receipt by the clerk of the remittitur, and providing that the judgment of the supreme court be made the judgment of the superior court. This order also embraced a direction that it be entered upon the minutes as of the date when the last trial began. The motion in arrest of judgment was then overruled, and Knox sued out a bill of exceptions, alleging that the court

erred in passing the nunc pro tunc order just mentioned, and also in overruling his motion in arrest of judgment.

We are of the opinion that no error was committed. All jurisdiction of this court over the case was at an end after the remittitur therefrom had been filed in the office of the clerk of the court below. *Zorn v. Lamar*, 71 Ga. 85. And see *Legg v. Overbagh*, 4 Wend. 488, 21 Am. Dec. 115. It was, of course, essential that, before taking any further steps in the case, the trial court should have been officially informed of the judgment which had been rendered by this court. Section 5597 of the Civil Code points out the manner in which a trial court is to be apprised of the decision of this court in any given case, viz. that such decision "shall be certified by the clerk [of this court] to the court below, under the seal of the supreme court." This section further declares that, after the decision has been so certified, it "shall be respected and in good faith carried into effect by the superior court." The thirty-fifth rule of this court is based upon the section of the Code just cited. Section 5134 declares that "when any cause shall be sent back to the superior court by the supreme court, the same shall be in order for trial." It is certainly safe to say that a case is "sent back" when the remittitur from the supreme court reaches the hands of the clerk of the trial court. The case starts on its journey back to the court from whence it came to the supreme court when the remittitur is transmitted by the clerk of this court, and the journey is completed when that remittitur is lodged with the official custodian of the trial court, who is authorized to receive the document. That custodian is the clerk of that court, and none other. "If the judgment below is affirmed, upon filing the remittitur with the clerk of the superior court in vacation, the supersedeas shall cease, and execution shall issue at once for the amount of the original judgment." Civ. Code, § 5598. This very clearly indicates that the "filing of the remittitur with the clerk of the superior court" is all that is necessary to restore to that court jurisdiction over the case; for, in the absence of such jurisdiction, any action taken by its clerk with reference to issuing an execution upon "the original judgment" would be wholly nugatory. "All cases decided by the supreme court which are not finally disposed of by such decision, shall stand for further hearing at the term next ensuing after the decision of the supreme court, unless the lower court be in session when such decision is made, in which event they shall stand for trial during such term of the lower court" (section 5490); and "the clerk of the lower court in which a remittitur is entered shall docket the case immediately after the other cases then pending in his court which stand for trial at the term above fixed" (section 5491), to the end that another hearing may be had in conformity to the judgment of the supreme court. In the great majority

of instances the clerk actually receives the remittitur during the vacation of the trial court. He is nevertheless authorized and directed to immediately "docket the case," acting, not under any order passed in term by the judge, but solely by virtue of the fact that "a remittitur is entered" in the court of which he is clerk. The term "entered," as employed in section 5491, is used in the sense of "filed" or "duly deposited." That section cannot possibly mean that the remittitur must be spread upon the minutes before the clerk proceeds to "docket the case." On the contrary, it contemplates that the case shall be immediately entered upon the docket of the trial court, in order that the judge, on reaching the case in its regular order, may dispose of it by carrying into effect the judgment rendered by this court. If the remittitur be received in vacation, this much must be done at once, independently of any action taken by the trial judge in the premises, in order that, as provided by section 5490, the case "shall stand for further hearing at the term next ensuing after the decision of the supreme court." Unless the filing of the remittitur in the office of the clerk of the lower court operates to at once restore to that court its former jurisdiction over the case, it ought not to be docketed at all; and the requirement that it shall "immediately" be docketed when the remittitur is "entered" (that is, filed) conclusively shows the intention of the lawmaking power to have been that the trial court should resume jurisdiction over the case whenever the mandate of this court reaches it through its duly-appointed clerk.

We attach no importance whatever to the fact that in the present case the clerk of the lower court, upon receipt of the remittitur, actually entered it upon the minutes. There being no statute requiring him to do so, it was, perhaps, improper for him, in the absence of an order of court so directing, to take any further action with respect to the remittitur than to preserve it on file. It is, however, good practice for the judge to order all remittiturs to be entered upon the minutes, to the end that they may show a complete history of the cases to which such remittiturs relate; and trial courts may and should, by appropriate orders, effectuate any special directions given by the supreme court. It was eminently proper for the judge to pass the nunc pro tunc order to which exception is taken, for it was his duty to take such action as would make the minutes show what disposition had been made of the case in the supreme court. In this connection, see *Armstrong v. Lewis*, 61 Ga. 680, and *Goldsmith v. Railroad Co.*, 62 Ga. 544. We are aware that it has been the general, if not the universal, custom of trial courts to enter orders in terms declaring that the judgments of this court be made the judgments of those courts, but there is no statutory requirement to this effect. On the contrary, as we have undertaken to show, the scheme of all the

Code sections bearing upon this subject seems to be that the resumption of jurisdiction by a trial court follows immediately upon the reception by its clerk of the remittitur from this court. It is true that in the case of *Hubbard v. McCrea*, 103 Ga. 680, 30 S. E. 628, it was said that the lower court had no jurisdiction to proceed with a new trial thereof until after the remittitur from this court had been "entered upon the minutes of the lower court, and made the judgment thereof." It was not, however, essential in that case for any such ruling to be made; for, as disclosed by the opinion delivered by Mr. Justice Little, the fact was that the court below undertook to enter upon the new trial before the remittitur had been filed with its clerk; that is to say, before that court had any official information whatever as to the action which had been taken in the case by the supreme court. The use of the language quoted doubtless grew out of the fact (well known to the writer of the opinion and to all of us) that the practice of entering remittiturs upon the minutes of the trial courts of this state, and making them the judgments thereof, had long prevailed. It is to be noted, however, that this language was not used relatively to any such question as that with which we are now dealing. That case was decided March 23, 1898. On the next day this court, in *Lyon v. Lyon*, 103 Ga. 747, 30 S. E. 575, held that a new hearing in a case which had been brought here "could not lawfully be had before the remittitur from this court had been filed in the office of the clerk of the court below." The opinion in the latter case was delivered by the same justice, who remarked (page 751, 103 Ga., and page 576, 30 S. E.) that the judge of the superior court "had no power whatever to proceed with a new interlocutory hearing of the cause before the remittitur from this court reversing the judgment rendered on the former interlocutory hearing had been filed with the clerk below; and good practice would also require that this remittitur should also have been entered upon the minutes and made the judgment of the lower court, if practicable." The second headnote in the case of *Wiggins v. Tyson*, 112 Ga. 745, 38 S. E. 86, clearly indicates that "the reception of the remittitur" by the clerk of the trial court is all that is needed to invest it with full authority to enforce a judgment of affirmance. Said Mr. Justice Little (pages 748, 749, 112 Ga., and page 88, 38 S. E.): "The method of conveying to the superior court . . . the information that this court had affirmed its judgment was by a remittitur, the transmission of which is regulated by statute and the rules of this court. It is true that until this writ is received the superior court can take no further action."

Now, for the first time, so far as we are informed, this court has before it for decision the question whether or not the filing

of a remittitur with the clerk of a trial court is, without more, sufficient to reinvest that court with jurisdiction over a case, the exercise of which had been suspended by suing out and prosecuting the writ of error. After due investigation and reflection, we now definitely rule that it is not a condition precedent to a trial court entering upon another hearing ordered by this court that the remittitur should, by a formal order, be entered upon the minutes of the court below, and made the judgment thereof. The motion in arrest of judgment with which we are now dealing rests solely upon the ground that in the absence of such an order the superior court of Franklin county had no jurisdiction over the case. If it did not acquire jurisdiction by the filing of the remittitur in the clerk's office, it was without authority to take any steps in the case, and had no more right to pass an order formally making the judgment of this court its judgment than it had, without so doing, to proceed with the trial. In other words, if the filing of the remittitur in the office of the clerk did not operate to reinvest the superior court with jurisdiction to again try the case, it could not have been lawfully docketed, set for a hearing, or called for trial; nor had the court any power to deal with it for any purpose. On the other hand, if the filing of the remittitur with its clerk gave to the court power to again entertain jurisdiction of the case for any purpose, it thereby acquired full jurisdiction over the case for all purposes. It would be an anomaly to hold that a trial court could, by passing an order which adopted as its own the judgment of any other court, thus confer upon itself jurisdiction of a case over which it would otherwise have no jurisdiction at all. We do not see our way clear to so hold. Judgment affirmed. All the justices concurring, except LITTLE, J., dissenting.

(112 Ga. 786)

COCHRAN v. STATE.

(Supreme Court of Georgia. July 17, 1901.)

CRIMINAL LAW—INSTRUCTIONS—CREDIBILITY OF WITNESSES—CONTINUANCE—NEW TRIAL—ADJOURNMENT OF COURT—CHALLENGE TO ARRAY.

1. It is not erroneous in the trial of a criminal case for the judge to charge the jury: "Where the state makes out a *prima facie* case (that is to say, a case where the jury would be authorized to convict if no other evidence was offered), and the defendant offers an alibi as a defense, the burden is on him to make it out by a preponderance of the evidence (that is, by the greater weight of the evidence); but the evidence offered as to alibi is to be considered along with all the other evidence, in order to determine whether the guilt of the defendant has been shown beyond a reasonable doubt."

2. The circumstance that a witness who testifies in behalf of the accused in a criminal case is his relative, or the fact that such witness is jointly indicted with the accused for the offense for which he is on trial, may be considered by the jury in passing upon the

credibility of such witness and weighing his testimony, and general instructions to this effect are not erroneous.

3. This court will not interfere with the exercise by the trial judge of his discretion in denying a motion for a continuance, when the facts in connection therewith, as certified by the judge, are sufficient to warrant the conclusion that the motion was not made in good faith.

4. Though the trial judge may propound to the accused irrelevant and inappropriate questions, this affords no cause for a new trial, when neither the questions nor the answers thereto were heard by any person who subsequently was selected and served as a jurymen upon the trial of the accused.

5. Where the law provides for a term of a superior court to extend beyond one week, and the judge, on any day of the first week, orders that the court take a recess until a named day in the next week, the court may lawfully assemble on that day, and when assembled is in lawful session, though there be no order calling a special term, or directing an adjourned term of the court to be held during that week.

6. Though the statute provides that, "when a superior court is held for longer than one week, the presiding judge shall draw separate panels of petit jurors for each week of the court," yet where the judge draws jurors for a term, and they appear and serve during the first week thereof, and subsequently, by direction of the court, appear for service during the next week, and are duly impaneled for such service, and upon the trial of a felony case are put upon the accused as part of the array of 48 jurors from which the trial jury is to be selected, a challenge to the array upon the grounds that these jurors "had been summoned for the previous week, and had not been re-summoned for the" week when this trial occurred, did not raise the question that they had not been properly drawn to serve during the second week, and the court committed no error in overruling it.

7. Certain written requests to charge were properly refused because not warranted by the evidence. There was no error in failing to charge that the testimony to corroborate a confession must connect the accused with the perpetration of the crime charged. There was ample corroboration of the confession of the accused, the testimony of the accomplice was sufficiently corroborated by evidence which connected the defendant with the perpetration of the offense charged, the evidence as a whole fully warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Campbell county; J. S. Candler, Judge.

Shell Cochran was convicted of murder, and brings error. Affirmed.

J. F. Gollightly, Claude C. Smith, J. B. Suttles, and Arnold & Arnold, for plaintiff in error. W. T. Kimsey, Sol. Gen., J. M. Terrell, Atty. Gen., C. S. Reid, and L. S. Roan, for the State.

FISH, J. Shell Cochran was tried for and convicted of the crime of murder. He made a motion for a new trial, which was overruled, and he excepted.

1. One of the grounds of the motion is that the court erred in giving to the jury the charge set out in the first headnote. It is contended that this charge was contradictory, and that the burden was not upon the defendant to establish his defense of alibi by a

preponderance of the evidence. The charge is in substantial accordance with the rule upon the subject which has been established by repeated decisions of this court. In the case of *Harrison v. State*, 83 Ga. 129, 9 S. E. 542, Chief Justice Bleckley, in formulating from previous decisions the rule upon this subject which had been established in this state, said: "Touching alibi, the rule in Georgia, as established by authority, consists of two branches: The first is that, to overcome proof of guilt strong enough to exclude all reasonable doubt, the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that nevertheless any evidence whatever of alibi is to be considered on the general case with the rest of the testimony, and, if a reasonable doubt be raised by the evidence as a whole, the doubt must be given in favor of innocence." In *Bone v. State*, 102 Ga. 387, 30 S. E. 845, it was held: "It is not error in the trial of a criminal case for the presiding judge to charge the jury that when the state makes out a prima facie case against the defendants, 'and the defense of alibi is relied on, then the burden of proof is on the defendants to show you by the preponderance of the evidence offered that at the time and place in question it was impossible for the defendants to have been there,' when immediately after such charge he instructs the jury to consider all the evidence offered, the evidence touching the alibi and all other parts of the case, with reference to determining whether the evidence offered is so strong as to convince them of the defendants' guilt beyond a reasonable doubt." Other decisions of this court to the same effect could be cited.

2. Another ground is that: "The court, in charging upon the rules of weighing evidence, and upon the credibility of witnesses, erred in charging the jury as follows: 'You will consider all the testimony of all the witnesses, taking into consideration the state of a witness' feeling towards any party to the case, his or her relationship to any party to the case, or his or her interest in the result of the case. In other words, consider is he or she interested in the result of the trial, if such is shown by the evidence. All this is to be considered by you in determining the credit to be given the testimony of every witness. Their manner, interest, or bias, if shown, as also the reasonableness or unreasonableness of the testimony of the witness, may be considered by the jury. The fact that a witness is jointly indicted for the same offense with the defendant, and for which the defendant is on trial, may be considered by you in fixing the credit you will give to the testimony of such witness.'" It is alleged that this charge was erroneous, because "it goes too far towards individualizing the witness, and is argumentative, and would naturally be considered by the jury as singling

out those witnesses for the defendant who were relatives of the defendant," and "because such charge also went too far in pointing out to the jury to consider whether the witnesses were jointly indicted for the same offense with the defendant, and in compelling the jury to consider this as a circumstance." Three of the witnesses who testified for the defense were jointly indicted with the prisoner on trial,—two of them as principals in the crime charged, and one of them as accessory. Two of these witnesses were his brothers, and other witnesses who testified in his behalf were closely related to him by blood or affinity. These were circumstances which the jury had the right to take into consideration when weighing the testimony of these respective witnesses. Where the testimony in a case conflicts, it is the duty of the jury, if they cannot reconcile it, to determine where the truth lies, and in order to do this they must take into consideration the credibility of the respective witnesses; and in passing upon the credibility of any witness they can consider any circumstance shown by the evidence which would naturally tend to bias or prejudice such witness in favor of the one side or the other. They can consider whether he is himself vitally interested in the result of the trial, whether he will be affected by the verdict rendered therein, or whether the issue on trial is one of vital interest to a near relative of his. Any fact shown by the evidence which, according to human experience and observation, would naturally tend to cause the witness to lean towards one side or the other, may be considered by the jury in passing upon the credibility of a witness' testimony and the weight to be given to his evidence. Certainly, if he testifies in behalf of the accused, who is being tried for the alleged crime of murder, and the evidence shows that he is closely related to the accused, the jury may take this fact into consideration in determining the credibility of such witness and in weighing his testimony; and it is equally clear that if, in such a case, he stands jointly indicted with the prisoner on trial for the same alleged offense, the jury have the right to take this fact into consideration when weighing his testimony. This is so because these are facts which might naturally cause him to be biased or prejudiced in favor of the defense. The fact that some of the circumstances which the court charged could, if shown by the evidence, be taken into consideration by the jury in weighing the testimony of the witnesses, were applicable only to certain witnesses, did not render the charge erroneous, as "singling out" or "individualizing" those particular witnesses. The court had the right to point out, in general terms, what circumstances, if shown by the evidence, the jury could consider in passing upon the credibility of witnesses; and the fact that, when the jury should come to consider the evidence, some of these circumstances would be found

to be applicable only to the testimony of particular witnesses, can make no difference. Were it otherwise, it would be impossible in most, if not all, cases for the court, even in the most general terms, to indicate to the jury what sort of circumstances they could take into consideration in passing upon the credibility of witnesses and the weight to be given to their testimony; for it would rarely, if ever, be the case that all of the circumstances which the jury might properly consider for this purpose would apply to all of the witnesses. A similar objection to the charge of the court was made in *Wheeler v. State*, 112 Ga. 43, 37 S. E. 126, where the court charged the jury that they had "a right to consider the circumstances and condition of any witness as proven to have been at the time of the incidents about which said witness testifies"; that they could consider the condition of the witness "as to soberness," and his "surroundings," "with reference to determine whether or not such witness was in a condition to see and understand what was occurring." The error assigned upon this charge was that "it was argumentative, and singled out and was made applicable to a particular witness of the accused." It was held that "the instruction was general, and there was evidence to support it, and it certainly was not erroneous because it may have been applicable to only one witness."

3. It is alleged in the motion for a new trial that the court erred in overruling a motion to continue the case upon the ground of the absence of a particular witness for the defendant. Motions to continue are addressed to the sound discretion of the trial court, and it is only where the discretion of such court has been clearly abused that this court will reverse a case because of the refusal of a continuance. The facts in connection with this motion to continue, as certified by the trial judge, are sufficient to warrant the conclusion that the motion was not made in good faith, and under such circumstances the discretion of the trial judge in overruling the motion to continue will not be interfered with by the supreme court.

4. Another ground of the motion for a new trial is that the court erred, while the motion for a continuance was being heard, in propounding to the accused certain questions. The questions and the answers thereto were as follows: "By the Court: Q. Are you the man that said you could prove hell was an ice house in thirty minutes? A. No, sir; I never said that. Q. By the Court: That was Steve, was it? A. I don't know, sir." In certifying this ground the trial judge states: "The fourteenth ground is approved, as follows: The remark that is criticised was made as a matter of pleasantry to the defendant in a side remark, and was not heard by but few near us. It was made laughingly to the defendant while waiting for a witness to be brought back into the back room,—a jury room to which we had retired,

where we were all seated. We were not in the court room, but had gone back into the jury room, out of the presence of the public. Parties in the room did not all hear it. One of defendant's counsel, who was present in the room, afterwards asked me what it was I said to the witness. There was no one present at the time but the defendant, his counsel, the state's counsel, the stenographer, and one or two of the defendant's friends. * * * The remark was not in connection with the case, and could not have affected the defendant in any way. His examination as a witness had been concluded by counsel on both sides, and another witness had been sent for." These manifestly irrelevant and inappropriate questions propounded by our learned Brother, the trial judge, "as a matter of pleasantry," to a prisoner charged with and about to be tried for the grave offense of murder, would have afforded ample ground for setting the verdict of guilty aside, and granting a new trial, if they had been asked in the hearing of any person who subsequently became a member of the trial jury. But these questions could not have been, as contended, "prejudicial and injurious to the accused" on his trial, when they were not asked in the presence or hearing of any of the jurors in attendance upon court, or of any person who subsequently served upon the jury that tried the case. They could not have, therefore, affected the verdict rendered, and consequently afford no cause for a new trial.

5. Another ground of the motion for a new trial was: "Because the court erred in overruling defendant's objection to being tried by the court organized for the second week under the following circumstances: * * * At the August term, 1900, of Campbell superior court, his honor John S. Candler, judge of said court, drew thirty-six traverse jurors, and the clerk entered on the minutes of the court at said August term said thirty-six names under the following caption: 'Traverse Jurors Drawn for the February Term of Campbell Superior Court, 1901.' And on Monday, the 4th day of February, 1901, the clerk called the names of said thirty-six jurors, twenty-nine of whom being present, and, having no lawful excuse, were sworn as traverse jurors, the first twelve to be known as panel No. 1, the second twelve as panel No. 2, and the additional five to be known as part of panel No. 3, to be supplied as the court might direct. Panels Nos. 1 and 2 served in civil cases on Monday, the 4th and 5th; and on the 6th the case of Pegram Cochran, one of the defendants in this indictment, was put on trial, and the forty-eight jurors placed upon him was the twenty-four panels Nos. 1 and 2, the other five jurors of panel No. 3, and the forty-eight was completed by tales jurors duly drawn by the court and served by the sheriff. From said number put upon Pegram Cochran, several of panels Nos. 1 and 2 disqualified, some

from relationship, some from having expressed opinion, and twelve jurors were secured for the trial of said Pegram Cochran. During said week, at the end of each day, the clerk would enter on the minutes, and court approved the minutes, as follows: 'The court took a recess till to-morrow.' And on Friday, the 8th day of February, the verdict in the case of Pegram Cochran was rendered, and the trial ended. And on that date the court had the clerk to make the following entry, and made the following announcement: 'The court will now take a recess until Tuesday, February 12th, at 8 o'clock, a. m.' The court excused some of the jurors for the term for legal reasons, and all who had acted as jurors in the trial of Pegram Cochran. No new jury was drawn during said week, but the court instructed all the traverse jurors and tales jurors who had been drawn for the previous week to appear on said Tuesday, except some excused for cause, and had also drawn, and the sheriff serve, thirty additional tales jurors. On Tuesday, February 12th, after defendant had made his motion to continue, and the motion was overruled, and under said circumstances, the defendant's counsel made the following statement: 'We want to submit to your honor that this trial cannot proceed, because this is not the regular term of court, and there has been no call of a special term; and we wish to offer evidence, if it is necessary, to show that no special term of court has been called to try this defendant.' The court announced that it 'did not adjourn, but took a recess. The February term is now in session, and has never adjourned at all.' On making said announcement, the court then placed upon defendant forty-eight jurors, the first twelve being those of panel No. 1, which had been carried over from the previous week, and the additional twelve being made up from the remaining traverse and tales jurors, drawn the week before, which had been supplied to fill the places of those excused; and, when said array of twelve was placed upon the defendant, the defendant challenged the array upon the ground that the regular term of the court had expired, and that there had been no call of a special term, and the jurors composing panel No. 1 had been summoned for the previous week, and had not been resummoned for the present week; they had been excused until Tuesday morning, after the trial of Pegram Cochran was begun, and told by the court to return at that time, and therefore could not act as jurors. The court overruled the challenge to the array. Defendant says that the above ruling is error; that the court should have sustained his first point, that the court was not regularly organized for the trial of this case; that the court erred in not sustaining his challenge to the array, on the grounds therein stated, and also because the court erred in not sustaining his challenge to each poll of the six jurors of panel

No. 1. as they were placed upon him, and for that reason a new trial should be granted him." The law requires "that the judge of the superior court of the county of Campbell hold the spring and fall terms of said court, of each and every year, not less than two weeks, unless the business of said court is sooner disposed of." Acts 1874, p. 42, No. 46. The court, during the term at which the defendant was tried, met, as provided by law, on the first Monday in February, and on the following Friday, by a proper order duly entered upon the minutes, took a recess until the next Tuesday. It seems almost superfluous, therefore, to say that the regular February term of the court was not terminated by the order passed during the first week of the term declaring a recess until a named day in the next week. When the court reassembled on the Tuesday following the recess, there was simply a continuation of the regular February term of the same; and there was therefore no merit in the contention that the trial of the defendant could not proceed, because it was not the regular term of the court, and no special term had been called to try the defendant.

6. Nor do we think that there was any merit in the challenge to the array of jurors put upon the accused upon the ground that "the jurors composing panel No. 1 had been summoned for the previous week, and had not been resummoned for the" week when this trial was had, and that "therefore [they] could not act as jurors." This challenge to the array was made when panel No. 1 was put upon the accused. This panel had been formed from jurors who at the preceding August term had been drawn, and subsequently summoned, for the February term, and tales jurors who had been duly drawn by the court during the first week of the latter term, and summoned by the sheriff; and when the court took a recess that week these jurors were instructed by the judge to appear for service on the following Tuesday. There was no necessity for formally resummoning them. Had the defendant challenged the array put upon him on the ground that the judge had not, as the law directs, drawn separate panels of petit jurors for each week of the court, a very different question would have been presented. He did not challenge the array upon the ground that no separate panel of petit jurors had been drawn for the second week of the court, but upon the ground that the very jurors put upon him had not been resummoned for service during the second week of the court. In support of this ground of the motion for a new trial, counsel for the plaintiff in error have presented to this court an argument which would have been appropriate if the above-indicated objection to the array had been made in the court below, but they cannot raise here a question which was not raised in the trial court. They cite the case

of *Bridges v. State*, 103 Ga. 21, 29 S. E. 859, but that decision does not show that the court erred in the present case in overruling the challenge to the array. There the challenge to the array was on the ground that "said array of jurors contains the names of 19 jurors who have not been drawn, summoned, and impaneled as required by law"; the challenge showing the illegal manner in which these jurors had been selected and impaneled. The point ruled was that: "In a county in which a superior court continues in session longer than one week, and at the commencement of the second week the judge causes full panels of jurors to be organized from persons regularly drawn and summoned for that week, it is error for him to direct the clerk, in making up a panel of forty-eight jurors for the trial of [a felony] case, to include in such panel jurors who have served during the preceding week, and whom the judge has directed to report for duty during the week in which the case is being tried; such persons having been neither regularly drawn as talesmen by the judge, nor regularly summoned by the sheriff." This decision of the court was based on section 858 of the Penal Code, which provides: "When any person shall stand indicted for a felony, the court shall have impaneled forty-eight jurors, twenty-four of whom shall be taken from the two panels of petit jurors, from which to select the jury. If the jury cannot be made up of said panel of forty-eight, the court shall continue to furnish panels, consisting of such number of jurors as the court, in its discretion, may think proper, until a jury is obtained. In making up said panels of forty-eight jurors, or successive panels of any number, the presiding judge may draw the tales jurors from the jury boxes of the county and order the sheriff to summon them, or he may order the sheriff to summon tales jurors from among persons qualified by law to serve as jurors." The course herein prescribed was not followed by the judge in the *Bridges Case*. Twenty-four jurors were, as the statute directs, taken from the two panels of petit jurors who had been regularly drawn and summoned, but, in completing the panel of 48 for the trial of the felony case, the judge neither drew tales jurors from the jury boxes and had them summoned by the sheriff, nor did he have them summoned by the sheriff from among persons qualified by law to serve as jurors; but he ordered the clerk to place upon the panel the names of those jurors who had served during the preceding week, and who had not been excused from further attendance upon the court. This court held that this was equivalent to his selecting and summoning these jurors himself, and that they had not been selected as tales jurors in the manner pointed out by law. In the case now before us the jurors challenged upon the array were not improperly selected as tales jurors by the judge, to complete a full panel of 48 for the

trial of a felony case, but they were one of the two panels of 24 petit jurors with which the organization of the panel of 48, from which the trial jury was to be selected, began. The statute requires that 24 of the 48 jurors impeached in a felony case shall be taken from the two panels of petit jurors. This was done in this case. Panel No. 1, which was challenged when put upon the accused, was one of the panels of petit jurors; the original panel of 12 having been broken by some of the members thereof being excused during the first week of the court, and having been subsequently completed from tales jurors drawn by the judge during that week, and summoned by the sheriff. The error was not in beginning the formation of the full panel of 48, from which to select the trial jury, with the two panels of petit jurors, but it was in not having drawn new and separate panels of petit jurors for the second week of the court. As we have seen, however, the array was not challenged upon this ground, but upon the ground that "the jurors composing panel No. 1 had been summoned for the previous week, and had not been resummoned for the" week when this trial took place. Manifestly, the purpose of the law in requiring separate panels of jurors to be drawn for the first and second weeks of the court is that the same persons shall not serve upon the regular panels during both weeks. If the jurors who served during the first week had been resummoned, then, of course, the same persons who had served during that week would have reappeared in court for service during the second week; but, if separate panels of jurors had been drawn for the two weeks, this would not have occurred. It seems clear to us that the challenge did not raise the question whether or not jurors drawn for the first week of the court could, over the objection of the accused, serve during the second week thereof.

7. Some of the grounds of the motion for a new trial allege that the court erred in refusing to give in charge to the jury certain written requests. It is sufficient to say that the charges contained in these requests were not authorized by the evidence in the case. One ground alleges that the court, in charging upon the subject of confessions, and the necessity for a confession to be corroborated before it would justify a conviction, erred in not charging that the corroborating testimony must be such as to connect the accused with the crime charged. This is the rule in reference to the corroboration of the testimony of an accomplice, but it is not the rule in reference to the corroboration of a confession. There was ample corroboration of the confession of the accused, the testimony of the accomplice was sufficiently corroborated by evidence which connected the defendant with the perpetration of the offense charged, and the evidence as a whole fully warranted the verdict.

This opinion and the foregoing headnotes sufficiently cover every question worthy of consideration presented by the motion for a new trial, in so far as the grounds of the motion were verified by the trial judge and argued here. There was no error in refusing a new trial. Judgment affirmed. All the justices concurring.

(113 Ga. 736)

COCHRAN v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

JUDGE-DISQUALIFICATION—CRIMINAL LAW—CONTINUANCE—NEW TRIAL—HOMICIDE—INSTRUCTIONS—EVIDENCE—CONFESSIONS—LEADING QUESTIONS.

1. A judge of the superior court is not disqualified from presiding at the trial of an indictment merely because previously thereto he held a court of inquiry and bound the prisoner over.

2. Under all the facts appearing, there was no abuse of discretion in refusing to grant a continuance.

3. That the judge, while a panel of 48 jurors was being made up, excused jurors who were not disqualified, affords no cause for a new trial, when it appears that the panel, after being completed, was put upon the accused, and there was no challenge to the array, or other objection to the panel, and, further, that the peremptory challenges allowed to the accused were not exhausted.

4. Though one accused of crime be jointly indicted with others for the offense of murder, a charge to the effect that if he, "alone or with others," unlawfully shot and killed the deceased, with malice aforethought, he would be guilty of the crime, is not cause for a new trial.

5. When testimony is distinctly offered for an explicit purpose, and there is no contention that it should be considered for any other purpose, a new trial will not be granted because the court in its charge restricted the jury to the consideration of such testimony with reference to this purpose alone, although it may have been relevant for other purposes.

6. When a request to charge that confessions should be received with caution is given in the exact language of the request presented, it is not cause for a new trial that the court omitted to use the word "great" between the words "with" and "caution."

7. The fact that the judge in charging the jury referred to them as "honest, experienced, intelligent, upright citizens, selected to try the case," is not cause for a new trial.

8. One on trial for crime is not entitled, as matter of right, to make a second statement to the jury.

9. Allowing leading questions to be asked is a matter purely within the discretion of the trial judge. There was no error in the charges complained of not specifically noted above, there was no material error in admitting evidence, the evidence fully warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Campbell county; J. S. Candler, Judge.

J. A. Cochran was convicted of murder, and brings error. Affirmed.

Arnold & Arnold, J. F. Gollightly, C. C. Smith, J. B. Suttles, and R. D. Waits, for plaintiff in error. W. T. Kimsey, Sol. Gen., O. S. Reid, J. M. Terrell, Atty. Gen., and L. S. Roan, for the State.

LEWIS, J. Eight men, one of whom was the plaintiff in error, were indicted for the murder of Sterling Thompson. The defendants severed, and J. A. Cochran was tried and convicted. He excepts to the overruling of his motion for a new trial, the material grounds of which will be considered as the opinion proceeds.

1. It is contended that the judge who tried the case should have held himself disqualified, although there was no suggestion of disqualification, nor any objection to his presiding. It appears that, after the defendant and several of the others named in the indictment were placed in Fulton county jail, Judge Candler, upon application to him for a committing trial, went to Fairburn and held the committal trial; his reason being that he did not wish the jurors who would likely be drawn or summoned to hear the evidence on the committal trial. Before that time the defendants had applied to the judge to have the prisoners returned to Fairburn for a committal trial. They made no objections to his hearing the evidence, but stated that they wished an investigation as to whether they should be bound over. The judge went to Fairburn, heard the evidence, and, the defendants offering no evidence, committed the defendant and others under arrest to jail under the warrant sworn out, charging them with murder. Leaving out of consideration the fact that at the time of the trial this point was not made, there is no merit in the contention that conducting the preliminary committal trial disqualifies, or ought to disqualify, the judge from presiding at the regular trial of the accused. The only argument advanced to sustain it by counsel for the plaintiff in error is that the news that the superior court judge had presided at the preliminary trial and bound the accused over might lead the public, including prospective jurors, to the conclusion that the judge had made up his mind that the accused was guilty. If we concede, as we must, that the citizens of the county where the case was tried were possessed of a sufficient amount of intelligence to understand the nature of a commitment trial, this argument at once falls to the ground. The accused offered no evidence at the preliminary hearing, and the act of the judge in binding him over was simply equivalent to a judicial determination that the case against the prisoner warranted further investigation by the grand jury. While there is no Georgia case exactly in point as to facts, the principle here involved is fully settled by the ruling of this case of *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147. The first headnote of that case is as follows: "It does not per se disqualify a judge of the superior court to preside on the trial of an indictment for perjury that the same judge presided at the trial of the case in which the alleged per-

jury was committed, and also of a second case in which one of the witnesses in the first was convicted of perjury. Nor does any disqualification result, as matter of law, from the judge having, by reason of his acquaintance or supposed acquaintance with the facts thus derived, privately and unofficially advised the prisoner's counsel to induce his client to plead guilty, saying that there was no doubt about his guilt, and no earthly chance for him to be acquitted." Certainly a stronger case is there presented than is now before us. We quote the following from the learned opinion of Chief Justice Bleckley on pages 154, 155, 88 Ga., page 116, 14 S. E., and page 149, 30 Am. St. Rep.: "It can make no difference that the judge had thus become convinced of Heflin's guilt, because the opinion of the presiding judge as to the guilt or innocence of the prisoner, however that opinion may have been formed, does not unfit him for discharging his judicial duties with the most complete fairness and impartiality. These duties are exactly the same whether the accused is guilty or innocent, and upon that question the judge has no deciding power, and is not permitted to intimate to the jury his opinion. * * * It could hardly be expected that from hearing all the evidence he would not form some opinion of his own as to the actual guilt or innocence of the person on trial, but the law cares not for this, and is not so absurd as to make it work a disqualification to preside throughout the trial."

2. The accused moved for a continuance on the ground of the absence of certain named witnesses by whom he expected to establish proof material to his defense. To the ground of the motion for a new trial complaining of the refusal to grant a continuance, the trial judge appended an explanatory note. In the light of this note, and taking the showing for a continuance in its entirety, the record discloses ample reason for concluding that the judge was warranted in holding that, under all the facts and circumstances appearing, the motion to continue was not really made in good faith. We will not, therefore, disturb the judgment on this ground.

3. The fifth, sixth, and seventh grounds of the motion assign error upon the excusing of three jurors of the array put upon the defendant, upon the contention of the state's counsel that they were disqualified by relationship. It appears that the three jurors in question were related in various degrees of affinity to others of the men who had been jointly indicted with the defendant on trial, but no relationship was shown to exist between any of them and the defendant himself. The panel was filled up from regularly drawn jurors from the jury box of the county, and the jury selected without either side having exhausted the peremptory challenges allowed them. No

challenge to the array was made after these jurors were taken off, nor was any objection made to the jurors who were afterwards put on to fill their places. Conceding, for the sake of the argument, that the three jurors were not disqualified, and that the court erroneously struck them from the panel, the defendant, by not thereafter challenging the array, waived any objection to such error. See *Moon v. State*, 68 Ga. 687; *Fogarty v. State*, 80 Ga. 450 (8), 5 S. E. 782. There is nothing in conflict with these views in the decision in the case of *Cunneen v. State*, 96 Ga. 406, 23 S. E. 412; for in that case the judge arbitrarily excused a juror from the panel, and upon that ground the accused challenged the array.

4. There is no merit in the ground of the motion which complains of the charge of the court to the effect that if the evidence, taken all together, should satisfy the jury beyond a reasonable doubt that the accused, "alone or with others," attacked the deceased, and in such attack unlawfully shot and killed him, with malice aforethought, they should convict him of murder. See *Plain v. State*, 60 Ga. 284; *Nobles v. State*, 98 Ga. 73, 21 S. E. 64.

5. Error is assigned upon the following portion of the judge's charge: "Evidence has been offered as to the whereabouts of other persons who are jointly indicted with this defendant, at the time when this offense was alleged to have been committed. This evidence has been offered but for one purpose, namely, for the purpose of throwing light upon the credibility of witnesses in this case. To make this plain to you, certain witnesses have been offered as to certain parties other than the defendant being present at the scene of the killing. Witnesses have been offered to prove that these parties were not present. This last evidence is only relevant for the purpose of contradicting or impeaching such witnesses. You are not to pass upon the guilt or innocence of these parties. In considering this evidence, you only consider it in determining the credit to be given to the testimony of such witnesses, because a witness may be impeached by proof of contradictory statements, and also by disproving the facts testified to by him." We see no error in this charge. The evidence in question was offered for the distinct purpose of impeaching certain witnesses, and the court had not been called upon to pass on its admissibility for any other purpose. That being the case, it was not error to restrict its consideration by the jury to the purpose for which it was admitted, even if it were admissible for other purposes.

6. The charge of the court upon the subject of confessions was given in the exact language of the written request of counsel for the accused, and he will not be heard to now complain because the phraseology he selected was used. It is customary to charge that

confessions are to be received with "great" caution, but, even if the omission of the word "great" be reversible error, the court in the present case was led into the mistake through the act of the defendant's counsel and it would be absurd to set aside the judgment for any such reason.

7. Complaint is made that the judge, in charging the jury, referred to them as "honest, experienced, intelligent, upright citizens, selected to try the case." It is not shown how this language affected the verdict one way or the other. We are not prepared to hold that it is reversible error for the court to compliment the jury. Such a matter must, in the nature of things, be left to the good taste of the presiding judge. How the language used could have prejudiced the rights of the accused, we cannot see; nor can we understand why he should object to having his case submitted to men of the character mentioned.

8. It was not error for the court to refuse to allow the defendant to make more than one statement. That no such right is given him by the law, and that the granting of such a privilege is entirely discretionary with the trial court, has been repeatedly ruled by this court, and it is only necessary to cite, in passing, a few of the authorities which sustain this position. See *Vaughn v. State*, 88 Ga. 732, 16 S. E. 64; *Boston v. State*, 94 Ga. 590, 20 S. E. 98; *Sharp v. State*, 111 Ga. 176, 36 S. E. 638; *Knox v. State*, 112 Ga. 373, 37 S. E. 416.

9. Error is assigned because the court allowed the solicitor general to propound to a named witness certain questions alleged to have been leading. As to this, see the opinion of Chief Justice Bleckley in *Howard v. Johnson*, 91 Ga. 319, 18 S. E. 132, where the subject is dealt with as follows: "Granting that the question propounded . . . was leading, the allowance of it was not cause for a new trial. Such details in practice are generally subject to the discretion of the trial court." See, also, *Allgood v. State*, 87 Ga. 668, 13 S. E. 569.

Numerous other points are made in the motion for a new trial, but we have here dealt with every question which we deem necessary to a correct determination of the case. There was no material error in the admission or rejection of evidence, and the charge, taken as a whole, was full and fair. The evidence was ample to sustain the verdict, and we see no error in overruling the motion for a new trial. Judgment affirmed. All the justices concurring.

(113 Ga. 762)

KOLLOCK v. WEBB et al.

(Supreme Court of Georgia. July 17, 1901.)

FINAL ORDER—APPEAL—WASTE BY LIFE TENANT.

1. The action being against four persons jointly, a judgment on demurrer dismissing it as to three of them is final in its nature, and

may be brought to the supreme court by the plaintiff while the case is still pending in the court below as to the other defendant.

2. Remainder-men, whether their interest be vested or contingent, may appeal to a court of equity to prevent the life tenant from wasting and destroying the corpus of the estate.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Action by Bruce T. La Pierre and Bessie C. La Pierre, by W. W. Kollock, guardian, against Hiram H. Webb and others. Judgment for defendants, and plaintiff Kollock brings error. Reversed.

L. E. Bleckley, W. T. Crane, T. S. Bean, and Robt. McMillan, for plaintiff in error. J. B. Jones and H. H. Dean, for defendants in error.

COBB, J. Bruce Thyler La Pierre, Elsie May La Pierre, and Bessie Calhoun La Pierre brought their petition in the superior court against Hiram H. Webb, Susan M. Webb, Anna E. La Pierre, individually and as trustee, and Thomas J. Gastley, as sheriff, alleging that the plaintiffs were the minor children of Alonzo N. and Anna E. La Pierre, that their father was dead, and that they knew of no person whom they could call to their aid to act as their next friend. The petitioners further alleged, in substance: On February 20, 1883, their mother (then Anna E. Thyler) executed and delivered to their grandmother, Eliza Jane Thyler, a deed conveying certain real estate situated in the state of New York. The deed was executed in the state of Georgia, but at the time of its execution both the grantor and the grantee were residents of the state of New York. Under the deed the property therein described was conveyed to Eliza Jane Thyler, party of the second part, upon certain uses and trusts, that is to say: "To let and lease the same, and, after paying all taxes, assessments, water rents, insurance premiums, repairs, and all other necessary charges and expenses, to apply the net income of one-half part thereof to the use, maintenance, and support of the said party of the first part for and during her natural life, and on her death to convey, transfer, and pay over the half part of the said premises, or that which shall have been substituted in its place, as hereinafter provided, to the lawful issue of the said party of the first part, to them and their heirs, forever. But if the said party of the first part shall die, leaving no lawful issue her surviving, then to convey, transfer, and pay over the same to such person or persons in such proportions as she shall by her last will and testament, or instrument in the nature of such will, appoint and direct. But if she shall die leaving no lawful issue her surviving, and no such last will, or instrument in the nature of a will, then to convey, transfer, and pay over the same to the right heirs at law of the said party of the first part, to them and their heirs, forever. And to apply the net income

of the other half part of the said premises, or that which may be substituted in its place, to the use, maintenance, and support of the said party of the second part for and during her natural life; and if she shall die before the said party of the first part, then, after her death, to apply the said net income to the use and maintenance of the said party of the first part during the residue of her natural life, and on the death of the survivor of the said parties of the first and second parts to convey, transfer, and pay over the said half part of the said premises, or that which shall have been substituted in its place, to the lawful issue of the said party of the first part, to them and their heirs, forever. But if the said party of the first part shall leave no lawful issue surviving the said survivor of the parties hereto, then to convey, transfer, and pay over the said half part of the said premises, or its substitute, to such person or persons, and in such proportions, as the said party of the second part shall, by her last will and testament, or instrument in the nature of a last will, direct and appoint, and, in default of such will or instrument, to the right heirs at law of the said party of the first part, to them and their heirs, forever. With the power unto the said party of the second part and her successors, and she and they are hereby expressly authorized and empowered, to sell and convey the said premises, or any portion or portions thereof, and any and all real estate which may be substituted in its place, and any portion or portions thereof, with the consent, however, of the said party of the first part, to be evidenced by her joining in and executing the instrument or instruments of conveyance thereof, and to invest and keep invested the proceeds thereof, or, with the consent of the said party of the first part, to purchase with the said proceeds other real estate, and to hold the said proceeds, securities, or investments, and real estate so purchased with the said proceeds upon the same trusts, for the same uses, and with the same powers as the premises herein described." Eliza Jane Thyler is dead, and Anna E. La Pierre has been appointed her successor in the trust provided for in the deed. The deed was within the provisions of that part of the laws of New York relating to uses and trusts, wherein it was provided, among other things, that: "Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate." The deed was a New York contract, and under the law of New York just quoted the plaintiffs were vested remainder-men. The property mentioned in the deed was worth from twenty-eight to thirty thousand dollars, and the net income therefrom was from twelve to fifteen hundred dollars per annum. A portion of the property was subsequently sold and the proceeds invested in property in the

state of North Carolina. In violation of the deed of trust, Eliza Jane Thyler and the father and mother of plaintiffs incumbered the property in North Carolina with a mortgage to secure a debt due to a building and loan association, which had full notice of the want of power in the parties to legally create the lien. In 1890 petitioners' father became acquainted with H. H. Webb, of Clarksville, Ga.; and the petition then proceeds to set forth various transactions between Webb and Mrs. La Pierre and Mrs. Thyler, and between Mrs. Webb and Mrs. La Pierre, consisting of sales, loans of money, conveyances, mortgages, and the like, from which it appears that the remaining portion of the New York property had been sold, and the proceeds used to pay the individual debts of the father and mother of the plaintiffs, the debt due the loan association by mortgage on the North Carolina property being one of them. As a consequence of these various transactions between the Webbs and the mother and grandmother of plaintiffs, the proceeds of the sale of the property mentioned in the deed of 1883, as well as the proceeds of the sales of other property bought with the proceeds arising from the sale of the property mentioned in the deed, have become intermingled with the individual property of Webb and his wife, both of whom had notice at the time of each transaction of the source from which the money which went into their possession arose; and, if something is not done to prevent it, the entire property will be dissipated, and the interests both of petitioners' mother as the life tenant and of themselves as remaindermen will be entirely dissipated, and upon the death of their mother there will be nothing remaining of the New York property, or the proceeds arising from the sale thereof. It is distinctly alleged that the proceeds of the different sales can be directly traced into the possession of Webb and his wife, both of whom had full notice of the fact that the mother of plaintiffs had no right to use the proceeds in any other way than for purposes of reinvestment. The petition describes with great particularity each of the transactions referred to, and the property to which it relates, and into whose possession the property and proceeds thereof have gone. Webb is attempting to have sold a portion of the property which was still in the possession of their mother under certain tax executions of which he claimed to be the transferee. These transfers were invalid, for the reason that they were not made by a proper officer, being made by the tax collector, when they should have been made by the sheriff. The prayers of the petition were, in substance, that the sale under the tax executions be enjoined; that Webb be restrained from further transferring his property, or removing beyond the jurisdiction of the state; that a certain note signed by the mother of petitioners individually and as trustee, and payable to Mrs. Webb, together with a mortgage given to se-

cure the note, be set aside and canceled; that a full accounting of the property traceable into the hands of the different defendants be had; and that it, by a proper decree, be placed in a position where it might be used in the manner described in the deed of 1883 during the lifetime of the mother of petitioners, so that the property, after her death, may be delivered to the plaintiffs, as contemplated by the deed. While the case was pending, Kollock was appointed guardian ad litem for the petitioners, and thus became a party plaintiff to the case. All of the defendants except Mrs. La Pierre united in a demurrer to the petition, in which they set up that there was no equity in the petition, and that it set forth no cause of action; that it appeared upon the face of the petition that the plaintiffs had no title to the property, and no right to recover and maintain the suit, and that no such right had accrued to them under the deed upon which they based their claim; that under the deed the absolute title was in a trustee, and that during the life of Mrs. La Pierre the trust was executory, and the remainder was contingent; and that until the death of the life tenant the sole right of action was in the trustee, and in no other person whatsoever. The court sustained the demurrer, and the plaintiffs excepted.

1. Upon the call of the case a motion was made to dismiss the writ of error upon the ground that the case was still pending in the court below, for the reason that, as Mrs. La Pierre had not united in the demurrer, the case was still pending as to her. Under the ruling made in the case of *McGaughey v. Latham*, 63 Ga. 67, the motion to dismiss the writ of error must be overruled. It was there held that, the action being against two persons jointly, a judgment on demurrer dismissing it as to one of the defendants is final in its nature, and may be brought to this court by the plaintiff while the case is still pending in the court below as to the other defendant. In the opinion Mr. Justice Bleckley said: "The action brought was a joint action against two, and no such action is now pending in that court, the court having dismissed it as to one of the defendants on the demurrer which we have just discussed. The judgment of dismissal was final in its nature, and while it stood no further proceedings could be had below except against the other defendant. It is manifest that the case as a joint action was at an end, and that to reinstate it the plaintiffs were without remedy other than a writ of error." See, also, *Sutherland v. Agency*, 53 Ga. 442. In *Shealy v. Toole*, 68 Ga. 573, it was held that the grant of a nonsuit as to one of two defendants is not such a final judgment as will give the other the right to bring the case to this court, it appearing that the case was still pending in the court below as to the other defendant. The case of *Zorn v. Lamar*, 71 Ga. 80, 85, is clearly

distinguishable from the case of *McGaughey v. Latham*, supra, but some of the language of Mr. Chief Justice Jackson on page 88 would indicate that he did not apprehend what seems to us to be the full purport of the ruling made in the *McGaughey Case*. The language of the learned chief justice rather indicates that, where the cause of action was joint, a dismissal as to one of the defendants would authorize the bringing of a writ of error, notwithstanding the case had not been dismissed as to the other; but that, where the action was joint, though the cause of action was several, the right to bring a writ of error while the case was pending as to one of the defendants did not exist. Upon an examination of the *McGaughey Case*, it will appear that the action was joint, but that the cause of action was several, the suit being against one alleged to be indebted upon an account and against another alleged to be liable on account of a promise to pay the account. The object of the suit was to hold the latter person liable as security,—a liability which could have been asserted in a suit brought against him alone, provided he was liable at all as security. In the case of *Deadwyler v. Bank*, 110 Ga. 511, 35 S. E. 779, the court followed the reasoning of Mr. Chief Justice Jackson in *Zorn v. Lamar*. The case of *McGaughey v. Latham* being a unanimous decision by three judges, and never having been under review, must be followed in preference to the later case of *Zorn v. Lamar*, even if that decision can be properly construed to be in conflict with the *McGaughey Case*, as well as in preference to *Shealy v. Toole*, notwithstanding that was a unanimous decision, and *Deadwyler v. Bank*, which was a decision by five justices only, and therefore not absolutely binding as authority. It is our duty, in any event, to follow the earlier decisions of the court when concurred in by all the members of the court; but we the more cheerfully follow them in cases which, like the present, relate solely to questions of practice, which it is important should be settled, and not open to fluctuation, notwithstanding they may be not in exact accord with technical niceties. The present case being an action against several persons jointly, and not a joint cause of action against them, the rule laid down in *McGaughey v. Latham*, supra, is controlling. See, also, *Rives v. Rives* (Ga.) 39 S. E. 79, in which it appears that this court, in allowing a reinstatement, did so solely on the idea that by a correction of the record it was shown that the original petition set forth a joint cause of action; thus again following the reasoning of Mr. Chief Justice Jackson referred to above. This, however, resulted in no injury to any party, for the case was actually reinstated and decided on its merits.

2. It was contended by counsel for plaintiff in error in the argument here that the

deed of 1883 should be construed according to the laws of New York, while counsel for the defendants in error contended that it was governed as to validity and effect by the laws of Georgia. For reasons which will hereafter appear, we do not consider it material to a proper determination of the case to authoritatively decide this question, though we incline to the opinion that, as both the grantor and the grantee in the deed were domiciled in the state of New York at the time it was executed, and the property upon which it was operative was located in that state, the validity and effect of the contract must be determined by the laws of New York, notwithstanding its actual execution may have taken place in the state of Georgia. See, in this connection, *Latine v. Clements*, 8 Ga. 432; *Kerr v. White*, 52 Ga. 362; 3 Am. & Eng. Enc. Law (1st Ed.) 563; *Story, Conf. Laws* (8th Ed.) § 363. Relying upon the allegations in the pleadings as to what is the law of New York, so far as these allegations give information on the subject, and the presumption that the common law is of force as to matters about which there are no allegations, we think that, whether or not the deed be construed under the law of New York or under the law of this state, a proper construction of the same is as follows: After the death of Mrs. Thyler, Mrs. La Pierre is entitled to a life estate in the whole property, and, as life tenant, is entitled to the income and profits arising from the property during her life, the corpus being kept intact to pass to those who are to take under the terms of the deed after her death. The deed having been executed before the marriage of Mrs. La Pierre, the remainder over to her lawful issue and their heirs, forever, created a contingent remainder; but upon the marriage of Mrs. La Pierre, and birth of children, the contingency no longer existed. There were then, during the existence of the particular estate upon which the remainder was based, persons in esse to answer to the description provided for the remaindermen, and the remainder became vested; but this remainder, though vested, under the other terms in the deed, belonged to that class of vested remainders which was subject to be divested upon the death of Mrs. La Pierre without lawful issue surviving her. See 20 Am. & Eng. Enc. Law (1st Ed.) 838 et seq.; *Daniel v. Daniel*, 102 Ga. 181, 183, 28 S. E. 167, and cases cited; *McDonald v. Taylor*, 107 Ga. 43, 45, 32 S. E. 879, and cases cited. While, in our opinion, the deed, properly construed, gives to the living children of Mrs. La Pierre a vested remainder, subject to be divested upon her death without issue, still, for the purposes of the present case, we think it is immaterial whether the remainder created by the deed for the benefit of the children of Mrs. La Pierre was vested or contingent. A life tenant is entitled to the corpus of the property for his own use, but this posses-

sion is subject to the right of the remaindermen to have the property in a state of security to be forthcoming to them upon the termination of the life estate. *Bowman v. Long*, 26 Ga. 142. In *Dickinson v. Jones*, 38 Ga. 97, it was held that threatened waste by any life tenant, or person claiming under such a one, would be promptly and efficiently restrained by a court of equity upon application by any remainderman. In the case of *Griswold v. Greer*, 18 Ga. 545, it was distinctly ruled that a contingent remainderman had a right to bring a suit against the life tenant and one co-operating with him to prevent the waste of the corpus of the property, and the removal of the same beyond the jurisdiction of the court. The right of a contingent remainderman, either in his own name or through a proper representative, to appeal to a court of equity during the continuance of the life estate for the preservation and security of the property, in order that it might be forthcoming at the termination of the life estate, was distinctly recognized in the case of *Keaton v. Bagga*, 53 Ga. 226. See, also, *Fleming v. Hughes*, 99 Ga. 449, 27 S. E. 791. In *Clarke v. Deveau*, 1 Rich. (S. C.) 172, the supreme court of South Carolina held that cestuis que trust whose interests are future and contingent may, upon sufficient grounds, maintain a bill against the trustee and tenant for life to have their interests secured. In the opinion *Moses, C. J.*, said: "If the remainder is only contingent, still the party representing it, as we have said, is not prevented from seeking the aid of this court for its safety and preservation. A cestui que trust, though entitled to a mere contingent benefit, may, upon reasonable cause shown, apply to this court to have his interest properly secured. * * * It might not, probably, be stretching the jurisdiction of equity too far to say that one who holds for a contingent remainderman, and who fraudulently converts the estate confided to him to his own use, may be held to answer for such disposition, either by requiring an account, and the payment of the money into court, or, if the property is still under his control, to transfer it to the succeeding trustee." A case very similar to the present one is that of *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438. In that case a conveyance of real estate was made to a trustee, with power with the grantor's consent during her life to sell or lease, and from the proceeds, after defraying the expenses of the trusts, to pay over the residue for the reasonable support of the grantor as she might require the same during her life, and to accumulate the surplus, and at her death to apply it to the bringing up, education, and support of such child or children as she should or might have during the life of such child or children, with remainder over in default of children. It was held that the life tenant did not have vested in her by the terms of the

deed an equitable fee simple, and she had no power to extinguish the trust by conveyance to a third party; and that, upon the grantor's having children, they became entitled to a vested interest in the trust estate, and to bring an equitable action to avoid a fraudulent disposition of it by the grantor and trustee. See, also, *Johnson v. Johnson* (Ohio) 38 N. E. 61; *Dunham v. Milhous*, 70 Ala. 596, 606; 2 *Perry, Trusts* (5th Ed.) §§ 539, 540, 547. When it is conceded that the plaintiffs are entitled to be heard in a court of equity,—and we think they are so entitled, whether their interest be that of vested or merely contingent remaindermen,—there is no difficulty whatever in holding that, as against the demurrers filed to the petition, the plaintiffs are entitled to the relief sought upon the allegations made by them. The life tenant under the deed has now become the trustee, and by reason of contracts, conveyances, and other transactions entered into by her in her individual capacity as well as in her capacity as trustee, a portion of the trust property has been converted into money, and has passed into the hands of Webb and his wife, and there is a probability that the remaining portion will be sold, and the money arising therefrom pass likewise into their hands, or into the possession of some one who may have no notice that it is charged with the trust; the allegations, in effect, showing a state of affairs where, unless relief along the lines indicated in the prayers of the petition is granted to the remaindermen, there will not only be no estate to be turned over to the remaindermen at the expiration of the life estate, without regard to who may be entitled to take at that time, but the estate will be entirely consumed, destroyed, and dissipated before the time for the life estate itself to determine. Under such circumstances the remaindermen, whether contingent or vested, either in their own name or in that of a proper representative, have a right to be heard in a suit against the life tenant and trustee and those co-operating with her to have an accounting, and determine how much of the property in which they are interested as remaindermen is still in the possession of the life tenant and trustee, how much is still in the possession of the other defendants, who took the same with notice of the rights of the plaintiffs, how much is in the possession of the defendants other than the life tenant which has been purchased with the proceeds arising from the sale of property by the life tenant, and how much of the proceeds of such sales has gone into the possession of the other defendants with knowledge of the source from which it was derived; and, upon these facts being ascertained, a decree should be entered fixing and ascertaining of what the estate consisted at the date of the decree, and making provision for its investment and preservation, either by the present trustee, or by a

successor to be appointed if the present trustee is then for any reason an improper person to be intrusted in the future with the corpus of the property. The petition set forth a cause of action. If its allegations are true,—and for the purposes of the demurrer this must be admitted,—it is overflowing with equity, and is not subject to any of the objections set up in the demurrer. The allegations are sufficient in their nature to make a strong appeal to the conscience of the chancellor for the preservation of the rights of these helpless infants, who so plaintively appeal to the court to be allowed to come under its protection as wards in chancery. If the prayers of the petition are not sufficient to give all of the relief which the circumstances of the case require, they may be amended when the case comes on for a final hearing. The plaintiffs are entitled to be heard by a court of equity. They have just cause for appealing to that tribunal, and the doors of that court, which is supposed to always have a ready and willing ear to hear the cries of the weak, the helpless, the wronged, and the friendless, should not have been closed against them. "Equity wishes the plundered, the deceived, and the ruined, above all things, to have restitution." 1 Cyc. Law & Proc. p. 1159, citing *Lofft, Max.* 374. Judgment reversed. All the justices concurring.

(113 Ga. 320)

LA PIERRE v. WEBB et al.

(Supreme Court of Georgia. July 18, 1901.)

PLEADING—AMENDMENT—RES JUDICATA.

1. An amendment to a petition brought by one in his individual capacity, making allegations and asking for relief which would be appropriate to the plaintiff in a representative capacity, but not as an individual, is properly disallowed when there is no offer to amend the petition by making the same one in the name of the plaintiff in a representative capacity.

2. A judgment overruling a demurrer to a foreclosure proceeding filed against a person in both an individual and representative capacity, and which raises the question that the mortgagor in his representative capacity had no right to create the lien, is conclusive upon the mortgagor both as an individual and in his representative capacity.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Action by Anna E. La Pierre against H. H. Webb and S. M. Webb. Judgment for defendants, and plaintiff brings error. Affirmed.

W. T. Crane, Thos. S. Bean, and Robt. McMillan, for plaintiff in error. H. H. Perry, Chas. L. Bass, J. B. Jones, and J. J. Bowden, for defendants in error.

COBB, J. Anna E. La Pierre filed in the superior court an equitable petition against H. H. Webb and Susan M. Webb, setting up that certain trust property in which she

was interested as life tenant and her children as remainder-men had been sold, and that a portion of the funds arising from such sale had been paid to the defendants; and praying for an accounting by the defendants of the sums so received; and also praying that a certain mortgage which had been executed by the plaintiff individually and as trustee be declared void, and delivered up to be canceled. Subsequently to the filing of this suit, Susan M. Webb filed in the superior court against Anna E. La Pierre individually and as trustee a proceeding to foreclose the mortgage just referred to. To the foreclosure proceeding the defendants filed a demurrer, one ground of which was that she had no authority to execute the mortgage as trustee. This demurrer was overruled. After answers had been filed in each case, an order was passed referring both the equitable petition and the foreclosure proceeding to an auditor, who was, by an order, permitted to hear the cases together, and make only one report or two reports, as he deemed best, but there was no order consolidating the two cases. The cases were heard by the auditor, and he made one report, but dealt with each case separately therein. To the report Anna E. La Pierre filed certain exceptions of law, which were overruled, and she filed a bill of exceptions assigning error upon the judgment overruling her exceptions. When the case was called in this court, a motion was made to dismiss the writ of error upon the ground that it appears from the record that the plaintiff in error has attempted to bring to this court two separate cases on one writ of error. While the bill of exceptions refers to two cases, and while there are in the transcript of the record copies of the record in each of the cases, after a careful examination of the bill of exceptions in the light of the record, we are satisfied that, properly construed, the bill of exceptions does not attempt to bring under review the rulings made in both of the cases, but that the only rulings complained of are those which were made in the case of the equitable petition brought by Anna E. La Pierre against H. H. and Susan M. Webb, and that the references in the bill of exceptions to the other case are merely explanatory, and no assignment of error in the bill of exceptions can be properly applied to the judgment rendered in the foreclosure proceeding. The bill of exceptions recites at the beginning, where it is usual to designate the case which is sought to be brought to the court by a bill of exceptions, that "there came on to be tried in the case of Anna E. La Pierre against H. H. Webb and Mrs. Susan M. Webb certain exceptions to an auditor's report, said case having been an equitable petition," etc., and then proceeds to state that that case, "together with a proceeding to foreclose a mortgage, brought by Mrs. Susan M. Webb against Anna E. La Pierre," had been referred to an auditor,

etc. The assignments of error in the bill of exceptions are upon the overruling of exceptions to the auditor's report. There is no assignment of error in reference to anything done in the foreclosure proceeding, and, notwithstanding the bill of exceptions is confused, and by no means clear, we are of opinion that a fair construction of it shows that it was not the intention of the pleader to bring before this court for review any other case than that of the equitable petition filed by Anna E. La Pierre against the Webbs. So construing the bill of exceptions, the first assignment of error to be dealt with is that which complains that the court erred in overruling that exception to the auditor's report which complains of the ruling of the auditor sustaining the demurrer of the defendants to the amendment offered by the plaintiff to her petition. This amendment was offered before the auditor after the case had been referred. The case, as originally brought, was one by Anna E. La Pierre in her individual capacity. While there were a number of allegations in the petition in reference to a trust estate of which she was trustee, and in reference to the interests of her children under a trust deed, the suit was by her solely in her individual capacity, and under her original petition she was entitled to no relief whatever except such as might be necessary to protect her in her rights as an individual in the property and transactions referred to in the petition. In the amendment offered she was still proceeding as an individual, but attempting to set up rights as trustee for her children in the property referred to in the original petition, and the relief prayed for by her was that which was appropriate if she had brought the action in her representative capacity. Keeping in mind that the suit was by Anna E. La Pierre as an individual, and not in her representative capacity, it appears that the amendment was properly disallowed, for the reason that there was nothing therein which authorized any relief to her in her individual capacity, and the averments in the amendment and prayers thereof were those which would be appropriate if the suit had been brought by her in her representative capacity as trustee for her children. There was no offer to amend by changing the capacity in which she sued to one as trustee, which it seems might have been done; the Code declaring that in an action by or against an individual the pleadings may be amended by inserting his representative capacity. Civ. Code, § 5106. See, also, Higdon v. Heard, 14 Ga. 255 (1); Poole v. Hines, 52 Ga. 500; Tift v. Towns, 63 Ga. 240. The defendants in the foreclosure proceeding having filed a demurrer raising the question as to whether Anna E. La Pierre, as trustee, had authority to execute the mortgage, and this demurrer having been overruled by the judge before the case was referred to the auditor, the

auditor held that this ruling concluded Anna E. La Pierre from raising any question in the equitable petition, even if it could be properly raised there, as to the right of the trustee to create a lien by mortgage upon the trust property. This ruling of the auditor was also excepted to. We think the auditor ruled correctly, and that the judge committed no error in overruling the exceptions filed to his report on this ground. Anna E. La Pierre being a party to the foreclosure proceedings in her individual capacity as well as her capacity as trustee, a judgment rendered in that proceeding would bind her in another controversy between her and the parties to the foreclosure proceeding; and, as the equitable petition which prayed for the cancellation of the mortgage was one by Anna E. La Pierre in her individual capacity, a judgment on demurrer in the foreclosure proceeding is binding upon her individually, and also concludes her as to any right or interest she might have as an individual to bring in question her right as trustee to create a lien by mortgage on the trust property. Her children, not being parties to the equitable petition, of course are not bound by any judgment rendered therein; and how far they may be bound by the judgment rendered in the foreclosure proceeding, to which they were not parties, is a question which cannot be properly determined in the present controversy. The foregoing deals with all of the questions which we think can be properly determined under the bill of exceptions as we have construed the same. Judgment affirmed. All the justices concurring.

(61 S. C. 190)

POAG v. CHARLOTTE OIL & FERTILIZER CO.

(Supreme Court of South Carolina. July 18, 1901.)

FRAUD—SALE OF UNSOUND FOOD.

In an action to recover damages arising from fraud in the sale of unsound food for a sound price, plaintiff must show that the seller knew the goods to be unsound at the time of the delivery.

Appeal from common pleas circuit court of York county; Klugh, Judge.

Action by J. E. Poag against the Charlotte Oil & Fertilizer Company. Judgment for plaintiff, and defendant appeals. Reversed.

Thos. F. McDow and Witherspoon & Spencers, for appellant. Finley & Brice and Wilson & Wilson, for respondent.

POPE, J. The complaint contains two causes of action, in the first of which the plaintiff alleges the defendant to be indebted under contract to the plaintiff the balance of \$34 for a rebate on 200 tons of cottonseed hulls at 25 cents per ton, and for 400 empty sacks shipped by plaintiff to defendant at \$2 per hundred; and on the second

of which, the defendant, by reason of unsound cotton-seed hulls shipped by it to plaintiff, damaged the plaintiff \$200. Judgment for \$234 was demanded by plaintiff. The answer of defendant denied any indebtedness to plaintiff, and further alleged that if any of the cotton-seed hulls which were shipped by the defendant to the plaintiff were unfit to be fed to plaintiff's stock, the plaintiff had knowledge of such unsoundness before he fed them to his stock, and defendant was wholly unaware of any such unsoundness; that if such cotton-seed hulls were unfit to be fed to stock, it was without fault on defendant's part, and despite its utmost care to prevent the existence of any fault in the condition of said cotton-seed hulls. The issues joined came on for trial before his honor, Judge Klugh, and a jury. Verdict was for \$190 in favor of plaintiff. After entry of judgment the defendant appealed therefrom on the single ground of an error in the judge's charge to the jury, to wit: "For error—after properly instructing the jury that the right of plaintiff to recover for damages resulting from the use of unsound food purchased of defendant must be bottomed upon fraud or deceit practiced by defendant upon the plaintiff—in charging that if a sound price was paid and received, the law, raising a warranty of soundness, would imply fraud or deceit from the fact of unsoundness; and that whether the defendant actually knew of the unsoundness or not, being bound to know, he would be responsible for any damages following." We will now consider this ground of appeal. The complaint does not allege a knowledge by the defendant of the unsoundness of the cotton-seed hulls sold to the plaintiff. It is admitted by the appellant that under the laws of this state a sound price is a warranty of a sound commodity, but it is not admitted that the laws of this state will "imply, in such a case, fraud or deceit in the seller from the fact of unsoundness"; and that "whether the defendant knew of the unsoundness or not, being bound to know, he would be responsible for any damages following." The exact language used by the circuit judge is: "If the plaintiff agreed with the defendant to buy sound property, then he had the right to have the defendant to know whether or not he was selling and delivering sound property, and the defendant, whether he actually knew it or not, delivered unsound property for a sound price, the law would imply deception, and would hold the defendant responsible for any damage occurring from the deceit." To hold any one responsible for deception or deceit without any knowledge thereof by the party to be affected thereby is a bold and startling doctrine. We prefer to adopt the rule of law on that subject from 14 Am. & Eng. Enc. Law, pp. 86-88: "As was stated in a preceding paragraph, a fraudulent intent in the case of a false representation

includes knowledge that the representation is false, or what is called a 'scienter.' * * * As a general rule, an action of deceit cannot be maintained if a false representation is made in the honest belief that it is true. In the requirement of a scienter, deceit differs from a breach of warranty. If a representation amounts to a warranty, an action of assumpsit for a breach of warranty, or an action on the case for a false warranty, express or implied, may be maintained, whether the defendant knew the representation was false or not. Therefore, when it is decided in any case that the knowledge of the falsity of a representation is necessary to entitle a person to maintain an action for damages, care should be taken to ascertain whether the action is for deceit or for breach of warranty or false warranty, before the decision is relied upon as authority." See, also, pages 223, 224, 1 Strob., and pages 552, 553, 47 Am. Dec., in the case of *Chisholm v. Gadsden*. We cannot avoid the conclusion that the jury may have been misled in their reliance upon the charge of the trial judge by his language, complained of by the defendant. A new trial must be ordered.

It is the judgment of this court that the judgment of the circuit court be reversed, and the action remanded to the latter court for a new trial.

(61 S. C. 166)

VIRGINIA-CAROLINA CHEMICAL CO. v. MOORE et al.
(Supreme Court of South Carolina. July 17, 1901.)

ACTION ON WRITTEN CONTRACT—PAROL AGREEMENT—EVIDENCE.

1. In an action on a written contract, defendant can set up as a counterclaim, and show by parol evidence, an independent agreement entered into between the parties at the same time, not varying the terms of the written contract, and claim damages for breach thereof.

2. Where a written contract does not contain all the terms of the transaction, parol evidence is competent to show the entire transaction.

Appeal from common pleas circuit court of Spartanburg county; Buchanan, Judge.

Action by the Virginia-Carolina Chemical Company against Moore & Hughes. Judgment for plaintiff, and defendants appeal. Reversed.

D. E. Hydrick and Stanyarne Wilson, for appellants. J. T. Johnson, for respondent.

McIVER, C. J. This action was brought by the plaintiff to recover from the defendants the sum of \$198.50, the same being the price of 10 tons of Globe fertilizer ordered by the defendants, and delivered to them by the plaintiff, in pursuance of a contract in writing, a copy of which is appended to the complaint as a part thereof, and marked "Exhibit A." The defendants by their answer admitted the allegations of the complaint and for a defense set up as a counterclaim an

agreement with the plaintiff, through its agent, Iredell Jones, Jr., through whom the contract (Exhibit A), set up as a part of their complaint, had been made, that they, the defendants, should be the sole agents for the sale of plaintiff's commercial fertilizer for the year 1896 at Duncans, S. C., and the vicinity thereof; that none of its goods would be sold or shipped to any other person or persons at that point, or in the vicinity thereof; and that such agreement was the main inducement to defendants to enter into the contract (Exhibit A). It is also alleged in the answer that the plaintiff, in violation of its said agreement with defendants to make them the sole agents for the sale of plaintiff's fertilizers at Duncans, shipped and sold, and allowed its agents to ship and sell, to other persons at said point, and in the vicinity thereof, its fertilizers, whereby defendants suffered loss and damage to the amount of \$153.50; and that the defendants consent that plaintiff may have judgment for the difference between the amount claimed in the complaint and the amount set up as a counterclaim. The plaintiff replied, denying all the allegations upon which the counterclaim is based. The case being thus at issue came on for trial before his honor, Judge Buchanan, and a jury, and the defendants, having admitted on the record plaintiff's case, claimed and were allowed the right to open and reply. When the defendants offered testimony tending to prove the agreement set out in their answer, such testimony was objected to by plaintiff, and the objection was sustained.

The ground of the objections and the reason for the rulings made seem to have been that, inasmuch as the plaintiff based its action upon a contract in writing, it was not competent for defendants to introduce any parol testimony tending to contradict or vary the terms of the written contract. There can be no doubt that the rule as expressed in 1 Greenl. Ev. § 275, is well settled, that "parol, contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," though, as will be seen by the succeeding sections, this rule is subject to numerous exceptions, which, however, we will not now consider, as we do not understand that the testimony in question was offered for the purpose of either contradicting or varying any of the terms of the written contract set out as a part of the complaint. On the contrary, the pleadings very plainly show that it was no part of the defense to attack or modify any of the terms of the contract, as it was admitted in express terms; and, in addition to this, it was also admitted on the record that, by reason of the terms of such contract, together with the other facts alleged in the complaint, the defendants had become liable to pay to the plaintiff the sum of money demanded in the complaint. So that it is difficult to perceive what application the rule invoked could have to the case as made by the pleadings. The testimony

ruled out was offered, not for the purpose of impairing, altering, or in any way otherwise interfering with the written contract upon which the plaintiff based its claim, but solely for the purpose of showing that by reason of the breach by the plaintiff of another distinct and independent agreement, the plaintiff had become liable to pay the defendants the damages alleged in the answer; and such damages were distinctly pleaded as a counterclaim to the admitted demand of plaintiff. Upon this ground, therefore, we think there was error in rejecting the testimony offered by defendants.

There is, however, another ground equally fatal to respondent. It is quite clear that the contract in writing, set out as an exhibit to the complaint, does not contain all of the terms of the transaction between the parties; and hence, if looked at alone, it would not afford plaintiff any cause of action against defendants. It only purports to be an agreement that the defendants should become the agents of plaintiff to sell its fertilizers at the point named, and the terms of such engagement; but it contains no contract by which defendants bind themselves to pay to the plaintiff any specified sum of money, and it contains no statement of the consideration upon which the defendants agreed to enter into the purposed arrangement. The terms of that paper do not show, of itself, any such contract as could become the basis of a cause of action for any specified sum of money. This being so, then the cases of *Kaphan v. Ryan*, 16 S. C. 352; *Fullwood v. Blanding*, 26 S. C. 312, 2 S. E. 585; *McAteer v. McAteer*, 31 S. C. 313, 9 S. E. 963, and *Willis v. Hammond*, 41 S. C. 153, 19 S. E. 310,—are quite sufficient to show that the testimony was competent in order to show the entire transaction between the parties. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(61 S. C. 155)

VAUGHAN et al. v. BRIDGES.

(Supreme Court of South Carolina. July 13, 1901.)

WILL—CONSTRUCTION OF CODICIL—LIFE ESTATE.

1. Limitations in a will, referred to in a codicil, though not made a part thereof, must be considered in construing such codicil.

2. Testator devised certain land to his sons for life, with the remainder to their children living. By a codicil he devised a certain other tract, which he had thereafter purchased, to his sons, to be divided among them, subject to the limitations and conditions expressed in his will. *Held*, that the land mentioned in the codicil went to the sons for life, with remainder in fee to their surviving children.

Townsend, J., dissenting.

Appeal from common pleas circuit court of Lancaster county; Buchanan, Judge.

Action by J. W. Vaughan and others

against John J. Bridges. Verdict for plaintiffs, and defendant appeals. Affirmed.

Ernest Moore, for appellant. T. Y. Williams, for respondents.

TOWNSEND, Special Judge. This was an action by summons and complaint for the recovery of a tract of 85 acres of land in Lancaster county, the issue of title being raised by the complaint and answer. The cause was heard at October term, 1899, before Hon. O. W. Buchanan, circuit judge, and a jury. The hearing was had upon the admissions and statement of facts and the evidence hereinafter set out, and upon the agreement of counsel below set forth:

"The land here in question is a part of the tract of land known as the 'Douglass Tract,' which tract was owned and possessed by Milton B. Vaughan in fee simple at the time of his death. Milton B. Vaughan died some time about the year 1885, leaving of force his last will and codicil will hereinafter set out, and leaving as his sole heirs at law his sons, William, Wylie, and John H. Vaughan, the latter being called John in the will and codicil. The wife of Milton B. Vaughan being dead, the said Douglass tract of land described in the codicil will of Milton B. Vaughan was partitioned and divided in kind amongst the sons of the said Milton B. Vaughan, viz. the said William, Wylie, and John H. Vaughan, and the said eighty-five acres of land, being part of the said Douglass tract, was set apart to John H. Vaughan. By deed duly executed, dated January 4, 1883, the said John H. Vaughan conveyed to John A. Bridges, his heirs and assigns, 'all my right, title, and interest in and to' the said eighty-five acres of land. This deed contains the usual habendum clause, 'unto the said John A. Bridges, his heirs and assigns,' and the warranty clause as follows: 'And I hereby bind myself and my heirs to defend the same unto the said John A. Bridges, his heirs and assigns, against any and all persons claiming or to claim the same, or any part thereof.' John A. Bridges conveyed the same land in fee simple to the defendant, John J. Bridges, by deed dated January 12, 1887. The defendant, John J. Bridges, ever since the date last named has been in possession of the said tract of land, claiming the same in fee simple. John H. Vaughan died April 1, 1895, leaving the plaintiffs, his children, surviving him. Thereafter the plaintiffs, his children, demanded the possession of said lands from the defendant, claiming to be the owners thereof, and, possession being refused, brought this action. The following is that portion of the will of Milton B. Vaughan bearing upon the question here presented: 'Second. I give, devise, and bequeath to my three sons, William, Wylie, and John, my whole estate of lands, consisting of the Ingram tract, the Addison

land, the Thompson tract and the Caston lands, to be equally divided between them. My will is that John is to have the Ingram lands, Wylie the Caston place, and William the Thompson place; but those tracts, with the Addison lands, are to be valued, and each son made equal in value out of the whole. Each son will take the settlement on the above tracts and as much land adjoining as will make each equal in value when divided; this division to await the termination of my wife's widowhood or her death. [Here follow bequests of negroes.] The lands and negroes which I have given or may be allotted or received by my said three sons, William, Wylie, and John, I give, devise, and bequeath to the said William, Wylie, and John each, respectively, during the term of their respective natural lives, and at their respective deaths to such child or children as they may each, respectively, leave living at the time of their respective deaths; and, in case either of my three sons should die leaving no child or children alive at their respective deaths, then their share of lands and negroes and increase under this title or any other clause of my will is to return and be equally divided between my surviving son or sons and their legal representatives. I mean the children of a deceased son to take among them the share of a surviving son.' The above will bears date June 29, 1850. The following is that portion of the codicil will of Milton B. Vaughan bearing upon the question here presented. It is dated May 16, 1854: 'Whereas, I, Milton B. Vaughan, did, on the 29th June, 1850, make and execute my last will and testament; and whereas, I have since purchased some other estate in lands and negroes that a change or addition becomes necessary, and I desire it also in some few particulars, do hereby make the following codicil will and amendment to the said will of the 29th June, 1850: First. Since my will of the 29th June, 1850, I have purchased a tract of land called the "Douglass Tract" at the commissioner in equity sale, and also two negroes, Charles and Rush. Now, I give, devise, and bequeath said tract of land and negroes to my three sons, William, Wylie, and John, to be equally divided amongst them, share and share alike, subject to the same limitations and conditions as are expressed and declared in the second clause of my will of the 29th June, 1850, and they are to take precisely the same estate in the Douglass tract and negroes Charles and Rush as is given to them in the property and estate mentioned in the said second clause of my will of the 29th June, 1850.'

"It is agreed by and between the attorneys for the plaintiffs and for the defendant that the presiding judge shall direct a verdict by the jury in this case in accordance with the construction of the will and codicil will of said Milton B. Vaughan which may

be adopted by the court. That is to say, if the court shall adopt the construction contended for by the attorney for the plaintiffs, that under the codicil will and will of Milton B. Vaughan the children of John H. Vaughan were to take an estate in remainder in fee simple in the Douglass tract of land after the termination of the life estate of John H. Vaughan, then the verdict shall be for the plaintiffs. If, however, the court shall adopt the construction contended for by the attorney for the defendant, that under said codicil and will only a life estate was given to John H. Vaughan, and no estate in remainder in the Douglass tract was given to the children of John H. Vaughan, then the verdict shall be for the defendant.

"The presiding judge made the following charge to the jury: 'The plaintiffs bring this action against the defendant, and claim to be the owners of the property by reason of the provisions of the will and codicil will of Milton B. Vaughan. The construction of the will is the matter here at issue. It is agreed among the counsel that, whichever way the court rules, the verdict will be directed according to the construction the court gives of the will. The construction the court gives this will is this: That the plaintiffs have title to this land pursuant to the provisions of clause second of the will, in which the testator says [see clause second of will]. The codicil recites the purchase of a tract of land called the "Douglass Tract," which, it is admitted, includes this tract; and the testator there says [see first clause of codicil]. My idea is that he intended to incorporate the Douglass tract, so to speak, subject to the same limitations. Therefore, I direct a verdict for the plaintiffs.' The presiding judge thereupon refused the written requests to charge which had been in due time submitted by the defendant, and which are correctly set out in grounds of appeal hereinafter stated, and directed a verdict for the plaintiffs. Under the said direction of the court, the jury found a verdict for the plaintiffs for the land in dispute, and judgment was entered for the plaintiffs in accordance with the verdict.

"In due time the defendant gave written notice of intention to appeal to the supreme court of the said state from the said charge, refusals to charge, direction of verdict, rulings, and judgment, and also executed the bond required by order of the circuit court to stay execution pending the appeal. The defendant now appeals to the supreme court of the said state of South Carolina from the said charge, refusals to charge, rulings, direction of verdict, and judgment; and the defendant now states the following exceptions and grounds of appeal:

"(1) Because the circuit judge erred in directing a verdict by the jury in favor of the plaintiffs and against the defendant for the land in dispute, and because the circuit judge erred in failing to direct a verdict in favor of

the defendant. (2) Because the circuit judge erred in holding and charging: (a) That the plaintiffs 'have title to this land pursuant to the provisions in clause second of the will'; (b) that the testator, by the codicil and will, 'intended to incorporate the Douglass tract, so to speak, subject to the same limitations,' to the children of John H. Vaughan as were provided in the second clause of the will as to the other lands there mentioned; (c) that under the said codicil and will the tract of land here in question, being a part of the Douglass tract, was devised in remainder after the death of John H. Vaughan to his children then surviving; (d) that under said codicil and will the said Douglass tract was devised to William, Wylie, and John for life, with remainder to their respective children surviving at the death of each. (3) Because the circuit judge erred in failing and refusing to hold and charge, as duly requested by defendant: (a) That no estate whatever in the Douglass tract of land was devised to the children of the said William, Wylie, and John H. Vaughan by the terms of the said codicil will. (b) That, by the terms of the said codicil and will, William, Wylie, and John H. Vaughan took an estate for life in the said Douglass tract of land, and that the remainder in fee simple in the said tract remained undisposed of by said will and codicil; and that such remainder in fee simple descended to the heirs at law of the said Milton B. Vaughan. (c) That under the admitted and agreed facts in this case William, Wylie, and John H. Vaughan took a life estate in the said Douglass tract of land under the will, and took the fee simple in remainder as heirs at law of the said Milton B. Vaughan; and that under the voluntary partition between the said William, Wylie, and John H. Vaughan the tract of land described in the complaint, being a part of the said Douglass tract, being vested absolutely and in fee simple in the said John H. Vaughan, and passed by the subsequent conveyances to the defendant. (d) That under the admitted and agreed facts in this case the defendant was and is seised of the said tract of land here in question as owner in fee simple thereof. (4) Because, under the agreed and admitted facts in this case, and under the agreement of counsel at the hearing, the circuit judge erred in failing to direct a verdict in favor of the defendant and against the plaintiffs for the land in dispute."

All of the above has been copied from the "case."

As will be seen, Milton B. Vaughan, by his will, devised to his three sons, William, Wylie, and John, and their children, certain lands. By the codicil he devised the Douglass tract to the same three sons, William, Wylie, and John, without any mention of their children. The appellant, who derives his title through John, contends that John took only a life estate in his part of the Douglass tract under the codicil, but that he took

the fee therein descended to him as the heir of his father. The respondents contend that under the codicil John took a life estate, and that they (his children) took the fee-simple interest in remainder. So that the main question here is the construction of the codicil. This can be done only by ascertaining the intention of the testator, and this must be done according to certain rules of construction. In the first place, simply the language which the testator used must be resorted to to ascertain his intention, if plain. If not plain, then it may be considered in the light of surrounding circumstances, but there must be no resort to conjecture. *Hamilton v. Boyles*, 1 Brev. 414; *Howser v. Flood*, 1 Nott & McC. 321; *Canedy v. Jones*, 19 S. C. 300, 45 Am. Rep. 777; *Mellichamp v. Mellichamp*, 28 S. C. 125, 3 S. E. 333; *Durant v. Nash*, 30 S. C. 184, 9 S. E. 19. The language used in the codicil clearly gives John a life estate. There is no difference between appellant and respondents on this point, but they do differ as to the disposition of the fee-simple remainder. Now, what became of the balance of the estate, the fee-simple remainder, after John's life estate? Appellant contends that the testator did not dispose of it, and that John inherited it at testator's death. The respondents contend that the testator did dispose of it,—that he gave it to them (John's children) in remainder after John's life estate. They (respondents) contend that the testator, by the codicil, intended to give his three sons, William, Wylie, and John, and their children, the same estate in the Douglass tract that he gave them (his three sons and their children) in other lands by his will. No such intention appears in the language used in the codicil. The language there used refers entirely and exclusively to the respective interests which the three sons, William, Wylie, and John, were to take, and John's children are not mentioned. In order that John's children take an interest, there must be words added to the codicil; that is, if John's children are to take, it must be by implication. Such estates are sometimes created. An implication is admissible when it is plain from the language used by the testator that it should be allowed, or when it is necessary to carry out the provisions of the instrument. *Taveau v. Ball*, 1 McCord, Eq. 7; *Shaw v. Erwin*, 41 S. C. 212, 19 S. E. 499; *Carr v. Porter*, 1 McCord, Eq. 60. I fail to find any words in the codicil which can be construed so as to show the intention on the part of testator to include John's children. There is not the remotest allusion to them, directly or indirectly. An implication, therefore, is not admissible from testator's language, nor do I see any foundation for an implication on the ground of necessity, because there can be no trouble in carrying out the provisions of the codicil without such implication. At the death of testator, John took the life estate under the codicil, and he took the fee-simple remainder, which had not been disposed of (*Andrews v. Loeb*, 22 S. C. 274), as heir of tes-

tator, and, the two estates having merged one into the other, gave him the fee-simple title to the land. In *Renwick v. Smith*, 11 S. C. 306, an attempt was made to interpolate the words "and his children" in a devise similar to the one under consideration, but the court refused it, because the intention of the testator must be ascertained from the language which he used, and not from conjecture. The case of *Andrews v. Loeb*, supra, furnishes an instance in which the fee was not disposed of by the devise. Chief Justice Simpson, in delivering the opinion of this court, says: "We adopt the reasoning of the circuit judge, and concur in his conclusion. This conclusion might also be sustained upon another ground, if necessary. At the death of Moses Andrews, inasmuch as he devised only a life estate to his widow, without disposing of the fee in terms to any one, the fee descended to his heirs. These were his widow and his two children, who inherited one-third each; that is, the fee descended to them in that proportion, awaiting a sale as directed by the will upon the termination of the life estate." So, in this case, I think that the testator did not, by his codicil, dispose of the fee in the Douglass tract of land, but that at his death it descended to John as his heir, and from him, by deed, to John A. Bridges, and from John A. Bridges, by deed, to the appellant, John J. Bridges; and that it was error in the circuit judge to charge the jury that plaintiffs were entitled to an interest in said land under the codicil, and that he erred in the other respects as hereinbefore set forth in the grounds of appeal, and also in refusing appellant's requests to charge. I think, therefore, that the judgment of the circuit court should be reversed, and the case remanded for a new trial; but, as the majority of this court think otherwise, the judgment of the circuit court must be affirmed.

POPE, J., and GARY, A. J., dissent.

McIVER, C. J. After a very careful examination of this case, I regret to say that I am unable to concur in the conclusion reached by his honor, Judge TOWNSEND, acting associate justice. The facts of this case are so fully, fairly, and clearly set forth in the opinion of Judge TOWNSEND as to supersede the necessity for any further statement here, and the only question is whether the testator, Milton R. Vaughan, died without making any disposition, either by his will or the codicil thereto, of the remainder in a tract of land known as the "Douglass Tract," after the termination of the life estates created therein by the codicil to his will. In the first place, the presumption is that a person who undertakes to dispose of his property by will intends to dispose of all of his property, and the whole of his interest therein, unless there is something in the will manifesting a contrary intent. Here there is nothing whatever in the

will, or at least those portions of it which are set out in the "case" (for there is no full copy of the will set out), which manifests any such contrary intent. On the contrary, the recitals in the codicil plainly show that the testator did not intend to die intestate as to any portion of his property; for those recitals show that the testator had acquired other property, a part of which was real estate,—the Douglass tract,—after he had made his will, which subsequently acquired property, under the law as it then stood, would not have passed under his will; and therefore he proceeded to execute a codicil to his will, apparently for the express purpose of disposing of such after-acquired property. This strengthens the general presumption that the testator intended to dispose of his whole estate, and, while not conclusive, as the question still remains whether he has expressed such intention in such a way as will warrant the court in carrying into effect such intention, yet it affords some aid in construing the language actually used by the testator in his will and codicil; for, after all, the cardinal rule of construction of a will is to seek for the intention of the testator as disclosed by the language which he used. In the first place, I would remark that it seems to me to be misleading to say that the testator, by his will, devises to his three sons, William, Wylie, and John, "and their children," certain lands, whereas by the codicil he devises the Douglass tract to the same three sons, William, Wylie, and John, without any mention of their children; for in the second clause of his will the testator uses this language: "I give, devise, and bequeath to my three sons, William, Wylie, and John [without mentioning their children], my whole estate of lands [designating the several tracts], to be equally divided between them," and then proceeds to indicate what tract each son shall take, and how and when the division shall be made; and, after making some bequests of negroes, then proceeds as follows: "The lands and negroes which I have given or may be allotted or received by my said three sons, William, Wylie, and John, I give, devise, and bequeath to the said William, Wylie, and John, each, respectively, during the term of their respective natural lives, and at their respective deaths to such child or children as they may each, respectively, leave living at the time of their respective deaths; and in case either of my said three sons should die leaving no child or children alive at their respective deaths, then their share of lands and negroes and increase under this title or any other clause of my will is to return and be equally divided between my surviving son or sons and their legal representatives. I mean the children of a deceased son to take among them the share of a surviving son." In the codicil the testator, after reciting the fact that since the making of his will he had acquired other property, to wit,

the Douglass tract of land and two negroes, Charles and Rush, proceeds in the following language: "Now, I give, devise, and bequeath said tract of land and negroes to my three sons, William, Wylie, and John, to be equally divided amongst them, share and share alike, subject to the same limitations and conditions as is expressed and declared in the second clause of my will of the 29th June, 1850; and they are to take precisely the same estate in the Douglass land and negroes Charles and Rush as is given to them in the property and estate mentioned in the said second clause of my will of the 29th June, 1850." It seems to me that the language used in the codicil necessarily implies an intention upon the part of the testator that the Douglass tract should, like the other lands mentioned in the second clause of the will, above copied, go to the three sons for life, with remainder in fee to their surviving children. What other possible meaning were the words, "subject to the same limitations," intended to express? If the testator, in the codicil, instead of using the words, "subject to the same limitations," expressed in the second clause of the will, had repeated the words used in the second clause of the will, by which the estate of the sons was declared to be for life only, I suppose it could not be doubted that the effect would be to give the sons an estate for life, with remainder in fee to their surviving children; and it seems to me that the words actually used in the codicil amounted, practically, to a repetition of the language used in the second clause of the will. I have examined the cases cited to sustain a contrary view, and do not think that they are sufficient for the purpose. In my opinion, therefore, the judgment of the circuit court should be affirmed, and, as the majority of the court concurs in this conclusion, the judgment of the circuit court is affirmed.

(81 S. C. 170)

PROCTOR v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 17, 1901.)

NEGLIGENCE AT CROSSING—INSTRUCTIONS—PLEADING AND PROOF—VARIANCE.

1. In an action for personal injuries it is not reversible error for the judge in his charge to say that the allegation of damages for \$1,995 was made only to avoid removal to the United States court where the jury find a verdict for \$740.

2. Where the complaint in an action against a railroad company alleges that defendant "willfully, wantonly, and recklessly," with intent to injure plaintiff, let off steam from its engine, and blew the whistle, thereby frightening plaintiff's team at a crossing, an instruction that the jury may give damages arising from negligence alone was erroneous.

Appeal from common pleas circuit court of Greenwood county; Benet. Judge.

Action by John M. Proctor against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

The following complaint was filed:

"John M. Proctor, the plaintiff above named, by Graydon & Giles, his attorneys, complaining of the Southern Railway Company, the defendant aforesaid, alleges:

"(1) That the said defendant, the Southern Railway Company, is a corporation, duly chartered under and by virtue of the laws of the state of Virginia, and owns and operates a certain railroad between the cities of Greenville and Columbia, in this state, known as the 'Columbia & Greenville Railroad Company,' together with the tracks, cars, locomotives, and other appurtenances thereunto belonging. (2) That on the 13th day of September, 1899, while the plaintiff was returning from the city of Greenwood to his home in the county of Greenwood, in the state of South Carolina, and while traveling along the public road near the track of the defendant, driving two mules hitched to a two-horse wagon, at a point near the oil mill in the town of Ninetysix, said county, the plaintiff observed an engine and a train of freight cars attached thereto belonging to the defendant, and operated by its agents, servants, and employes, on the track of the defendant, and moving in the direction of the said town of Ninetysix, and towards the plaintiff, and about to meet the plaintiff's wagon and team. (3) That the plaintiff, to avoid meeting the said engine and train of freight cars attached thereto, drove out of and off of the said public road, and away from the track of the defendant, and stopped his said team to allow the said engine and train of freight cars attached thereto to pass, the said plaintiff being then and at all times in plain and open view of the defendant, its agents, servants, and employes; when the defendant, its agents, servants, and employes, saw that the plaintiff had moved his wagon and team off from the public road, and away from the noise of said engine and train of freight cars attached thereto, then the defendant, its agents, servants, and employes, caused the said engine and train of freight cars attached thereto to come to a full stop on the track of the defendant's road. (4) That the plaintiff, seeing that the said engine and train of freight cars attached thereto had come to a full stop, then drove his said wagon and team back into the said public road, and attempted to pass the said engine and train of freight cars attached thereto while standing; but, as soon as the plaintiff approached near and opposite to the said engine, he being in the said public road, the defendant, its agents, servants, and employes who were in charge of the said engine and train of freight cars attached thereto, and being in full and plain view of the plaintiff and his wagon and team, with intent to frighten and scare the plaintiff's team and injure the plaintiff, willfully, wantonly, and recklessly, and not regarding the rights of the plaintiff in that regard, let off steam from said engine, blew the

whistle attached to said engine, so that the said team of mules became frightened and unmanageable, and were made to run away, and threw the plaintiff out of said wagon, and the wheels of said wagon were made to pass over the body of the plaintiff, inflicting serious and painful wounds and bruises on plaintiff's back, foot, and injuring the plaintiff internally, so that he became ill and sick, and for a long time was unable to attend to his business, and was confined to his bed, and suffered intense pain from the injuries to his left kidney; and he fears that from the effects of said injuries he will never be strong and well again. (5) That by reason of the injuries as aforesaid, received by the willful, wanton, and negligent conduct of the defendant, its agents, servants, and employes, the plaintiff has been damaged by the defendant in the sum of \$1,995. Wherefore the plaintiff demands judgment against the defendant in the sum of \$1,995, and the cost of this action."

The trial judge instructed the jury as follows:

"The case you have been trying, and have now about reached the conclusion of, is an action for damages brought by the plaintiff, Proctor, against the Southern Railway Company, for alleged injuries said to have been inflicted upon him by the railroad company or its servants. The allegations are of such a character as, if established by testimony, by the preponderance of proof, would justify a jury in finding a verdict for damages, either actual damages or punitive, or both, or only actual or only punitive. It depends entirely on the testimony. The allegations are so framed that counsel had the right to introduce testimony as to actual damages, and also evidence as to punitive, vindictive damages; and it is left entirely with the jury to say from the testimony whether the plaintiff has made out his case for damages of any kind, or in any amount. You have heard counsel on both sides speak of actual and compensatory damages, and of punitive, vindictive, or exemplary damages, and perhaps a word or two of explanation may help you so that you may the better weigh the testimony. When a man seeks only actual damages, called also 'compensatory damages,' he seeks at the hands of the jury only enough money to place him where he was before,—to pay him back, to compensate him for the actual injury. But when he seeks and obtains punitive damages as well as actual, the jury in the case, if it is a proper case, are allowed in law, after having ascertained how much he ought to receive as compensation, to add another amount of money, not for the purpose of the compensation of the plaintiff, but for the purpose of inflicting a penalty upon the defendant for the wrongdoing proved,—something in the nature of a punishment, very similar to a fine imposed in a criminal court for a violation of the law; and intended not only

to punish for the wrongdoing in the past, but to act as a warning for the future not to repeat such wrongdoing. Hence they are called 'punitive damages,' the word 'punitive' meaning of the character of punishment. They are also called 'vindictive damages,' supposed to embody the righteous indignation of a jury at wanton, reckless, willful wrongdoing; and they are also called 'exemplary damages,' because they are supposed to operate as an example not only to the defendant who suffers the penalty, but to others in the same line of business, who will take warning.

"Now, in this case, the plaintiff alleges that the injuries which he alleges in his complaint were inflicted upon him because of the willful, wanton, and reckless conduct of the railway company and its servants. These allegations, if they are sustained by sufficient proof, by the preponderance of the testimony, would justify a jury in finding punitive damages, and also actual, if proved. It is alleged here that the conduct spoken of as willful, wanton, and reckless consisted in blowing the whistle of the engine and in letting off steam in a willful, wanton, and reckless manner; and, further, that those acts were done with the intent to frighten the plaintiff's team of mules, and also to injure him. So that, under the allegations of this complaint, the plaintiff charges not only that the conduct was willful, wanton, and reckless, but with intent to frighten his mules, and to injure him. He alleges, further, in his complaint, that, as a consequence of that conduct on the part of the railroad servants, he suffered injury; that his team ran off, having been frightened by the blowing of the whistle and the letting off of steam in the manner described; and that he suffered painful wounds and bruises in his back, and he also suffered internal injury, which caused him to be ill and sick, and unable to attend to business for a long time; and that he was confined to his bed, and suffered intense pain from injuries to his left kidney, so that he will never be well and strong again; and for these alleged injuries he claims damages to the extent of \$1,995,—that otherwise odd sum being manifestly, of course, to come within the amount for which a suit of this character can be allowed in this court, and not removed to the federal court. If they had asked for more,—for \$2,000,—probably the railroad company would have had a petition to remove it to the other court; so that the amount alleged in the complaint may be explained in that way. \$1,995 might have been \$1,999.99, so far as that is concerned. The railway company, answering, denies that the plaintiff is entitled to any damages at all; denies all the allegations of the complaint. Therefore the burden of proof is put upon the plaintiff to establish his case according to the measure of proof, which is always applied in the court of com-

mon pleas before a jury. In the court of common pleas he is not required to prove it beyond a reasonable doubt, but by the preponderance of the testimony. So that you will take all the evidence that seems to favor, tends to favor, or does favor the plaintiff's claim on all these allegations, and put that evidence in one scale, and in the other scale over against it put all the evidence, no matter from what witness, that is against the plaintiff's claim, weigh the two batches of testimony, and, if the testimony in favor of the plaintiff's claim clearly weighs more than the testimony against it, then the plaintiff's claim has been established by the preponderance of the testimony,—which means the greater weight of the testimony; and I need not charge this intelligent jury that 'greater weight of the testimony' cannot and should never mean the greater number of witnesses, because the testimony of one good, honest, truthful witness should, in the opinion of an intelligent jury, outweigh the testimony of a dozen or more doubtful or untruthful witnesses. In other words, the question is, how much truth is there in the testimony? And if the jury finds more truth in the testimony of one man than in the testimony of twenty, then that man's testimony would outweigh the twenty who might be against him. You have heard all the testimony in the case. You are first to determine, how were the injuries inflicted? That is one of the main facts first to be ascertained. Did the plaintiff suffer any injuries? If so, what were they, and to what extent has he been injured in his person, and are the injuries temporary, cured or curable, or permanent? If he has, according to the testimony, and that is your view of it, suffered injuries, then the next question is, who is to blame? He charges that the railway company is to blame, and should be made to pay him damages; in other words, he charges that the conduct of the railway company and its servants was the direct, proximate cause of the injuries he suffered. If that is your view of the case by the preponderance of the testimony, then, if you are satisfied that the injuries were due directly to the wanton conduct of the railway company, or to the reckless conduct of the railway company, or to the negligence of the railway company, the plaintiff would be entitled to damages. If simply to the negligence—want of due care—of the railway company, he would be entitled to actual damages. If due to the wanton conduct,—the willful conduct,—with intent to injure plaintiff (after some explanation on that point which I shall give you) he would be entitled to punitive damages.

"The plaintiff alleges that the blowing of the whistle and the letting off of steam was done recklessly. That means done without care. 'Recklessly' generally means 'gross negligence.' It is a little stronger than 'carelessness' in its usual application, but still

an allegation of reckless conduct would justify a jury in finding that the conduct was ordinary negligence,—want of due care,—if the plaintiff failed to prove gross negligence, wanton, willful misconduct; and what is meant by due care is simply that measure of caution and carefulness which was proper under the circumstances. That measure of care necessarily varies in the different cases, just because the circumstances developed in the different cases vary. A man who is driving a team of horses is expected by all people of intelligence and common sense to exercise due care,—just that amount of care which he should exercise in proportion to the probable danger in driving a team of horses; and he is expected to exercise more care in driving that team of horses along the street of a town than out in the country. For obvious reasons, the measure of care varies. So, also, the man who is driving or operating a locomotive and train, if there is more danger in working such machinery, from its weight, and the speed with which it moves, and the tremendous power which it takes, then common sense and intelligence would expect of him a greater degree of care, if there is greater danger in running a train than in driving a team of horses. So, also, more care is expected of an engineer or conductor running a train along the streets of a town, where there are numerous traveled places, than out in the country, where they have no reason to expect the presence of any person, may be, for miles, or any other obstruction in the way. You see, therefore, that the measure of care necessarily varies, and under the varying circumstances just this amount of care is necessary: that amount of care which would or should have been exercised by a person of ordinary intelligence and prudence. A jury can easily apply that in every case. In this case, therefore, you are to say what amount of care should have been exercised by the railway company's servants in operating the train on the day mentioned in the complaint, at the place mentioned in the complaint, under the circumstances detailed in the testimony under the allegations of the complaint. So much for due care.

"The plaintiff goes further, and says that the conduct of the railway company's servants was wanton, willful, showing an utter disregard of the rights of the plaintiff, and it was done with intent to frighten his team, and to injure him. Counsel for the defendant has submitted to the court as matter of law that a principal cannot be held liable in punitive damages for the wrongful acts of his agent or servant, and cited authority from the supreme court at Washington in other cases; and, as a general proposition, that is good law. The counsel for the railway company in this case submitted that as law, arguing that (as those cases argued in the cases cited) a master should not be

subjected to a penalty or a punishment for the willful and wanton misconduct of his servant. He should be held liable in compensatory damages only; actual damages only. But, like all general statements, they are not always applicable, not applicable to all cases. What is good law in one case would not be good law in another case; and the opinion of the highest court in the land, while good as to that particular case, might not be good as to another case, where the facts would not correspond sufficiently with the facts of the case before the court; because whether or not a master or principal should be held liable in punitive as well as actual damages for the wrongful act of his servant would depend on whether or not the acts of the servant or agent were committed while he was conducting the business of his master or principal within the scope of his agency, actually operating within the limit of his agency as such servant of the master, and whether the principal or master had either expressly or impliedly authorized or ratified or adopted the acts of the servant, or whether the master or principal had been guilty of negligence in selecting or employing his servant or agent. For example, if the railway company exercises due care in selecting and employing its servants to operate the train, and if those servants, in operating the trains, are guilty of personal acts of violence, for instance, upon a passenger, not in the line of the business as railroad servants, but as individuals, why the railroad company would not be held responsible for such violent conduct on the part of the servants; but in conducting the business as servants they mistreated or maltreated a passenger, or are guilty of any wanton, willful misconduct against any person, passengers, or other people, or against property, if doing that in the line of the business, conducting the work of the master, then the general principle laid down would not apply, because the railroad company is held to act through its servants. That is all that the public sees of a railway company,—the servants who operate the trains. They stand to the public as the railway company, and if, in the conduct of the business as the railway company's servants or employes, they are guilty of willful, wanton, reckless misconduct towards the public, showing an utter disregard for the lives and property or rights of the public, then the railway company, being a quasi public servant, is held responsible in punitive damages. So, also, if the railway company could be shown in a proper case to have been reckless and careless in employing servants, placing incompetent, inexperienced, and careless men in charge of dangerous machinery, like a locomotive, and if that incompetent, careless, and reckless servant, who should not have been employed by the railway company, and who would not have been employed by the railway company if they had ex-

exercised proper care in selecting and employing a servant, is guilty of conduct which causes injury to the public because of his recklessness and incompetency, why then the railway company would, in such a case, be properly held liable in punitive damages, as well as in actual. As I have said, the railway company is a quasi public servant. It does not operate its railroad just as a private corporation operates its factory or its mills, or any other business it may conduct. The railway company owes certain duties to the public. It does not run its road entirely for its own profit, but it is held bound to observe certain duties, and to discharge those duties to the public, and among them is that they should employ safe, competent servants, who will run their trains with due care. So, also, it is very properly held that, while whistling, blowing the whistle, and letting off steam may be necessary—must be necessary—in operating a railroad, even if that, however, is done unnecessarily, and wantonly and willfully, for the purpose of frightening horses or other cattle near the track, that is an infringement of the railway company's duties to the public; and, if injury results therefrom, the railway is properly held liable in damages, either in actual or both actual and punitive, as the testimony in a proper case may justify. It is for you to say in this case whether the plaintiff has proved by the preponderance of the evidence that he was injured in the manner alleged. If he was, what was the extent of his injury? If he was injured to a certain extent, whether the injuries are permanent or temporary or both. If so, was the railway company to blame directly as the cause of that injury? If so, you will find out whether he is to obtain actual damages only, or actual and punitive. With my explanation of the law, I think you will be able to say from the testimony whether he is entitled to either or both. If you come to the conclusion that he is entitled to damages, the amount is entirely in your power to assess, but it must be, of course, in accordance with the testimony. The amount claimed is \$1,995. You cannot go beyond that, no matter what the damages proved; nor can you go to that extent unless you are satisfied that the proof justifies that as an amount, but any amount less than that. If you come to the conclusion that he is entitled to any damages, you will assess in accordance with the testimony. If he is entitled to actual damages, you will first fix that amount. Then also ask: Is he also entitled to punitive damages? Was the conduct of the railway company wanton, willful, with intent to injure—frighten the team and injure the plaintiff? If you have not come to the conclusion, then you can only grant compensatory damages; actual, not punitive. If you are satisfied that the injuries were inflicted by the railway company, and were due simply to a want of due

care, then you will simply award actual damages, and not punitive damages. If you come to the conclusion that the plaintiff is entitled to a verdict for damages in any amount, you will write the verdict out in words, and not in figures, and say, 'We find for the plaintiff so many dollars damages.' If the testimony does not satisfy you that the plaintiff is clearly entitled to his damages by the preponderance of the testimony, then you will say, 'We find for the defendant.'

"I am very glad to be able to congratulate you and the counsel that this case has been argued without any reference at all to wealthy corporations, or any attempt being made to stir up any prejudice in the minds of the jury against railway corporations, which always seem to me an insult to the intelligence of the jury, and altogether apart from the evidence in the case. You are left as honest men in this case by the counsel in this cause to judge of these parties, the railway on the one side and the plaintiff, Proctor, on the other, as if they were two individuals, or two letters of the alphabet, A against B; and you are to decide from the testimony whether the plaintiff has made out his case, and award the damages if he has. If he has not, then you will find for the railway company. You will take the record, and write your verdict on the back of the summons and complaint."

From judgment for plaintiff, defendant appeals.

T. P. Oothran, for appellant. Graydon & Giles, for respondent.

McIVER, C. J. This was an action brought by the plaintiff to recover damages for injuries sustained by reason of the alleged willful, wanton, and reckless conduct of the servants and agents of the defendant company. The allegations of the complaint (which should be fully set out by the reporter in his report of the case) may be stated briefly as follows: That on the 13th day of September, 1899, the plaintiff, while driving his wagon, drawn by two mules, along the public road, which ran very near the railroad track of the defendant company, seeing a freight train approaching, drove out of the public road, and away from the defendant's track, for the purpose of allowing the said train to pass not so near plaintiff's wagon as it would have been if the plaintiff had remained in the public road, when the officers and agents in charge of said freight train stopped said train; that plaintiff, seeing that the train had stopped, drove his wagon back into the public road, with a view to pass said train while it was stopped; but, as soon as the plaintiff had approached near and opposite to the engine drawing the train, he being in the public road, those in charge of the train, being in full and plain view of the plaintiff and his wagon, with intent to frighten and scare

plaintiff's mules and injure the plaintiff, willfully, wantonly, and recklessly, and not regarding the rights of the plaintiff, let off steam from the engine, blew the whistle, so that the mules became frightened and unmanageable, and were made to run away, whereby plaintiff was thrown from the wagon, which caused serious injuries to plaintiff specified in the complaint. The defendant answered, denying each and every allegation in the complaint.

The case came on for trial before his honor, Judge Benet, and a jury, and, after the pleadings were read, his honor, as seems to be his custom, delivered a preliminary charge to the jury, in which, as we understand it, he stated to the jury fully and clearly the issues which they were called upon to try, but, as we shall see presently, in his general charge he stated the issues differently, and, as we think, erroneously, in one respect at least. At the close of the testimony, and after hearing the argument of counsel and the general charge of the circuit judge, the case was submitted to the jury, who found a verdict in favor of the plaintiff for the sum of \$740, and from the judgment entered on the said verdict (a motion for a new trial having been made and refused) the defendant appeals upon the several grounds set out in the record, which need not be set out here, as it is claimed by counsel for appellant in his argument here—justly, we think—that the various grounds raise practically but two questions, which are stated by counsel as follows: First. Did the circuit judge err in declaring to the jury that the plaintiff had fixed the amount of his damages at \$1,995 to avoid a removal of the case to the federal court? Second. Did the circuit judge err in charging the jury that the plaintiff might recover upon proof of ordinary negligence? To better understand the first of these questions, it will be necessary to state that the circuit judge, in his general charge to the jury, after stating the nature and extent of the injuries which the plaintiff, in his complaint, alleged he had received, proceeded to use the following language: "And for these alleged injuries he claims damages to the extent of \$1,995,—that otherwise odd sum being manifestly, of course, to come within the amount for which a suit of this character can be allowed in this court, and not removed to the federal court. If they had asked for more,—for \$2,000,—probably the railroad company would have had a petition to remove it to the other court; so that the amount alleged in the complaint may be explained in that way." Why such a matter should have been injected into this case, we are utterly at a loss to conceive. It was wholly foreign to any issue which the jury were called upon to try. It was not mentioned or alluded to in any way either in the pleadings or the testimony, and we do not see that it had any proper place

in the case. A plaintiff who brings an action for damages may fix the amount which he claims at any sum he pleases, and the only legal bearing or effect that it can possibly have is to forbid the jury from giving any more damages than the amount claimed in the complaint. What may have been the motives of the plaintiff in fixing the amount mentioned is a matter solely for him, and is not, properly, to be inquired into by any one else. While, therefore, we cannot approve of the practice of thus injecting into a case any matter which is wholly foreign to the issues joined in such case, the question to be determined by this court is whether there was any error of law in thus incorporating into a charge to the jury matters wholly irrelevant to any issue in the case. It is contended that such language was calculated to prejudice the minds of the jurors against the defendant; but, while this may be the effect in some cases, yet in this case it seems pretty clear that no such effect was produced, for the amount found by the jury was but little more than one-third of the amount to which they had a right to go, provided they thought the facts proved were sufficient to warrant such a finding. This seems to negative the idea that the jury were prejudiced against the defendant by the language used by the circuit judge in reference to the motive which probably influenced the plaintiff in fixing the amount of his damages at the sum stated in the complaint. We cannot say, therefore, that there was any error of law on the part of the circuit judge in using the language which is made the basis of the exception raising the first question.

The second question is of a much more serious character. In every system of pleading with which we are acquainted—not even excepting the liberal system of code pleading—one fundamental rule has always been acknowledged, and that is, a plaintiff who brings an action for damages for an alleged wrong done to him must state the facts constituting such wrong in intelligible language, so that the defendant may be able to understand what he is charged with having done, and thus enabled to meet the charge either with a denial or some satisfactory explanation. This rule is based upon common right and common sense; and, while the system of code pleading is designed to obviate the asperities of some of the artificial and technical rules of the former system of pleading, we do not understand that it was intended to abrogate any of the fundamental rules based upon common right. Hence, when a person is brought into court, charged with having done certain acts which it is alleged caused wrong and injury to the plaintiff, he cannot be called upon to answer for other acts of a different character, which are not charged in the complaint. Even the recent act of 1898 (22 St. at Large, p. 693) entitled "An act to regulate the practice in the courts

of this state in actions *ex delicto* for damages," was not designed to have, and cannot have, the effect of abrogating the rule above stated; for in the first section that statute simply declares that in such an action it is not necessary to make any separate statement of the facts which would entitle him to recover actual or exemplary damages, and he shall not be required "to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instructions of the court." And as is well said by Mr. Justice Pope in *Glover v. Railway Co.*, 57 S. C., at page 234, 35 S. E. 512, the object of that statute, or at least the first section of it, was to alter "the practice in this state in actions *ex delicto* for damages; and that since this act so much of the case of *Spellman v. Railroad Co.*, 35 S. C. 486, 14 S. E. 947, 28 Am. St. Rep. 858, as indicated that the pleadings in our courts in damage suits should point out whether punitive or actual damages were sought, and that the recovery in such suits should correspond to the issue thus raised, is no longer authority in this state." Indeed, the first section of the act of 1898 has no application to the case now under consideration, for that section applies only to the manner in which the claims for actual and exemplary damages should be made, and in this case no such question is presented. The second section of the act of 1898 does, however, apply, and, as we think, so far from abrogating the rule upon which we rely, does in fact recognize such rule by the language (which we italicize) in that section which reads as follows: "That in all cases where two or more acts of negligence or other wrongs *are set forth in the complaint*, as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instruction of the court, and to recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs *alleged in the complaint*." It is manifest that this section does not authorize a recovery for any act of wrong not "alleged in the complaint," but plaintiff may recover for any act or wrong which is alleged in the complaint, although such acts or wrongs may not be separately stated. It is clear that the object of this section was to obviate the necessity of alleging acts of wrong separately, and to relieve the plaintiff from being required to elect, where one or more acts of wrong are alleged in the complaint, upon which he would proceed to trial. Now, in this case, there is no allegation whatever that the plaintiff was injured by the ordinary negligence (as the circuit judge terms it in his charge) of the defend-

ant, and no fact is alleged which would tend to show such negligence. On the contrary, the allegation is that the defendant did the acts complained of "with intent to frighten and scare the plaintiff's team and injure the plaintiff willfully, wantonly, and recklessly, and not regarding the rights of the plaintiff in that regard." This, so far from being an allegation of the want of due care on the part of the defendant which would constitute "ordinary negligence," is, on the contrary, an allegation that the defendant purposely—not negligently—did the acts complained of with intent to injure the plaintiff. So that the practical question presented is whether there was error on the part of the circuit judge in instructing the jury that, even if they were not satisfied that the defendant did the acts complained of in the manner and with the intent alleged in the complaint, they still might find for the plaintiff, if they were satisfied that the injuries complained of were due "to the negligence, or want of due care, of the railroad company." It seems to us clear that such an instruction would be erroneous; for it would be, in effect, saying that, where a defendant is charged with one wrong, the jury may hold him liable if a wholly different wrong from that charged is proved against him,—that if a person is charged with willful and intentional wrong, and such charge is not sustained by the testimony, still he may be held liable if the jury are satisfied that he has committed an entirely different and distinct wrong with which he is not charged. In other words, that a person who is brought into court to answer to one charge may be held liable under another and different charge, for which he has not been called upon to answer. This, it seems to us, would be in direct violation of the fundamental rules of law, as well as of common justice and right, as well as in direct conflict with the analogies of the law afforded by the cases upon this very subject of negligence; for it is well settled that in an action to recover damages for injuries sustained by reason of the alleged negligence of a railroad company the plaintiff will not be permitted to rely upon any act of negligence not alleged in the complaint. *Fell v. Railroad Co.*, 33 S. C. 198, 11 S. E. 691. And the same doctrine is recognized in the comparatively recent case of *Spires v. Railroad Co.*, 47 S. C., at page 30, 24 S. E. 993, where Mr. Justice Gary, in delivering the opinion of the court, uses this language: "If the complaint had alleged specific acts of negligence, * * * then the plaintiff would be restricted to the introduction of such testimony only as would tend to prove the acts of negligence alleged in the complaint." This is for the obvious reason that it is neither fair nor just to require a party who is brought into court, and called upon to answer for certain specified misconduct, to answer for other miscon-

duct of a totally different character with which he has not been charged, as he cannot reasonably be expected to be prepared to answer, as no such charge has been brought against him.

The view which we have adopted is specially applicable to a case like the present, where the nature of the wrong charged in the complaint is not only different from that for which the jury were erroneously instructed the defendant could be held liable, but is also attended by very different consequences; for in a case where the wrong charged in the complaint is willful, and done with intent to injure the plaintiff (as it is here), contributory negligence on the part of the plaintiff cannot be pleaded as a defense. See, in addition to the authorities cited by appellant's counsel, 7 Am. & Eng. Enc. Law (2d Ed.) at page 443, where it is said: "The doctrines of contributory negligence have no application in cases where the injury is inflicted by the willful act or omission of the defendant. In such cases contributory negligence is not a defense, and, in its legal sense, cannot exist." And this doctrine has been expressly recognized in this state in the case of *Darwin v. Railroad Co.*, 23 S. C. 531, 55 Am. Rep. 32. There is also another material difference, and that is, under a charge like that made in this complaint, the plaintiff may recover not only his actual damages, but also punitive, vindictive, or exemplary damages; whereas, under a charge of mere "ordinary negligence," the defendant may plead contributory negligence as a defense, and the plaintiff is not entitled to recover punitive, vindictive, or exemplary damages, but is limited to a recovery of his actual damages. That the circuit judge did instruct the jury that they might find for the plaintiff even if they were not satisfied that the charges as stated in the complaint were established, but were satisfied that the plaintiff's injuries were caused simply by the "ordinary negligence" of the defendant, may be seen by an inspection of his charge (which, for this purpose, should be set out by the reporter in his report of the case), where we find the following language: "If you are satisfied that the injuries were due directly to the wanton conduct of the railway company, or to the reckless conduct of the railway company, or to the negligence of the railway company, the plaintiff would be entitled to damages. If simply to the negligence—want of due care—of the railway company, he would be entitled to actual damages. If due to the wanton conduct,—the willful conduct,—with intent to injure plaintiff, * * * he would be entitled to punitive damages." (Italics ours.) Again, the circuit judge used this language: "The plaintiff alleges that the blowing of the whistle and the letting off of steam was done recklessly. That means done without care. 'Recklessly' generally means 'gross negligence.' It is a little

stronger than 'carelessness' in its usual application, but still an allegation of reckless conduct would justify a jury in finding that the conduct was ordinary negligence,—want of due care,—if the plaintiff failed to prove gross negligence, wanton, willful misconduct; and what is meant by due care is simply that measure of caution and carefulness which was proper under the circumstances." Here it is clear that the circuit judge confounded two separate and distinct, and in fact opposite, things,—recklessness and the want of ordinary care; and this, we think, was error. In 16 Am. & Eng. Enc. Law, 392-395 (a passage which is quoted with approval by Mr. Justice Gary in *Pickens v. Railroad Co.*, 54 S. C., at page 505, 32 S. E. 569), it is said: "The element which distinguishes actionable negligence from criminal wrong or willful tort is inadvertence on the part of the person causing the injury. He may advert to the act of omission of which he is guilty, but he cannot advert to it as a failure of duty—that is, he cannot be conscious that it is a want of ordinary care—without subjecting himself to the charge of having inflicted a willful injury, because one who is consciously guilty of a want of ordinary care is, by implication of law, chargeable with an intent to injure; malice 'being but the willful doing of a wrongful act.' * * * 'Negligence' and 'willfulness' are the opposites of each other. They indicate radically different mental states. The distinction between negligence and willful tort is important to be observed, not only in order to avoid a confusion of principles, but it is necessary in determining the question of damages, since, in the case of an injury by the former (negligence), damages can only be compensatory, while in the latter (willful wrong) they may also be punitive, vindictive, or exemplary,"—to which we may add another reason: that in the one case contributory negligence may be pleaded as a defense, while in the other it cannot be. See, also, 7 Am. & Eng. Enc. Law (2d Ed.) at page 443, where it is said: "'Willfulness' and 'negligence' are the opposites of each other; the one signifying the presence of intention or purpose, the other its absence. This distinction has not always been observed; consequently there are cases that use the terms 'gross' or 'willful' negligence to designate willful injuries." Now, while these passages refer, in terms, to "willfulness" as contradistinguished from "negligence," yet it seems to us that the same may be said of "recklessness," especially where, as in this case, it was expressly charged in the complaint that the acts of wrong complained of were done "with intent to frighten and scare the plaintiff's team and injure the plaintiff, willfully, wantonly, and recklessly, and not regarding the rights of the plaintiff in that regard." Now, it is quite true that negligence may be so gross as to amount to recklessness; but,

when it does, it ceases to be mere negligence, and assumes very much the nature of willfulness; so much so, that it has been more than once held in this state that a charge of reckless misconduct will justify the jury, if the same be proved, in awarding punitive, vindictive, or exemplary damages, while it never has been held, so far as we are informed, that the jury, under a charge of mere negligence, would be justified in awarding vindictive or exemplary damages. One in charge of so powerful and dangerous a piece of machinery as a locomotive is bound to use care in operating it, so as to avoid, as far as practicable, doing injuries to others; and, if he uses such machine recklessly and without regard to the rights of others, his conduct may as well be characterized by the term "willful" as by the term "reckless," for the difference, in this regard, between "reckless" and "willfulness" is scarcely appreciable.

The cases of *Glover v. Railway Co.*, 57 S. C. 228, 35 S. E. 510, and *Appleby v. Railroad Co.*, 60 S. C. 48, 38 S. E. 237, cited by respondent, are not in point; for in both of these cases negligence and carelessness were distinctly alleged in both of the complaints, while here there is no allegation of negligence, and, on the contrary, the allegation is that the wrong complained of was done purposely, and with intent to injure the plaintiff. The language contained in the fifth paragraph of the complaint cannot be regarded as an allegation of the facts constituting plaintiff's cause of action, but simply as a statement of the cause of the damages sustained by reference back to the facts constituting ("as aforesaid") plaintiff's cause of action. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(61 S. C. 141)

STATE v. BROCK.

(Supreme Court of South Carolina. July 13, 1901.)

CRIMINAL LAW — MISDEMEANOR — ARRAIGNMENT—DISQUALIFICATION OF JUROR—LIBEL—TRUTH AS JUSTIFICATION.

1. Any right to demand an arraignment by one charged with a misdemeanor is waived by participating in the trial in the usual way without objection.

2. Under Rev. St. § 2408, providing that the court, on motion, shall examine any person called as a juror to know whether he is related to any party, and, if it appears to the court that the juror is not indifferent, he shall be placed aside, the fact that a judge set aside two jurors as disqualified because related by blood or connected by marriage, within the sixth degree, to either of the parties, was not error, though the degree of such relationship was erroneously considered to be governed by statute.

3. Under Const. 1895, art. 1, § 21, providing that in prosecutions for libel the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and the

facts, an instruction that the provision of the constitution did not go any further than to allow the truth as a mitigation was error.

Appeal from general sessions circuit court of Clarendon county; Townsend, Judge.

John P. Brock was convicted of libel, and he appeals. Reversed.

Joseph T. Rhame and Lee & Moise, for appellant. John S. Wilson and W. Q. Davis, for the State.

POPE, J. Under an indictment for libel, the defendant, John P. Brock, was tried at the February, 1900, term of court of general sessions for Clarendon county. A verdict of guilty was rendered. After sentence, the defendant appealed upon several grounds. We will now pass upon these grounds in their logical order.

1. The appellant, in his second ground of appeal, alleges error as follows: "Second. Because his honor erred, it is respectfully submitted, in overruling the defendant's motion in arrest of judgment and to set aside the verdict, made upon the ground that the indictment had never been read to the defendant, nor had he ever been given the opportunity to plead to the same, and that no plea to the same had ever been made or entered, and no issue ever joined thereon; and in holding that a plea to the indictment was not essential or necessary, and that the trial and conviction of the defendant, in the absence of any plea to the indictment, was legal and valid." In the agreed case for appeal the following statement is made: "At no time was the indictment ever read to the defendant, nor was he ever called upon to plead, or given the opportunity of pleading, to the same; nor was any plea to the indictment ever made by the defendant or entered; and the entire trial was had without any plea to said indictment." And by the same agreed case for appeal this language explains when and how this matter was brought to the attention of the circuit judge for the first time: "The jury returned a verdict of guilty. The judge then asked the defendant if he had anything to say why sentence should not be passed upon him. Thereupon the defendant submitted a motion in arrest of judgment, and to set the verdict aside on the ground that the indictment had never been read to him; that he had never been called upon to plead to the same, nor given the opportunity of doing so; that no plea had ever been made or entered; that no issue had ever been joined between the state and the prisoner; and that hence his trial and conviction were both illegal and void, and could not support a judgment. After argument, the court held that, the defendant being charged with a misdemeanor, and not with a felony, a plea to the indictment was not essential; that it was not legally necessary that the indictment should be read to the defendant, nor that he should be called upon to plead to the same, nor afforded the opportunity of doing so; and that his trial and conviction, in the

absence of any plea to the indictment at all, was legal and valid; and he overruled the motion, and the defendant excepted. The sentence of the court was \$50, or one day's imprisonment." Thus the appellant brings squarely before this court the right of a defendant, when indicted for a misdemeanor, on his trial therefor to be regularly arraigned, and to be required to plead to said indictment. The case for appeal shows that the defendant was personally present at his trial, and also that he was represented by Joseph T. Rhame, Esq., and Messrs. Lee & Molise, attorneys, as his counsel; that the counsel for the defendant cross-examined every witness for the state, and introduced a number of witnesses for the defense, including the defendant himself. Not only so, but that repeated requests were made in writing upon which the circuit judge was asked to charge the jury. We find in section 47 of the Criminal Statutes of this state, that "no person shall be held to answer in any court for an alleged crime or offense unless upon indictment by a grand jury, except * * *," which provision is meant to carry into effect section 17 of article 1 of our present constitution. Section 54 (formerly 2641 of the General Statutes) requires that in the arraignment of persons indicted for "murder, manslaughter, burglary, arson, rape, grand larceny or forgery, shall be entitled to * * *," but "that any person or persons who shall be indicted for any crime or offense other than those enumerated above, shall have the right to * * *." Thus, by indirection, the Criminal Statutes of our state require arraignment for certain offenses, such as murder, manslaughter, burglary, arson, rape, grand larceny, or forgery, but do not require arraignment for any other offenses. What is an arraignment? The definition given in 2 Am. & Eng. Enc. Law, 829, is: "Arraignment is the calling of the prisoner to the bar of the court to answer to the matter charged against him." Lord Hale says, in his Pleas of the Crown (volume 2, p. 216): "An arraignment consists of three things: First, the calling of the prisoner to the bar by his name, and commanding him to hold up his right hand, which, though it may seem a trifling circumstance, yet it is of importance, for by holding up his hand, constat de persone indictati, and he owns himself of that name; second, reading the indictment to him in English, that he may understand his charge; third, demanding of him whether he be guilty or not guilty." So, therefore, when the appellant speaks in this ground of appeal of not having had the indictment read to him, he refers to the failure of the court to have him arraigned. In what cases must an arraignment be had? In volume 2 of the Encyclopædia of Pleading and Practice (at page 761) it is stated: "In a trial for a felony, and especially if capital, the arraignment has always been regarded as an essential;" citing in notes a number of authorities in

support of the proposition; among others, the case of State v. Moore, 30 S. C. 69, 8 S. E. 437. Arraignment is necessary in felonies, but as to misdemeanors the work Encyclopædia of Pleading and Practice (at page 762) states, "The authorities are divided as to whether an arraignment is necessary in cases of misdemeanor." Fortunately, in our own state, in the case of State v. Moore, supra, it is held that an arraignment is not necessary in misdemeanors, thus furnishing an adjudication of the question. But, as we understand, in the practice in our state from the earliest times an arraignment was not necessary in misdemeanors. Defendants charged with misdemeanors may be tried in their absence, and this cannot be done in cases of felonies. If a defendant charged with a misdemeanor can be legally tried in his absence, what would be the necessity of an arraignment, with no prisoner to answer to his name, to have the indictment read to him, and to demand of him if he be guilty or not guilty? None whatever. Then this view disposes of the objection that the defendant was not called on to plead to the indictment. Besides, the defendant, by his conduct here, is not entitled to have himself arraigned, and to have himself called on to plead to the indictment, for he took part in his trial at every stage until after the verdict of guilty was rendered, without once demanding this so-called right of arraignment. He thereby waived any so-called right to arraignment. This ground of appeal cannot be sustained.

2. We will next consider the alleged error of the circuit judge in causing certain jurors to stand aside. The first ground of appeal presents this question, and is as follows: "First. Because his honor erred, it is respectfully submitted, in holding and ruling that jurors related by blood or connected by marriage within the sixth degree to either of the parties were disqualified from sitting as jurors, and that both consanguinity and affinity within the sixth degree were grounds for legal exception under the statute; and in not holding that under the law a juror is legally disqualified only in those cases where he is related by blood to any of the parties; and that hence he erred in requiring the jurors Brailsford, McFaddin, and Carrigan to stand aside as being legally disqualified to sit as jurors in the trial then in progress." The "case" shows the following: "Upon motion of the solicitor, the jurors were placed upon their voir dire, and upon their examination the juror T. R. Brailsford testified that he was not related by blood to the defendant, nor by blood or marriage to the prosecutor, and that his relationship to the defendant consisted in his having married defendant's half-sister. The juror J. McDowell McFaddin testified that he was not related by blood or marriage to the prosecutor, and that his relationship to the defendant came about by reason of the defend-

ant's marriage to the aunt of the said juror, who thereby became the nephew by marriage of said defendant. The juror R. J. Carrigan testified that he was not related by blood or marriage to the defendant, but was the cousin of the prosecutor. The presiding judge ruled that under the statutes these jurors were legally disqualified to sit as such; that jurors related by blood or connected by marriage within the sixth degree to either of the parties were disqualified from sitting as such; that both consanguinity and affinity within the sixth degree were grounds for legal exception under the statutes; and ordered the jurors above named to stand aside, and refused to permit them to be presented. The defendant excepted in each instance. The two first named jurors were made to stand aside before the defendant had exhausted his peremptory challenges, and the last named afterwards." This court has repeatedly held that the question of whether a juror is indifferent or not is confided, under section 2403 of the Revised Statutes of this state, to the circuit judge for his decision. The section referred to reads as follows: "The court shall, on motion of either party in suit, examine, on oath, any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause and another shall be called." While the circuit judge committed error in stating that jurors related by blood or connected by marriage within the sixth degree to either of the parties were disqualified from sitting as such, that both consanguinity and affinity within the sixth degree were grounds for legal exceptions under the statutes, still he stated a very salutary rule. Certainly, the legislature has interdicted judges from sitting in cases of such relationship, and it is a good guide to the exercise of a sound discretion by a circuit judge, to observe the same degree of relationship. No doubt, he meant to give this as a reason for his not regarding the jurors presented as indifferent, because related to the defendant or prosecutor. The fact of relationship was in his mind. The degree of such relationship he mistakenly thought was governed by statute. This being so, his error was not serious or harmful.

3. Lastly, we will consider those exceptions which are of serious moment, and to which we have naturally given close attention. These grounds will be grouped and disposed of together. They are as follows: "Third. Because his honor erred, it is respectfully submitted, in refusing to charge the defendant's first request, as follows:

"That under the present constitution of this state, in all indictments and prosecutions for libel the truth of the alleged libel, if made out to the satisfaction of the jury, is a complete and perfect defense, and must result in the acquittal of the defendant;" and in charging the jury that he did not construe the constitution in that way, and that, even if the defendant had made out to the satisfaction of the jury the truth of the alleged libelous charges, yet the same would constitute no justification or defense; whereas, it is respectfully submitted that his honor should have charged as requested, and should have held that under the present constitution, in all indictments and prosecutions for libel, the truth of the alleged libel, if made out to the satisfaction of the jury, is a complete and perfect defense, as in a civil action, and that he erred in not so holding. Fourth. Because his honor erred, it is respectfully submitted, in charging the jury as follows: 'I do not understand it [the constitution] to go any further than to allow the truth as a mitigation,'—in that thereby his honor not only took from the jury the right to consider the truth of the alleged libel, if made out to their satisfaction, as a complete justification and defense to the indictment, but he also thereby took from the jury the right to consider the truth of the alleged libel, if made out to their satisfaction, as negating the malice charged against the defendant in the indictment. And the defendant submits that he was legally entitled at least to have the truth of the alleged libel, if made out to the satisfaction of the jury, considered by them as negating the malice charged against him in the indictment, and not merely as a 'mitigation,' as erroneously held by his honor. And because the erroneous charge of his honor left the jury no alternative but to find the defendant guilty, if they found the fact that he caused the publication of the alleged libel. Fifth. Because his honor erred, it is respectfully submitted, in refusing the defendant's second request, as follows: 'That the motive and intent with which an alleged libel is punished is, under the present law in South Carolina, immaterial, if the alleged libel is founded upon the truth; and, if the jury find that the matters charged in the alleged libel in this case are true, it is their duty to acquit the defendant.' And defendant submits that the constitution of 1895, having eliminated the following words from the constitution of 1868, 'or when the matter published is proper for public information, the truth thereof may be given in evidence,' the motive with which a libelous publication is published is now immaterial, if the alleged libel is true in fact; and his honor erred in not so holding. Sixth. Because his honor erred, it is respectfully submitted, in refusing the defendant's third request, as follows: 'That it matters not, under the present constitution of this state, whether

the publication of an alleged libel is actuated by malicious motives, if the jury find that the matters charged in such libel are true in fact; and that, if they so find in this case, it is their duty to acquit; and in charging the jury as follows: 'I do not construe the constitution to mean that,'—for that thereby the jury was, in effect, charged that the defendant might be convicted if the alleged libel was published with improper motives, even although such libel was true in fact. Seventh. Because his honor erred, it is respectfully submitted, in refusing the defendant's fourth request, as follows: 'That if the jury find that the matters charged against the prosecutor by the defendant in the alleged libel are not true in fact, and have not been established by the testimony, yet, if they further find that the defendant believed them to be true, and acted upon such belief, without negligence, it is their duty to acquit the defendant;' for that thereby the jury was, in effect, charged that the defendant might be convicted, even although he acted innocently, but mistakenly, but without negligence, in publishing the alleged libel. Eighth. Because his honor erred, it is respectfully submitted, in refusing the defendant's sixth request, as follows: 'If the jury find that the defendant was mistaken in the matters charged against the prosecutor in the alleged libel, and that said matters are not true, yet if they find that the defendant acted upon a mistaken belief of the truth of such charges, upon probable cause, and without negligence, the defendant would be entitled to an acquittal;' for that thereby the jury were, in effect, charged that the guilt of the defendant depended simply upon the fact of the publication, without regard to the motives actuating him in such publication. Ninth. Because his honor erred, it is respectfully submitted, in refusing defendant's eleventh request, as follows: 'That it is incumbent on the state in this prosecution to establish beyond all reasonable doubt, to the satisfaction of the jury, that the libelous charges alleged to have been made by the defendant are malicious and false; and, unless these facts are so established, the defendant should be acquitted;' for that thereby the jury were, in effect, charged that it is not necessary for the state to prove that the publication of the alleged libel was done maliciously, or that the same was false, and that the guilt of the defendant depended simply upon the fact of publication, without regard to its having been done maliciously, although the indictment charged the same was false and malicious. Tenth. Because his honor erred, it is respectfully submitted, in refusing the defendant's twelfth request, as follows: 'That if the jury be satisfied that the alleged libelous words said to have been published concerning the prosecutor, William S. Richbourg, are true in substance and fact, the defendant should be acquitted;' for that

thereby the jury were, in effect, charged that the truth of the alleged libel, if made out to the satisfaction of the jury, was no defense to the indictment. Eleventh. Because his honor erred, it is respectfully submitted, in refusing the defendant's thirteenth request, as follows: 'That if the jury find that the alleged libelous language set forth in the indictment is true in substance and in fact, they should find the defendant not guilty, though they are satisfied that such words were maliciously published by the defendant;' for that thereby the jury was, in effect, charged that the defendant might be convicted if the motive was improper, although the matters charged in the libel were in fact the truth. Twelfth. Because his honor erred, it is respectfully submitted, in refusing the defendant's fourteenth request, as follows: 'If the defendant should fail to establish the truth of the alleged defamatory matter, yet if, from all the facts and circumstances adduced in evidence, out of which the libelous publication emanated, or which led up to it, the jury believe that the defendant at the time of the publication actually believed the alleged libelous matter to be true, and that he had reasonable grounds for such belief, he should not be convicted;' for that thereby the jury were, in effect, charged that the defendant might be convicted for the alleged libel, although the same was innocently and mistakenly published by him."

Before we begin a brief discussion of these questions, it would be well to understand the nature of the misdemeanor with which the defendant stands charged. In volume 18 of the *Encyclopædia of American and English Law* (at page 861), we find the following definition: "A libel is a malicious defamation, expressed either by writing or printing, or by signs, pictures, effigies, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation." This definition is sustained by our own cases of *State v. Farley*, 4 McCord, 317; *Fonville v. McNease*, Dud. Law, 303, 31 Am. Dec. 556. No difficulty arises in this cause as to the definition of libel. It seems to us it is the old battle as to the power of the jury to determine the intent of the person who has published the libel, it being contended on the one side that all the jury can determine is the publication of the libel and the truth of the innuendoes, while the intent was to be determined by the court, while, on the other hand, it was contended that the whole case was to be submitted to the jury for their verdict. The former was the practice in the English courts until the statute passed in the thirty-second year of

the reign of George III., which restored to juries the right of deciding upon the intention as well as the fact of the publication and the truth of the innuendoes. A practical illustration of this may be found in the case of *State v. Allen*, 1 McCord, 525, 10 Am. Dec. 687. In the case just cited, Judge Johnson, in his charge to the jury, stated: "That in prosecutions for libels it was not within the province of the jury to decide on the intent of the defendant, or whether the publication was libelous or not, but that the only questions for their consideration were: First, whether the defendant was the publisher of the piece charged in the indictment; and, secondly, whether the innuendoes were true. That the intent was the inference of the law, to be decided by the court after the fact of publication and the truth of the innuendoes had been found by the jury, and that a general verdict would amount to no more than finding the fact of publication and the truth of the innuendoes." But the court of appeals reversed the circuit court as to such instructions, stating that a general verdict of the jury in cases of libel settled the intention, as well as the matter of publication and the truth of the innuendoes. The appellant virtually contends that the circuit judge, his honor, Judge Townsend, practically adopted the views announced by Judge Johnson when he limited the effect of the defendant's testimony as to the truth of the libel to merely a mitigation of the damages, thus depriving the appellant here (who was the defendant below) of having the jury to determine the matter of defamation to character of the prosecutor by the defendant, if the said defendant published the truth concerning said prosecutor. In Const. 1868, art. 1, § 8, it was provided: "In prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall be the judges of the law and the facts." Our constitution adopted in the year 1895 provides in article 1, § 21: "In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be judges of the law and facts." No complaint is made as to the action of the circuit judge in admitting testimony which had for its object the proof of the truth of the alleged libel. All such testimony that was offered was admitted. But the appellant complains that, after he had introduced such testimony, the circuit judge refused to the jury the right to apply such testimony in determining if the alleged libel was true, and limited such testimony to mitigation. Let us examine the question a little more carefully, by contrasting the provisions of the constitutions of 1868 and 1895, respectively, by means of parallel columns:

Const. 1868, art. 1, § 8.

"In prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall be the judges of the law and facts."

Const. 1895, art. 1, § 21.

"In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and the facts."

We should remember that it had been decided in this state, in the case of *State v. Lehre*, 2 Brev. 446, 4 Am. Dec. 596, that a person who was indicted for libel could not give any evidence tending to prove the truth of the libelous matter without the consent of the prosecutor. Hence the constitution of 1868 proposed a remedy for such wrong by giving to certain persons the right to prove the truth of such libel. But the constitution of 1895 went further, and threw wide open the door to all persons who were indicted or prosecuted for libel to show the truth of said libel; making the jury judges of the law and the facts. It is no part of the duty of a court to expound or construe that which is plain. You cannot make, by discussion, anything plainer, which, by the words used, is already plain. The circuit judge, having felt it his duty to limit the application of this constitutional guaranty to every person who is indicted or prosecuted for libel to show by evidence the truth of the libelous words, was in error; and, as this error may have contributed to the verdict of guilty, a new trial must be awarded. It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court for a new trial.

McIVER, C. J. I concur in the result solely upon the ground that the circuit judge erred in commenting upon the first request to charge when he used the following language: "I refuse that request, because I don't understand the constitution that way. I don't understand it to go any further than to allow the truth as a mitigation." That language was calculated to mislead the jury into the belief that the truth of the libel could only operate as a mitigation of the punishment for the offense charged, whereas I think the true construction of the constitution is simply to make the truth of the alleged libel competent testimony, and not to declare what shall be the effect of such testimony. I do not, therefore, assent to the proposition contended for by the appellant, — that the truth of the matters charged in the libel shall constitute a complete defense. On the contrary, I think such testimony can only operate as a circumstance tending to negative malice.

GARY, A. J., and JONES, J., concur in the result.

(61 S. C. 251)

CARROLL v. CHARLESTON & S. R. CO.

(Supreme Court of South Carolina. July 24, 1901.)

APPEAL—REVIEW—CHANGE OF VENUE.

Where there is no abuse of discretion shown in granting a change of venue, the supreme court will not consider whether a proper showing was made in the court below authorizing the granting of the motion.

Appeal from common pleas circuit court of Charleston county; Buchanan, Judge.

Action by Annie B. Carroll against the Charleston & Seashore Railroad Company.

The following affidavit was submitted on the motion for change of venue:

"Personally appeared before me Annie B. Carroll, and, being duly sworn, says that she is the plaintiff in the above-named action; and: First. That the action in this cause was begun in this court on the — day of December, 1898, and came to trial at the November term, 1899, before the Honorable George W. Gage, presiding judge, and a jury, at which term, after a long and protracted trial, the jury were unable to arrive at a verdict, and a mistrial was ordered; that thereafter the said cause continued on the docket and came to trial at this present November term of the said court of common pleas, before the present presiding judge thereof and a jury, and, after a long and protracted trial, the jury were unable to arrive at a verdict, and a second mistrial was ordered. Second. That the cause of action herein is a suit for damages brought by the plaintiff against the defendant for injuries occasioned to the plaintiff by the defendant's carelessness and negligence in leaving open and insufficiently protected a dangerous opening or hole in its wharf in the town of Mt. Pleasant, county of Charleston, on the 23d day of August, 1898, without sufficient lights or watchmen or guards to protect and notify passengers of the defendant, so as to secure them from any danger of falling therein, in consequence of which careless and negligent omissions the plaintiff fell into the said opening or hole, and was very seriously and permanently injured, as will more fully appear by reference to the complaint herein. Third. That the defendant herein, the Charleston & Seashore Railroad Company, is a corporation, as this plaintiff shows and alleges, at the time of said accident engaged in operating a steam ferryboat from the city of Charleston to a wharf and landing at the town of Mt. Pleasant, and thence, by means of an electric railroad line running through the town of Mt. Pleasant, through the town of Moultrieville, and through Sullivan's Island, to a hall or pavilion on the Isle of Palms; that since the bringing of said action, as plaintiff is informed and believes, and so alleges, the said Charleston & Seashore Railroad Company has been consolidated with the Charleston City Railway and other corporations, which consolidated corporation has since purchased

and owns all the property and plant of the Charleston Gaslight Company, and all the property and plant of the Charleston Electric Light Company, so that the said corporation is now generally known as the Charleston Consolidated Railway, Gas & Electric Company; and now owns and operates in the city of Charleston all the entire system of street railways in the city of Charleston, all the entire system of railroad and ferry communication between the city of Charleston and the towns of Mt. Pleasant and Moultrieville to the Isle of Palms, and all the entire system of lighting the city of Charleston by gas or electricity, and the furnishing gas and electric motive power therefrom. Fourth. That in consequence thereof, as plaintiff is informed and believes, the said Charleston Consolidated Railway, Gas & Electric Company is the largest local corporation in the city of Charleston and county of Charleston, employing a very large number of employees in every part and department of its business; that also, as plaintiff is informed and believes, and so charges and alleges, a large number of persons, influential citizens of Charleston, are interested and concerned in said company, and are stockholders and bondholders and own other interests in the same, which are likely to be affected by any judgment or recovery against the said corporation. Fifth. That the city of Charleston contains by far the largest number of qualified voters in the county of Charleston from whom jurymen are drawn, and, therefore, as plaintiff is informed and believes, at least four-fifths of the jury drawn in any particular panel are furnished and drawn from the city of Charleston. Sixth. That deponent verily believes, and on her oath does hereby so declare, that a fair and impartial trial cannot be had in the county of Charleston, where the action hereinabove entitled was commenced; that already there have been two mistrials, and from the magnitude of the corporation, and the number of employees and large interests involved, deponent verily believes it is impossible to draw a jury on which there shall not be one or more persons who, either directly or indirectly, through others, or through an interest and belief that the maintenance of the corporation is beneficial to others, are affected so as not to give a fair and impartial verdict in the cause. Seventh. That plaintiff is a person of very limited and restricted means; that the continuous trials in the courts are very expensive to her, and beyond her means; and, if the same is to continue with successive trials, plaintiff will be forced to drop her application to a court of justice to receive justice from a sheer inability to pay the expenses of the continuous and successive trials. Wherefore deponent prays this honorable court that the place of trial of this cause shall be removed to another county in the same circuit. [Signed] Annie B. Carroll.

"Sworn to before me, this 7th day of De-

ember, 1900. [L. S.] Signed, Claudian B. Northrop, Notary Public."

This motion was opposed by defendant's counsel, who submitted the following affidavits:

"The undersigned, being duly sworn, each for himself says: That he was one of the jurors sworn to try the above-entitled cause at the December, 1899, term of court of Charleston county. That said jury consisted of the following: T. H. Reynolds, foreman, Clarence Cole, H. J. Moroso, Joseph Beattie, L. F. St. Amand, J. O'Brien, James Carroll, M. W. Powers, F. J. Simmons, L. C. Weber, F. C. Torlay, M. J. Stelling. That the jury, after deliberating upon this case, and discussing it from all sides and in all aspects, came to the honest conclusion that they could not reconcile their differences, and asked to be discharged at 12 m. That, so far as they are able to state, the minds of the jury were not biased in any way, or affected by the large interests of the corporation, nor by the standing of its directors in this community, and that an earnest effort was made by the jurors to reconcile their differences of the facts of the case. That the jury was equally divided on the facts of the case, six of the jurors being in favor of a verdict for the plaintiff, and six being in favor of a verdict for the defendant. [Signed] Thomas H. Reynolds. H. J. Moroso. O. M. Cole. F. C. Torlay. L. C. Weber. M. W. Powers. J. O'Brien. L. F. St. Amand. M. J. Stelling.

"Sworn to before me, this 15th day of December, 1900. William Austin, Notary Public, S. C. [Seal.]"

"The undersigned, being duly sworn, each for himself says: That he was one of the jurors sworn to try the above-entitled cause at the November, 1900, term of court for Charleston county. That said jury consisted of the following: G. W. Klinck, J. B. Forbes, J. M. Addison, Jr., Edwin F. Connor, F. W. Adams, D. C. Shirer, Henry J. Conyers, James G. Whilden, W. T. Moore, John Semken, Samuel Berkman, E. M. Tully. That the jury, after deliberating upon this case, and discussing it from all sides and in all respects, came to the honest conclusion that they could not reconcile their differences, and asked to be discharged. That, so far as they are able to state, the minds of the jury were not biased in any way, or affected by the large interests of the corporation, nor by the standing of its directors in this community, and that an earnest effort was made by the jury to reconcile their differences of the facts of the case. That the jury was almost equally divided on the facts of the case; seven of the jurors being in favor of a verdict for the plaintiff, and five being in favor of a verdict for the defendant. [Signed] G. W. Klinck. Samuel Berkman. J. B. Forbes. John Semken. J. M. Addison, Jr. F. W. Adams. D. C. Shirer. J. G. Whilden. E. M. Tully. E. F. Connor. Henry J. Conyers. W. T. Moore.

"Sworn to before me, this 15th day of De-

ember, 1900. William Austin, Notary Public, S. C."

From order granting motion, defendant appeals. Affirmed.

Mordecai & Gadsden, for appellant. Mitchell & Smith, for respondent.

POPE, J. This action was begun on the 6th day of December, 1898, in the court of common pleas for Charleston county, in said state, for the recovery by the plaintiff from the defendant of \$15,250, because, as alleged, the plaintiff had been injured while a passenger on the line of defendant's railroad company from the Isle of Palms to the city of Charleston, by the negligence of the said defendant. The defendant denied the injuries of the plaintiff, but alleged, if she was injured, the same was the result of the contributory negligence of the plaintiff. The cause was twice tried,—once before his honor, Judge Gage, and a jury, on December 9th and 11th, inclusive, in the year 1899, and once before his honor, Judge Buchanan, and a jury, on the 5th and 6th of December, 1900. In each instance there was a mistrial because of the failure of the jury to agree. After due notice, a motion was made by the plaintiff for a change of venue before his honor, Judge Buchanan. The plaintiff submitted her own affidavit in support of her motion, while the defendant exhibited affidavits from the two juries, alleging that they had endeavored to give the parties a fair trial by reaching a verdict, but could not do so by reason of the difference of opinion among the jurors as to the weight of the testimony. (The reporter will insert a copy of these affidavits in his report of this appeal.) The circuit judge, after argument, ordered the cause changed for trial to Orangeburg county, S. C., which is a county in the same judicial district with Charleston county, viz. the First circuit.

From this order the defendant has appealed on three grounds, as follows: "First, because his honor erred in changing the place of trial herein, as the motion therefor was unsupported by any affidavit stating any facts tending to show that a fair and impartial trial could not be had in the county of Charleston; second, because his honor should have held that the affidavits in support of said motion failed to state any facts whatever, but, on the contrary, set forth merely a belief and speculation of plaintiff; third, because on the record herein, and affidavits submitted in support of said motion, his honor erred in granting a change of venue herein."

In disposing of this appeal, we will state: Section 2, art. 6, Const. 1895, requires the general assembly of this state "to pass laws for the change of venue in all cases, civil and criminal, over which the circuit courts have original jurisdiction, upon a proper showing, supported by affidavit, that a fair and im-

partial trial cannot be had in the county where such action or prosecution was commenced." And on the 12th day of February, 1896, the general assembly passed an act whose title is "An act to provide for a change of venue in civil and criminal cases in the circuit and magistrate's courts." 22 St. at Large, pp. 12, 13. The first section of this act relates to the change of venue by the circuit courts, and sets out the provisions of section 2 of article 6 of the constitution, and prescribes 10 days' notice of such application before the hearing is had "in regular term by some party interested." This is the law under which the present application for a change of venue was made. This action is on the law side of the court of common pleas. The supreme court of this state, in hearing appeals, is confined to questions of law in cases on the law side of the court. The circuit judge has decided that a proper showing has been made by the affidavits submitted for a change of venue. The three grounds of appeal here presented only ask a reversal of such decision on issues of fact. If we could interfere, however, we will venture to say that upon the facts we would not do so. There was no abuse of his discretion by the circuit judge. It is the judgment of this court that the judgment of the circuit court be affirmed.

(S. C. 124)

HOPPER et al. v. HOPPER.

(Supreme Court of South Carolina. July 13, 1901.)

PAYMENTS—APPLICATION—TOLLING LIMITATIONS—EVIDENCE.

1. Where payments are made generally to a creditor who holds several claims against the debtor, without any instructions as to application, the creditor may apply the payment to a debt already barred, thus tolling the statute.

2. In an action by executors on a note barred by limitations on its face, evidence that a credit on the note was in the handwriting of the intestate was admissible as tending to show an understanding that payment should be credited on the note, thus tolling the statute of limitations, where there was no contention that the payment was made directly on the note by the defendant, and there was an attempt to show an understanding between the parties that the payment, when made, should be credited on the note.

3. Evidence is not incompetent because the witness testified to "the best of his knowledge or recollection," such phrase going only to the weight.

Appeal from common pleas circuit court of Cherokee county; Hudson, Special Judge.

Action by D. J. and C. C. Hopper, administrators of W. J. Hopper, against Samuel L. Hopper. Verdict for plaintiffs, and defendant appeals. Affirmed.

The judge charged the jury as follows:

"This action is brought by the administrators of the estate of W. Junius Hopper against Samuel Hopper upon two notes, the notes reading as follows:

" '\$500.00. One day after date, I promise to pay W. J. Hopper \$500, borrowed money. January 1st, 1884. S. L. Hopper.'

" '\$550.00. One day after date I promise to pay W. J. Hopper \$550, borrowed money. January 1st, 1885. S. L. Hopper.'

"They are written one below the other, gentlemen, on the same piece of paper, and pasted together. Now, the action is brought to recover the amount alleged to be due on these two notes that are out of date, upon the promise to pay the notes from certain alleged credits, to wit, the first credit that is alleged—the first payment alleged to have been made—is January 1, 1896, and reads as follows: 'January 1st, 1896, received on the within notes \$276.40. W. J. Hopper,'—and is signed on the back of each. The next payment that is indorsed upon the back of the notes is as follows: 'Paid on the within notes, June 4th, 1896, \$288.05,'—and not signed. These notes, gentlemen of the jury, are not denied by the defendant in the case, but by a general denial in the answer. In the answer he sets up, as I conceive it, outside of the general denial, two defenses. One is that \$500 was paid on these notes under a contract by which he was to get \$500 for selling a certain tract of land, and that the land was sold according to the contract, and therefore a payment was made. I say that is the first defense,—a payment of \$500. The next defense is the statute of limitations,—that this case is barred by the statute of limitations; and then a specific denial that the plaintiffs are the owners of the notes. In order for the plaintiffs to recover in this case, it is necessary for them to show that they are the owners of the notes, and that, although out of date, yet that within the last six years certain payments were made on the notes, and upon these payments a new promise is implied; in other words, that these payments took the case out of the statute of limitations. Those are the points at issue.

"Now, gentlemen, I am requested to charge you certain propositions of law by the defendant's counsel, which I will now note: (1) 'A payment made on behalf of a debtor is not sufficient to avoid the statute of limitations, unless the additional fact appears that it was authorized by him, or was adopted by subsequent ratification.' That is correct. A payment must have been made by himself or his agent. (2) 'An admission, to avoid the statute, must amount to an unqualified acknowledgment of the debt, disconnected with any circumstances indicating an intention to avoid liability upon it.' That is not involved in this case, because it does not rest upon admission; it rests upon payments. The question is payment or no payment. (3) 'A creditor who has several claims against his debtor, and receives a general payment, may apply it to one of the claims which is out of date, but it does not revive the remainder of the debt. But

he cannot divide the payment, and apply a part to all.' In that, gentlemen, he is at liberty to do as he pleases, unless he is requested. (4) 'A new promise, which will take a claim out of the statute of limitations, cannot be inferred from a payment, unless there is an actual affirmative intention on the part of the debtor to make a payment upon the debt claimed to be due. There must be an intention on the debtor's part to waive the bar of the statute.' It must be a payment, gentlemen, on the debt, and must be so intended. If it is, it takes it out of the statute. (5) 'Part payment within statutory period by a debtor who owes two clear, undisputed debts, does not take either out of the statute of limitations, where a remittance is not specifically appropriated to either.' In reference to that, if it is within the statute bar, we have nothing to do with it. If the statute is a bar, and a general payment made upon the claims, as I said before, the creditor can apply a part to one and a part to the other, unless directed otherwise. (6) 'If the debtor shall pay with one intent, and the creditor receives with another, the intent of the debtor shall govern.' That is very true. (7) 'The debtor must assent to any credits placed on the claim barred by the statute of limitations by his creditor.' Certainly, it must be a payment made by the debtor, or at his direction. (8) 'After the bar of the statute has barred a debt, the interest of the creditor to fabricate evidence is strong enough to overcome any presumption that might otherwise arise from an instrument made by him.' That is not complete within itself, and it requests me to charge you on the weight of the testimony. So I cannot charge that request. (9) 'It is essential that an indorsement made on a note against which the statute of limitations has run at the time the instrument was made, that such indorsement was made bona fide, and with the privity of the debtor.' That is correct. (10) 'The payment by operation of law or acknowledged by creditor on account of an equitable set-off or counterclaim which the debtor might insist upon, or which he has never claimed to have applied as such, is not such a payment as will operate to prevent the statute from running.' I cannot see any application in that request to this case, and therefore I do not charge it. (11) 'A payment made by a debtor to whom he owes several distinct debts, without any direction as to its application, and immediately applied by the creditor to a debt barred by the statute of limitations, will not take the remainder of that out of the statute.' (12) 'The mere indorsement of the credit on the notes is not sufficient, and they cannot be even read in evidence without proof that they had been made by or with the consent of the defendant, or actual proof that such payment had been made.' That is correct.

"Now, gentlemen, here is our statute,

which I will read to you, and by which you are to be governed as far as it applies to the case. After providing that claims of this kind shall be barred, then section 131 of the Code reads as follows: 'No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but payment of any part of principal or interest is equivalent to a promise in writing.' So, gentlemen, the law of the case is simply this: If you should find as a fact that these payments were made upon these notes as indorsed here,—when I say 'made,' I mean made by the debtor, or by his direction,—if that be the case,—then the plea of the statute of limitations amounts to nothing. Right upon that question, were these payments made upon these notes by the debtor, as indorsed on that paper, as it purports to be a payment, and reads as follows: 'January 1st, 1896, received on the within notes \$228.40,' signed by W. J. Hopper? That of itself is a question. You will have to take all the testimony, and decide that yourself. The second has no signature to it. Whether these payments were made, is a question for you,—a question of fact for you; and I cannot help you. I cannot comment upon the testimony, and therefore it is left for you to say.

"In evidence in connection with these two notes is one that reads as follows: '\$552.80. On or by the first of January, 1896, we, or either of us, promise to pay J. Q. Little or order the sum of \$552.80, for value received of him. Interest after maturity at eight per cent. This September 5th, 1895. W. J. Hopper. T. H. Littlejohn. S. L. Hopper.' Now, I cannot make any comment upon these things in evidence, upon these dates in evidence. It is a question of fact for you. The evidence as to what transpired in the bank and elsewhere—the testimony of all these witnesses—is for you. As I tell you, I cannot comment upon it, for, if I could, then, if I could, under the statute,—under the law of the state,—I could give you my impression in regard to the testimony; but I cannot comment upon it. You have to do that. You are the sole judges of the facts. Now, gentlemen, one question is, did this debtor, S. L. Hopper, pay to his deceased brother the \$500 claimed in connection with that land sale? Well, in order for it to be a payment, you would have to find from the evidence that it was to be a payment, an agreement to be a payment, that such a contract existed between the parties. Did they come to a definite understanding? Then the other leading question is as to these payments here. If those payments on there were made upon the notes by his direction, or by himself, it is not barred; and the only question is, what are you to do? If both payments were made, you will cal

culate the interest on the two notes up to the time of the first payment, and give credit for that, provided it exceeds the interest. Then that will give you a new principal, and you would calculate the interest up to the time of the second payment, and give credit for that. Then you would get a new principal. Start on that,—on the balance up to the present time. If you find the \$500 to be credited, you will also, from the testimony, fix what date it is to be credited on, for that must come off as a payment. If it was not a payment, you will pay no attention to it. If you conclude as a matter of fact that these payments were not made by the defendant, or at his direction, that is the end of the case. It is barred. I do not like to talk to you more than is necessary in regard to the law. I don't want to get your minds confused. I think I have instructed you in regard to the whole case. First, dispose of the \$500 business. Say, if it was a payment. If so, fix the date. If that was a payment, and was made within the last six years, it is not barred. If it was no payment,—the \$500,—pay no attention to it. Then determine whether these payments were made before it is out of the bar,—the statute of limitations. If both a payment, give credit for only one; give credit, and pass the other. Now, gentlemen, that is the whole case. Then there is a question as to the ownership of the notes. The administrators claim to own them. If you find for a fact that these notes at any time belonged to Littlejohn, and Littlejohn surrendered them to the administrators, that makes the administrators own them. If they are the owners, then determine the course. If there were no payments, find for the defendant. If those payments were made, count up the interest, and find out the balance, and sign your verdict, 'We find for the plaintiff so much.' If for the defendant, say, 'We find for the defendant.'"

From judgment for plaintiffs, the defendant appeals on the following exceptions: "(1) Because the court erred in allowing the witness Mrs. W. J. Hopper to testify as to the handwriting of a credit made on the back of a note which was barred by the statute of limitations before such credit was made; the error complained of being that proof of the credit on a note barred by the statute of limitations cannot be given until after actual proof of payment has been made. (2) Because the court erred in allowing the first note of \$500 to be admitted in evidence by the proof of the handwriting of the plaintiff's intestate, giving credit on the said note after the same had been barred by the statute of limitations, without further evidence to show that such credit was made with the knowledge and consent of the defendant, or that the defendant had actually made the payment entered on the back of the note. The error complained of being, it is respectfully submitted to this court,

that, after a note has been barred by the statute of limitations, before the note can be admitted in evidence, or the credit on the said note admitted in evidence, there must be actual proof that such credit was made or entered on the back of the said note with the knowledge and consent of the defendant, or that the defendant had actually made payment to the plaintiff of the said amount to be applied as a credit on the said note. (3) Because the court erred in allowing the proof of credit by A. N. Wood, sworn to by the witness A. N. Wood, as placed on the back of the notes, as being sufficient to revive the notes; the error complained of being that there was no positive proof that the defendant had made the payments, or that he was present, or that he had authorized the credits to be placed on the said notes, or that he knew the credit had been placed on the said notes; and especially is this true when defendant had other papers in the bank of the said witness, Wood, and upon which said witness, Wood, stated the same credit had been placed; it being respectfully submitted to this court that the defendant should have either directed the credit placed on the note sued on, or that he should have had knowledge that it had been placed thereon, or that it had been placed thereon by his consent. (4) Because the court erred in ruling that when the witness J. Q. Little was giving testimony as to his 'understanding' of a certain transaction, and when objected to by defendant's counsel as to his giving his understanding in the matter, in holding that 'understanding' means an agreement; the error complained of being that an understanding by a witness, who was not a party to the transaction, may not mean an agreement, and an agreement can only be effected when the minds of both parties meet in the forming of a contract; whereas, one party might understand the matter one way, and the other party an entirely different way. (5) Because the court erred in allowing the witness J. Q. Little to testify as to instructions which plaintiffs' intestate, Junius Hopper, had given to Mr. Wood, neither the witness (Little) nor the defendant in this action being a party to such transaction, and the defendant in this action not being present; the error complained of being that such instructions would be incompetent as to the defendant here, and also hearsay. (6) Because the court erred in allowing the witness Little to testify as to what transpired between himself and the plaintiffs' intestate, W. Junius Hopper, at the bank, when the notes were deposited there, and as to instructions given at the bank at the time the notes were deposited there, the defendant in this action not being present, and not having knowledge of such instructions; the error complained of being that such instructions would be hearsay evidence as to this defendant, and such transactions would be

Incompetent to go to the jury as against this defendant. (7) Because the court erred in admitting the evidence of the witness J. Q. Little as to an understanding between himself and plaintiffs' intestate, Junius Hopper, as to where payments on other notes should be credited, the defendant in this action not being present, or having any knowledge thereof; the error complained of being that payments on other notes were entirely foreign to this issue, and that any agreement made between the witness J. Q. Little and plaintiffs' intestate is as to this defendant hearsay, and incompetent. (8) Because the court erred in refusing to allow the defendant to answer the question whether or not he had ever gone as security for his brother on other notes; the error complained of being that, if the defendant answered that he had done so, it would establish a course of dealing and custom between the brothers and plaintiffs' intestate and the defendant, S. L. Hopper, and show about other notes in the bank of A. N. Wood, testified to by the witness J. Q. Little, and of which, by reason of this ruling, this defendant was precluded from showing. (9) Because the court erred in refusing to allow the defendant as a witness to answer the following question: 'State whether or not you have paid other debts of your brother besides the one here charged;' the error complained of being that the answer, among other matters, sets up a defense of a general denial, under which other payments may be proven, and from which, by reason of this ruling, the defendant was precluded. (10) Because the circuit judge erred in failing or refusing to charge defendant's third request, which was as follows: 'A creditor who has several claims against his debtor, and receives a general payment, may apply it to one of the claims which is out of date, but it does not revive the remainder of the debt; but he cannot divide the payment, and apply a part to all,'—the error complained of being that, it is respectfully submitted to this court, even if no direction may be given by the debtor as to the application of a general payment, nevertheless a creditor cannot apply it to a note barred by the statute of limitations, and thus take it out from the bar, without the debtor's consent. (11) Because the court erred in refusing to charge defendant's fifth request, which was as follows: 'Part payment within statutory period by the debtor who owes two clear, undisputed debts does not take either out of the statute of limitations where the remittance is not specifically appropriated to either.' (12) Because the court erred in refusing to charge defendant's tenth request, as follows: 'The payment by operation of law, or acknowledged by creditor, on account of equitable set-off or counterclaim, which the debtor might insist upon, or which he has never claimed to have applied as such, is not such a payment as will operate to prevent

the statute from running,'—the error complained of being that, refusing to charge this request, he was, in effect, saying to the jury that plaintiffs' intestate, W. J. Hopper, who held the notes against the defendant herein, and for whom the defendant herein had indorsed a note of \$500, when such payments were made on the note of \$500 so indorsed that the said plaintiffs' intestate might apply the credits to the other note held by him against this defendant, and against which the statute of limitations had run. (13) Because the court erred in failing to charge defendant's eleventh request, as follows: 'A payment made by a debtor to whom he owes several distinct debts, without any direction as to its application, and immediately applied by the creditor to a debt barred by the statute of limitations, will not take the remainder of that debt out of the statute,'—the error complained of here being that in refusing to charge the said request it was practically holding that by such application to a debt barred by the statute, without the knowledge or consent of the debtor, a creditor could revive a debt already barred by the statute.'

J. C. Jeffries, for appellant. Butler & Osborne and J. E. Webster, for respondents.

McIVER, C. J. This action was commenced some time in May, 1899, by plaintiffs, as administrators of the estate of W. Junius Hopper, deceased, to recover the balance claimed to be due upon two promissory notes executed by the defendant, and made payable to plaintiffs' intestate, for borrowed money. The first of these notes bears date 1st January, 1884, and is payable one day after date, and is for the sum of \$500. The second note, for the sum of \$550, bears date 1st January, 1885, and is payable one day after date. These two notes were written on the same piece of paper, and upon the back of said paper the following indorsement appears: "Received on the within notes \$276.40. W. J. Hopper,"—which bears date 1st January, 1896. The other indorsement, which is not signed by any one, reads as follows: "Paid upon within notes, June 4th, 1896, \$288.06." The complaint is in the usual form, except that there is a special allegation "that the defendant made the following payments, and none other, on said notes," proceeding to state the two payments above credited, and alleging that by reason of such payments the defendant made and entered into a new promise to pay the balance remaining due on said notes, and alleging that such balance amounted on the 1st day of May, 1899, to the sum of \$1,639.86, and demands judgment for that amount. The defendant, by his answer, sets up three defenses: (1) A general denial of all the allegations of the complaint. (2) That plaintiffs' intestate, who was a brother of defendant, promised that, if defendant would effect a sale of a tract of land in which plaintiffs' in-

testate and his brother, the defendant, were interested, for the sum of \$5,000, said intestate would pay defendant the sum of \$500; that defendant did effect such sale, and thereby the note which defendant had given to plaintiffs' intestate for the sum of \$500 was extinguished and paid. (3) That the action brought by plaintiffs on the notes above stated is barred by the statute of limitations, defendant denying that he had ever made, either directly or indirectly, the payments credited on said notes. The case, being thus at issue, came on for trial before his honor, Judge Hudson, sitting as special judge under appointment from his excellency, the governor, and a jury. The jury found a verdict in favor of the plaintiffs for the sum of \$563.36, and the defendant appeals from the judgment entered thereon upon the several grounds set out in the record, which, together with the charge of the circuit judge, will be incorporated by the reporter in his report of the case.

Before proceeding to consider the questions presented by the exceptions, it will be necessary to make a general statement of the case as developed by the testimony. There is no dispute as to the fact that defendant did execute the two notes upon which the plaintiffs' action is based, and the real controversy seems to be as to whether the action is barred by the statute of limitations, or whether the case has been taken out of the operation of the statute by the alleged payments indorsed on said notes. Both of these notes show on their face that the bar of the statute was complete before either of the credits were indorsed, and therefore such credits, standing alone, would not be evidence sufficient to take the case out of the operation of the statute. *Concklin v. Pearson*, 1 Rich. Law, 391. Still, if there was other testimony sufficient to satisfy the jury that these payments were made, with the consent of the defendant, on the notes in suit, that would be sufficient to take the case out of the operation of the statute. That was a question of fact, which the circuit judge distinctly left to the jury; and, although there was a conflict of testimony, the verdict of the jury must be regarded by this court as final. The facts of the transaction are somewhat complicated, but, as we understand the testimony adduced by the plaintiffs, it would seem that plaintiffs' intestate borrowed some money from Little, and gave him a note to secure the payment of the sum borrowed; and also left with him, as collateral security, the two notes of the defendant, which constitute the basis of the present action. It also seems that plaintiffs' intestate also borrowed another sum of money from Little, and gave him a note therefor, upon which the defendant was surety. All of these notes were left with Mr. Wood, a banker, for collection; and the understanding was that whatever amount was paid by defendant on the note of plaintiffs' intestate, upon which he was surety, should be credited as a payment on the two notes

of defendant upon which this action was based. Accordingly, Wood, the banker, testified that when the defendant paid him the \$288.06 he credited the same, by the direction of defendant, upon the two notes now in suit, as well as upon the \$500 note upon which defendant was surety for plaintiffs' intestate, and that the entry of the credit for that sum on the two notes now in suit was made by him. "The notes and figures are in my handwriting. The balance is a stamp we use in the bank." As we have stated, there was other testimony on the part of the defendant in conflict with the foregoing, which, however, need not be specifically stated here, as this court, in a case like this, has no jurisdiction to pass upon questions of fact.

The exceptions of appellant relating to the questions raised by the plea of the statute of limitations, upon which the real controversy seems to turn, are based upon what we regard as a misconception of the doctrine of the application of payments. That doctrine may be thus stated: Where one person is indebted to another upon two or more accounts, the debtor, when he makes a payment, may, at the time of making such payment, direct the application of the sum of money paid to whichever debt he pleases; but, if he fails to give such direction at that time, then the creditor may, at any time thereafter, apply such payment to whichever debt he pleases, or may divide the amount of such payment, either equally or in any other proportion, between the several debts, as he may see fit to do. See *Mayor, etc., v. Patten*, 4 Cranch, 317, 2 L. Ed. 633, and *Field v. Holland*, 6 Cranch, 8, 3 L. Ed. 136, as reported in 1 Am. Lead. Cas. 268, 271, prepared by Hare & Wallace, and the notes appended. The doctrines there laid down have been recognized and followed in this state. *Heilbron v. Bissell*, 1 Bailey, Eq. 430, *Brice v. Hamilton*, 12 S. C. 32, and *Thatcher v. Massey*, 20 S. C. 542. The cases referred to in the elaborate notes to the cases of *Mayor, etc., v. Patten*, and *Field v. Holland*, as reported in 1 Am. Lead. Cas., *supra*, show that the great weight of authority, both in England and this country, is that a creditor may, unless the debtor otherwise directs, apply a payment to a note barred by the statute of limitations, and thus take such a case out of the operation of the statute. The only case mentioned to the contrary is that cited by appellant's counsel,—*Ayer v. Hawkins*, 19 Vt. 26, 80,—and that case may, and probably does, rest upon the civil-law rule, instead of the common-law rule; which latter, as said by Harper, Ch., in *Heilbron v. Bissell*, *supra*, is the rule which prevails in this state. The several exceptions of appellant which rest upon the idea that a payment made by a debtor upon a note, the action upon which is barred by the statute of limitations, will not have the effect of reviving the right of action upon the balance of the debt, cannot be sustained, under the authorities above referred to, and these

exceptions must, therefore, be overruled. This view is not only sustained by the weight of authority, but also by reason, and upon principle. The doctrine is well settled, in this state, at least, that a debt secured by a note upon which the right of action was barred by the statute of limitations is not thereby extinguished or paid, but the debt still remains due; and if the person can, by resorting to any other means than an action upon the note, recover his money, he may do so; and this, because the debt is not regarded as paid, but as still due, though not enforceable by an ordinary action at law. See *Wilson v. Kelly*, 19 S. C. 160, which, though a case in which a question arose as to the effect of a discharge in bankruptcy, was decided upon the principle declared to be applicable to a case of a debt barred by the statute. In both cases the action is barred, but the debt is not extinguished, and, on the contrary, remains still due. If this be so, then it follows that, upon the same principle, a creditor who holds two notes against a debtor, one of which is barred by the statute and the other is not, when he receives a payment from his debtor, who gives no directions at the time as to the application of the money paid, may apply the same to the note which, though barred by the statute, still remains a valid debt, and thus revives a right of action for the balance really due. If the debtor gives no direction as to the application of the money which he pays, and if the rule be as above stated, then the debtor must be regarded as having assented to whatever application the creditor chooses to make; and, if he applies it to the note which is barred by the statute, the debtor must, in law, be assumed to have assented to such application; and, if so, then, by the express terms of the statute, the right of action for the balance remaining unpaid is revived. So that the only remaining question is whether the defendant did assent to the credit of the amount which he paid on the \$552 note, as surety for the plaintiffs' intestate, upon the notes upon which this action is based. That is a question of fact which was distinctly left to the jury, who have solved it in favor of the plaintiffs; and their decision must be regarded here as final, unless there was some error, either in receiving incompetent testimony or in rejecting any competent testimony; and this we will proceed to consider.

The first and second exceptions, being of a kindred character, may be considered together. They impute error in the reception of testimony to the fact that the credit on the note first in date was in the handwriting of the plaintiffs' intestate, and in allowing said note to be offered in evidence without further testimony as to the fact that such payment was made by defendant. It must be remembered that there was no contention on the part of plaintiffs that the payments indorsed upon the piece of paper upon which both of the notes were written were made di-

rectly on such notes by the defendant, but the effort on the part of the plaintiffs was to show that there was an understanding between the parties that whenever the defendant made a payment on the note for \$552, to which the name of defendant appeared as surety for his brother, such payment should be credited on the notes in suit; and therefore the testimony objected to was competent as a circumstance tending to establish the contention on the part of the plaintiffs. For the fact that the defendant had paid money as surety for his brother, while it would give him a claim on his brother for the amount so paid, would not operate as a payment on the notes in suit unless there was an understanding to that effect between the parties. While this testimony may not have been competent as direct proof of the credit, yet it was competent as a circumstance tending to show that there was such an understanding; and that it was not received as direct proof is shown by the remark of the circuit judge, "That does not mean that the note or credit is proven." It is manifest, therefore, that this testimony was received, not as proof of the credit, but simply as a circumstance tending to show that there was such an understanding between the parties as that mentioned above, and as such was clearly competent. These exceptions are overruled.

The third exception seems to impute error to the circuit judge in receiving the testimony of A. N. Wood as to the fact that he had indorsed the last credit on the notes in suit. We are at a loss to conceive of any well-founded objection to this testimony. The fact that Mr. Wood, as many other prudent and cautious witnesses are in the habit of doing, expressed himself in the way he did,—“To the best of his recollection;” “I think Mr. S. L. Hopper authorized me to put it [referring to the credit] on those two notes;” “That is my impression, to the best of my knowledge,”—etc., certainly cannot render the testimony incompetent. At most, it could only affect its weight with the jury, though we do not well see how it could even have that effect; for, when asked, “Do you swear positively that Mr. Hopper told you to put it [referring to the credit] on those notes?” his answer was, “To the best of my knowledge, he did.” If the jury believed this testimony,—as they no doubt did,—then there was testimony sufficient to show that the defendant authorized the credit to be placed upon the notes in suit; and, if so, then the case was taken out of the operation of the statute. The third exception is overruled.

The fourth, fifth, sixth, and seventh exceptions, all referring to the testimony of the witness Little, must likewise be overruled. This testimony was but a link in the chain of circumstances tending to sustain the contention of the plaintiffs that there was an understanding that any payments made by defendant upon the \$552 note, on which he was surety of plaintiffs' intestate, should go

as credits upon the notes in suit, and was, therefore, competent.

The eighth and ninth exceptions will be considered together, as they impute error in rejecting the testimony of defendant tending to show that he had paid other debts as surety for his brother. If the defendant had set up such alleged payments in his answer as a defense to this action, then we could see how the testimony was relevant. But, not having done so, we are unable to perceive the relevancy of the testimony excluded to any issue presented in this case. He did set up as a payment his claim against his brother for compensation for his services in the sale of the land above referred to, and this, we presume, was allowed by the jury, for their verdict was for \$563.36, whereas the amount claimed in the complaint as a balance due on the two notes was the sum of \$1,639.36. These exceptions are overruled. The remaining exceptions have already been disposed of by what is said above. The judgment of this court is that the judgment of the circuit court be affirmed.

(61 S. C. 215)

RYKARD v. DAVENPORT.

(Supreme Court of South Carolina. July 23, 1901.)

NONSUIT—CREDIBILITY OF WITNESS.

In an action of claim and delivery against the state constable to recover whisky alleged to have been illegally seized, where there was evidence that plaintiff owned the whisky, and that he had procured it lawfully, and had it for lawful use, it was error to grant a nonsuit, as the credibility of plaintiff's evidence, and whether the whisky was contraband, are questions for the jury.

Appeal from common pleas circuit court of Greenwood county; Benet, Judge.

Action by L. H. Rykard against M. S. Davenport. From a judgment of nonsuit, plaintiff appeals. Reversed.

The following evidence was introduced by plaintiff: "Plaintiff L. H. Rykard, sworn, says: 'That I live in Greenwood county, at Salak. I know defendant. He lives in Greenwood, S. C. I came to Greenwood Saturday, September 22d, about 8 o'clock a. m., and thought probably I'd spend the day and night, perhaps part of day Sunday. I had three quarts and four pints choice old rye whisky, worth \$1 per quart. I came up here to stay from Saturday. For my personal use. I was getting ready to go home. Mr. Davenport and Henderson came up, and Davenport asked for the whisky. I found I had to go home, as my brother could not stop. After Davenport had taken the whisky, I told him he had no right to take my whisky. I asked him for the whisky. He got four pints from under the seat, and three quarts were in back of buggy, under the lap robe. I had not taken any whisky out of the buggy since I came to town. I got whisky from Augusta, Ga. Pints were not ordered with

the quarts. Have never got the whisky back. It was not taken by any of the means, tax, fine, or assessment, or under execution against my property. Whisky was for my individual use. Value of the whisky was \$5.' Cross-examined: 'I am station agent and postmaster at Salak. Six mails a day. Left Saturday to remain till Sunday afternoon. I was going to take the whisky back. Paul Heyman always puts up his whisky in packages. I emptied some into pints. Mr. Davenport and Policeman Henderson took the whisky. Mr. Davenport took the whisky himself. Henderson with Davenport. I bought the whisky in Augusta, and it reached my home at 12 the day before. Davenport said he seized because he heard I was transporting. Said he was obliged to take it. I knew he was state constable. I had no intention of taking it out of the state. Brought it here with intention of drinking before I went back home. Seized about 11, and about sundown I took out papers before Judge Allston. I saw Henderson before whisky was seized. He started to help me take out. Was intending to send my buggy home. Negro got in the buggy on the road. Josh Burton was the negro.' J. G. Rook, being sworn, says: 'I served these papers on Davenport. I did not get the whisky. Understood Davenport to say he had shipped the whisky. He told me since that he had it off.' Cross-examined: 'I am not certain, but think he said shipped it.' L. H. Rykard recalled: 'I have been damaged by losing time and the talk about me.' Cross-examined: 'I don't know whether I was damaged Saturday or not. I don't say I was damaged by running over the town. I did not know of any damages Saturday when I got out the papers. I meant when the whisky was taken. I don't like for people to talk about me, and was damaged by lapse of time and talk and Davenport seizing my whisky. It amounted to \$25.'"

Sheppards & Grier, for appellant. D. H. Magill, for respondent.

McIVER, C. J. This was an action of claim and delivery, brought before a magistrate to recover possession of certain property—five quarts of whisky—taken from the possession of the plaintiff by the defendant, who, upon demand, refused to deliver the same to the plaintiff. The case came on for trial before a magistrate and a jury. The testimony, which is set out in the "case," as the question arises on a motion for a nonsuit, based solely upon the ground "that the plaintiff had failed to make out his case," should be incorporated in the report of the case. The motion for a nonsuit was granted by the magistrate, and the plaintiff appealed to the circuit court, where the appeal was dismissed by the circuit judge in a short order, giving no reason whatever for his conclusion. The plaintiff appealed from the order dismissing his appeal upon the severa

grounds set out in the record, which, under the view which we take of the case, need not be set out here. The magistrate in granting the nonsuit assigned his reasons therefor as follows: "Because it was disclosed by testimony of plaintiff that the whisky was not in transit to destination, but had reached that destination, to wit, Salak, S. C., on Friday, September 21, 1900, and that on the day the said whisky was seized it had been transported from Salak, S. C., to Greenwood, S. C., and then was in the act of being transported back to Salak, S. C., all of which took place inside of this state, after it had reached its destination, a day at least; making it, to my mind, clearly contraband, and subject to seizure." The magistrate evidently acted under the erroneous impression that, upon a motion for a nonsuit, it was his province, instead of that of the jury, to weigh the testimony and determine what were the proper inferences to be drawn from such testimony. This was clear error, for the rule is too well settled to require the citation of any authorities that upon a motion for a nonsuit the only question is whether there is any testimony tending to establish the plaintiff's case, and that it is not the province of the court (in this instance, the magistrate) to draw conclusions from the testimony, as that is the exclusive province of the jury. So that, even if it be assumed that the testimony was sufficient to satisfy the mind of the magistrate, there would still be error. But was there any testimony tending to establish the plaintiff's case? There was testimony tending to show that plaintiff had bought the whisky in Augusta, Ga., for his own personal use, and had received it at Salak, where he lived, the day before it was seized; that he went to Greenwood on a visit on the morning of 22d September, 1900, and took the whisky with him for his own use while there; that he left home with the intention of spending Saturday and a part of Sunday in Greenwood, but finding that his brother, who seems to have been with him, could not stop, concluded to return on Saturday; and that the whisky was seized at Greenwood, before he left, by the defendant, who took it into his own possession, and refused, upon demand, to return it to plaintiff. There was no testimony whatever tending to show that plaintiff had made or intended to make any unlawful use of the whisky, and, on the contrary, the testimony was that he had bought the whisky outside of the limits of the state, and taken it with him to Greenwood for his own personal use. The only testimony that could by any possibility be regarded as even tending to show that the whisky was contraband, and therefore subject to seizure, was the plaintiff's own statement, as follows: "Davenport said he seized because he heard I was transporting. Said he was obliged to take it. I knew he was state constable. I had no intention of taking it out of the state. Brought it here

[Greenwood] with the intention of drinking before I went back home." It seems to us very clear that the testimony on the part of the plaintiff tended to show that the whisky belonged to the plaintiff, and was in his possession for a lawful use; and, in the absence of any evidence to the contrary, the plaintiff would have been entitled to recover. Whether this evidence on the part of the plaintiff was entitled to be believed was certainly not a question which the magistrate could determine upon a motion for a nonsuit, but was a question exclusively for the jury. So, also, even if there was any evidence tending to show that the whisky was contraband, and therefore liable to seizure, that also was a question for the jury, and not for the magistrate, to determine. There was therefore error in granting the motion for a nonsuit, and also error on the part of the circuit judge in not so holding. The judgment of this court is that the order of the circuit judge dismissing the appeal from the magistrate's judgment of a nonsuit be reversed, and the case is remanded to the circuit court, with instructions to reverse the judgment of nonsuit granted by the magistrate, and to grant a new trial.

JONES, J., concurs in the result.

(61 S. C. 220)

TRIMMIER v. DARDEN.

(Supreme Court of South Carolina. July 23, 1901.)

LIFE TENANT—DUTIES AND LIABILITIES—RIGHTS OF REMAINDER-MEN.

1. The remainder-men are not liable to a life tenant for improvements put by him on their lands.
2. Where a will authorizes the executrix to make necessary collections, and convert only such assets into money as are necessary to pay the debts, and to turn over in kind all the rest and residue of the estate to a trustee, the executrix has no power to invest the funds of the estate in erection of improvements.
3. Where a life tenant on condemnation of property receives compensation only for damages to her life estate, the remainder-men are not entitled to the sum so received.
4. A life tenant is only liable for taxes accruing during his life tenancy.
5. An administratrix who is also a life tenant is entitled to credit for payment of accounts due by testator.

Appeal from common pleas circuit court of Spartanburg county; Gage, Judge.

Action by T. R. Trimmer, administrator with the will annexed of F. M. Trimmer, against Belle Darden, administratrix of M. L. Trimmer. From the decree, both parties appeal. Modified.

The following is the circuit decree:

"This is a suit for an accounting. The cause comes before me on exceptions by both sides to the master's report. The exceptions of plaintiff are numerous; those of defendant, only two or three. The primary estate involved is that of F. M. Trimmer, who died

testate in August, 1888, possessed of a large property. His sister, Margaret L. Trimmier, qualified as administratrix of the estate, with will annexed, November, 1888. Margaret L. Trimmier was also a life tenant, under the will, of all the estate of F. M. Trimmier. She died intestate in 1897. One T. J. Trimmier administered on her estate, and he died in March, 1898. Now T. R. Trimmier is administrator of the estate of F. M. Trimmier, and Belle Darden is administratrix of the estate of Margaret L. Trimmier; and what is sought is a settlement of accounts betwixt the estate of Frank M. Trimmier and his sister and administratrix, Margaret L. Trimmier. The testimony covers a wide range, and raises issues not indicated by the pleadings, but no objection has been made on that ground. The master has not made up an itemized statement of the account. He has taken for a basis the four returns made by the administratrix, Margaret L. Trimmier, in the probate court, and has added to and subtracted therefrom. He has made a general statement of the amounts received and the amounts paid out for the nine years from 1888 to 1897, and indorsed therein the items added and items subtracted, and the result thereof is a balance of \$2,486.18 due to Margaret L. Trimmier's estate on 22d June, 1899. The plaintiff's major exceptions are three: (1) Error in striking off the account, as a charge against the administratrix, an aggregate sum of \$5,523.11, made up of twenty-six items, and characterized as rents for 1888. (2) Error in retaining on the account, as a credit for the administratrix, an aggregate sum of \$2,337.18, made up of seven items, and characterized as permanent improvements on real estate; and, of a kindred character, error in adding to the account, as a credit for the administratrix, an aggregate sum of \$745, and characterized as permanent improvements on a building called the Biber Building. (3) Error in striking off the account, as a charge against the administratrix, an aggregate sum of \$2,919.45, made up of two items, and characterized as rent received from Charles Petty on the Biber Building, sometimes called Spartan Building; and, of a kindred character, error in adding to the account, as a credit for the administratrix, an aggregate sum of \$4,505.26, made up of one item, and characterized as interest on the purchase money of the Spartan newspaper sale, from 1878 or 1879 to the death of Margaret, in 1897. The plaintiff makes two minor exceptions, to wit: (1) Error in retaining in the account an item characterized as wages of E. T. Lawson for 1888; the amount not indicated, but assumed to be \$535.11. (2) Error in adding in the account an item of \$470, and characterized as the price of a gin and press on the Winsmith place. The exception which refers to a fee of \$100 paid to Mr. O. P. Sanders was withdrawn. The defendant excepts on three grounds: (1) Error in adding to the account, as a charge against adminis-

tratrix, an item of \$545, and characterized as the price of the right of way over lands of F. M. Trimmier. (2) Error in striking off the account, as a credit for the administratrix, sundry items—four in number—aggregating \$493.81, and characterized as taxes for 1888. (3) Error in not adding to the account, as a credit for the administratrix, an item of \$306.50 paid to Charles Petty by M. L. Trimmier for advertising by Petty for F. M. Trimmier in his lifetime. And now for the consideration of these matters of controversy in the order stated:

"If the twenty-six items of rent were crops cultivated by F. M. Trimmier on his lands, then, under the statute, these crops belonged to his estate, for administration, as other quick assets. If these items were debts to be due to him by tenants, and unevincenced by notes, liens, or other obligation in equity, then they descended to the life tenant, Miss Margaret L. Trimmier, along with the land. The testimony does not reveal the character of these items, and did not, therefore, warrant the master's findings. The final determination of the right to these moneys ought not, however, be left to conjecture. The right ought to be determined according to the fact. That question is therefore recommitted to the master, to take further testimony, and find the matter in accordance with the rule in *Huff v. Latimer*, 33 S. C. 255, 11 S. E. 758.

"I approve the findings of the master with reference to improvements of a permanent character. No general rule can be laid down for the government of every case. Each case must be determined according to the facts of it, and to execute justice. The common rule of law and of reason is that he who expends his means on the land of another, with his eyes open, cannot of right demand reimbursement therefor. But to the rule there are numerous limitations. In a court of equity the inquiry in every case is not so much what is the rule, as what is right. In the case at bar, Margaret L. Trimmier was sister of Frank M. Trimmier. The estate was a handsome one. Margaret L. was life tenant, and manifestly the chief object of the testator's bounty. The estate had vacant lots, and houses in need of constant repair. The administratrix had large funds in her hands. The administratrix had the counsel of a gentleman of singular good judgment. The improvements benefited not the life tenant alone, but the remainder-men as well. If the administratrix expended her money on the land, and if an additional value has thereby been imparted to it, the administratrix, under the circumstances of this case, ought to have compensation therefor. *Palmer v. Miller's Legatees*, Cheves, Eq. 62, 34 Am. Dec. 602.

"The right or equity of the estate of Margaret L. Trimmier to have compensation for improvements on the Biber Building is more difficult. That claim amounts to \$745, and is made for remodeling a brick building on Morgan Square, now called the 'Biber Build-

ing,' and formerly called the 'Spartan Building.' I am satisfied, from the testimony that the building has been permanently and markedly improved, and that the cost thereof is reasonable. But Margaret L. Trimmier came by that property in this way: It was conveyed to her by deed in 1871 by Frank M. Trimmier, and along with it several other parcels of land. The deed carried only a life estate to Margaret, and remainder over. The returns of Margaret L. Trimmier do not show that she claimed to be reimbursed for the improvements to this property. That item has been added to her account by the master. The control and management of that property had no connection with the administration of the estate of Frank M. Trimmier. It is a bald case of a life tenant improving property at her own risk, and with full knowledge of her limited title. There is no equity to demand recompense, and I cannot allow it.

"Another matter of great difficulty grows out of the Spartan Building transfer. Frank M. Trimmier was the owner not only of the building and lot, but of a newspaper published therein, called the 'Spartan.' The deed of 1871 hereinbefore referred to conveyed the newspaper, along with the house and lot, to Margaret L. Trimmier. In December, 1878, the newspaper was sold to Charles Petty for \$3,500, on credit. He began its publication January, 1879, and at that time also became tenant of the Spartan Building, at a rental of \$20 per month. It is not clear how much Mr. Petty paid on the purchase price of the paper, when he paid it, and how he paid it. It is clear he paid no rent up to the 2d of March, 1887, except what he paid by advertisements for Trimmier. The note and mortgage from Petty to Frank M. Trimmier, held now as part of Trimmier's estate, embrace balances for rent of building and purchase price of paper, up to 2d March, 1887. On 2d March, 1887, Mr. Trimmier and Mr. Petty happily had a settlement, the memorandum sheets of which are in evidence. It appears therefrom that on that day Petty owed Trimmier seven years' rent, and interest thereon, aggregating \$2,032.80; that Trimmier owed Petty an account amounting to \$301.68; that a balance was then struck for rent due by Petty of \$1,731.12. It appears therefrom, also, that there was then due by Petty for the purchase price of the newspaper the aggregate sum of \$2,299.75. On 2d March, 1887, seventeen months before Frank M. Trimmier died, Petty owed somebody the following sums of money, to wit: Rent of building seven years, \$2,032.80; balance purchase price newspaper, \$2,299.75,—\$4,332.55. The important question is, to whom was this money rightly belonging? It does not appear what became of the rent of the Spartan Building from 1871 to 1879, but no claim is made here for it. It does not appear what became of the payments made by Petty on the purchase price of the Spartan newspaper. The presumption in each case is that, if paid to Frank M. Trim-

mier, he accounted for the same to the owner. It is manifest the sums above stated were not paid, to wit, \$2,032.80 (except a small sum by offset, amounting to \$301.68) and \$2,299.75. The memorandum and the testimony of Charles Petty make that plain. There is no question the rent belonged to Margaret L. Trimmier, for the real property was hers for her life. When Margaret L. Trimmier qualified as administratrix, in November, 1888, and had funds in her hands, the debt due to her for rent was paid. There can be no question but that Margaret L. Trimmier was owner of a life estate in the newspaper, the Spartan. But when that paper was sold to Mr. Petty for \$3,500, in December, 1878, and the note therefor taken in Frank M. Trimmier's name, did Margaret L. become entitled to a life estate in the note? I must infer the sale was made by consent of the life tenant, and I conclude, also, the note stood for the newspaper. But on 2d March, 1887, there was due by Petty only \$1,532 thereon, and six years' interest, to wit, \$2,299.75. See second sheet memo., above referred to. It is manifest, therefore, that Petty had paid in some way about \$2,000 of the purchase price of the paper. The testimony of Mr. Petty on this point ought to have been specific, but it was not. It is left, therefore, to conjecture from the written memorandum. Shall Margaret L. be entitled to demand interest on the \$2,000 settled in Frank M. Trimmier's lifetime, and interest on the \$1,500 due at his death? I must assume that the sums paid by Petty were paid to those entitled thereto, and that Margaret L. therefore received her share of the \$2,000 by some settlement with Frank M. As to the balance due by Mr. Petty of \$2,299.75, Margaret L. is entitled to have the interest thereon credited yearly from 2d March, 1887, to her death, when her estate therein ended by limitation. She can have no more than this. It was argued with great force by the attorney for plaintiff that Frank M. Trimmier must be presumed to have paid to Margaret L. in his lifetime the rents due to her, and interest on purchase price of the newspaper. But the written memorandum made by Frank M. Trimmier and by T. R. Trimmier, his clerk, fixes the entire transaction, and is conclusive to my mind. It is true, Margaret L. did not claim these items in her returns, but that is not conclusive against her.

"The plaintiff's exception as to the wages of E. T. Lawson is not sustained or overruled. That matter is remanded to the master, to be determined along with the matter of rents, already referred back. The ruling of the master, by which he allows Margaret L. credit for \$470, the price of a gin and press on the Winsmith place, is modified. She is entitled to credit for the value of the gin, etc., at the time of her death, but no more. The defendant's first exception is sustained. A right of way is not divisible into a life estate and remainder. It does not involve the f-

or partake of the fictitious entity called 'title.' The defendant's exception about taxes for 1888 is overruled. The life tenant was liable for taxes. The exception touching the item of \$306.50, which was due by Frank M. Trimmer to Charles Petty, has already been passed upon. It belonged of right to Margaret L. The cause is remanded to the master to take testimony and report on the issues referred back, and to report in accordance with his conclusions thereon, and pursuant to the findings herein."

J. T. Johnson, for plaintiff. Nicholls & Jones, for defendant.

GARY, A. J. In order to understand fully the facts of this case, it will be necessary to refer to the decree of his honor, Judge Gage. The record contains the following general statement: "This action was begun in the court of common pleas for Spartanburg county by the plaintiff, appellant, respondent, against defendant, appellant, respondent, April 15, 1898, for a settlement and accounting between the estates of F. M. Trimmer and M. L. Trimmer, arising from the administration of F. M. Trimmer's estate by M. L. Trimmer, as administratrix with the will annexed of F. M. Trimmer, from 1888 to 1897. The cause was referred to the master to hear and determine all the issues. The master made his report, and the same came on to be heard on exceptions thereto by his honor, Judge Gage. Judge Gage modified the master's report, and referred certain questions back to the master for further testimony and determination. On the coming in of the master's second report, there being no exceptions thereto, the same was confirmed by Judge Klugh. Both plaintiff and defendant appeal from the decree of Judge Gage. The counsel in the case entered into written agreement on the filing of Judge Gage's decree to await the determination of the matter then left open in order that all questions might be presented in one appeal. There being no appeal from Judge Klugh's order, the appeal was from Judge Gage's decree."

The issues are thus stated by the defendant's attorneys: "(1) The estate of Frank Trimmer consisted in part of money seeking investments, and in two lots in Spartanburg city, known as the 'New York Store' and the 'Red House,' which were not remunerative. In all this property Margaret L. owned a life interest, and was also her brother's administratrix. She invested some of the money in improving these lots. Both the master and circuit judge find that these improvements were judicious, permanent, and allowable. In addition thereto, she expended about \$700 in repairs, which were not allowed. Plaintiff appeals from the allowance of the permanent improvements. (2) In addition to the life estate in these buildings, held under the will, Margaret also held a similar estate by deed from Frank Trimmer in the Spartan

Building, with reversion to the same devisees. She made similar improvements on this property, which were allowed by the master, but excluded by the circuit judge. Defendant appeals. (3) During her life tenancy a railroad right of way was condemned over lands which she owned as a life tenant, and she received \$531 damages therefor. The circuit judge held that she was entitled to hold this as her own. The plaintiff excepts, and claims that she is entitled to only the interest thereon during her life. (4) After deeding to Margaret L. a life interest in the Spartan Building, he rented it to Capt. Petty, and several years after he took Petty's note in his own name for arrears of rent, and also paid Petty an account of \$301.68 out of said rents. The master and circuit judge held that he should account for this to Margaret L., the life tenant. Plaintiff appeals. (5) He also deeded to her a life interest in the Spartan newspaper. He afterwards sold it (with her consent) to Petty, and took the notes for the purchase price in his own name, and collected part of the purchase price. The master finds that Frank's estate is liable for the interest on the purchase price of the paper, and the circuit court finds that she was entitled to the interest in the said notes. The plaintiff appeals on the ground that Frank's estate owes her nothing on this account. The defendant appeals on the ground that the circuit judge made a mistake in his method of calculating the interest which he had found was due. (6) The master and circuit judge neglected to allow Margaret L. \$306.50 paid by her as administratrix for advertising for her testator. Defendant appeals. (7) They also failed to allow her credit for taxes charged against Frank Trimmer in his lifetime, and paid by her as administratrix. Defendant appeals. We think these last two items were an oversight."

The plaintiff's exceptions are as follows: "(1) Because his honor erred in finding as a fact that these improvements were permanent and injudicious, and erred in allowing the estate of M. L. Trimmer the following as proper credits and disbursements: 1896: April 13, paid W. A. Mistler, permanent improvements on N. Y. Store and Red House, \$14.95. April 20, paid Geo. Sanders, building chimney and pillars, \$20.50. May 11, paid H. J. Solesby, remodeling Red House, \$576.83. May 28, paid W. A. Mistler, putting tin roof on N. Y. and Floyd Liles stores, \$559.28. 1896: June 22, paid J. P. Hertzog, rebuilding Liles store, \$610. May 11, paid W. A. Mistler, for pipes and guttering, \$10.60. (a) It is respectfully submitted that said improvements were made to increase her own income as life tenant, and not for the benefit of the remaindermen, and his honor erred in not so holding. (b) It is respectfully submitted that as life tenant it was her duty to keep the real estate in ordinary and reasonable repair at her own expense, and, if she made more than ordinary repairs, she did it for her own

benefit and at her own peril, and his honor erred in not so holding. (c) It is respectfully submitted that the fact that Miss Margaret L. Trimmier, as administratrix, had large sums of the estate's money in her hands gave her no warrant in expending such money, or any part thereof, upon real estate, in order to increase her own income, even though the succeeding life tenant may be incidentally benefited, and his honor erred in not so holding. (2) Because his honor erred in allowing Miss Margaret L. Trimmier to retain as her own, and absolutely, the money paid her in condemnation proceedings for right of way over land of F. M. Trimmier; it being respectfully submitted that he should have held that, as life tenant, she could have the use of the money for life without interest, and at her death the money should go to the remainder-man, just as the land itself would do. (3) Because his honor erred in finding as a matter of fact that F. M. Trimmier owed his sister, M. L. Trimmier, anything on account of the rents of the Spartan or Biber Building; it being respectfully submitted that the evidence showed no such indebtedness, and his honor erred in not so finding. (4) Because his honor erred in finding as matter of fact that F. M. Trimmier owed M. L. Trimmier any sum whatever on account of sale of the Spartan newspaper; it being respectfully submitted that the evidence did not justify such finding, and his honor erred in not so holding. (5) Because his honor erred in not finding and holding that any and all claims arising from the rent of the Spartan Building and the sale of the Spartan newspaper, or either of them, was barred by statute of limitation and laches of defendant's intestate."

The defendant's exceptions are as follows:

"(1) Because his honor, the presiding judge, in considering whether permanent improvements made by Margaret L. Trimmier on the Spartan or Biber Building, erred in finding that her estate in said property differed materially from the estate she held in other property on which she made improvements, and for which she was properly allowed credit, and in not finding that the only difference in the estate was that she held the Spartan or Biber Building by deed without remainder over, and she held the other realty by will, with remainder to the remainder-men, and that there was no substantial difference therein, and that he erred in holding that 'this was a bald case of a life tenant improving property at her own risk, with a full knowledge of her limited title'; and in not finding that she made said permanent improvements just as she did on the other property, and should have like protection therefor, and that his honor erred in finding and holding that 'there is no equity to demand compensation,' and in refusing to allow the same. (2) That his honor, after finding that Margaret L. had a life interest in the note given by Petty for the Spartan newspaper, and that there was due thereon a bal-

ance of \$1,532, which was principal, and six years' interest (\$767.75) from March 2, 1881, amounting to \$2,299.75, erred in allowing her only the interest on said \$2,299.75 to be credited yearly from the 2d of March, 1887, to her death, the error being that this balance of \$2,299.75 embraced both principal and accrued interest from 1881 to 1887, which interest belonged to Margaret L.; and his honor erred in giving this interest to Frank M., and in allowing to Margaret L. the interest in her said interest, whereas the estate of Frank should receive at the death of the life tenant only the principal (\$1,532), and Margaret should receive credit for all the interest gained by the Petty note from March 2, 1881, until her death, which was seven per cent. compound interest, as shown by Frank M. Trimmier's calculation. (3) That his honor, after finding that 'Capt. Petty paid in some way about \$2,000 of the purchase price of the paper in Frank M. Trimmier's lifetime' (before March 2, 1881), and that he assumes that the sums paid by Petty were paid to those entitled thereto, he erred in finding that 'Margaret L. therefore received her share of the \$2,000 by some settlement with Frank M.,' and in not allowing her anything further on said sum so paid by Petty; the error being in not holding, as he had already found, that the note had been taken in the name of Frank M. Trimmier and belonged to him, except that Margaret L. had a life estate therein, to wit, the interest on the note; that, when Petty paid the \$2,000 of purchase money, Frank M., as the holder and owner of said note, received and retained it as his own, but that he became liable to Margaret L. for the interest on the amount so received from the time he received it (March 2, 1881) until her death, on May 4, 1897. (4) That his honor erred in finding that the amount paid by Petty in Frank's lifetime was about \$2,000, when he should have held that at least \$2,511 was paid prior to March 2, 1881, of which \$1,958 was principal and \$543 was interest, belonging to Margaret L., and that his honor erred in not allowing her credit for the said interest, with interest thereon from the date it was paid (March 2, 1881) until her death, May 4, 1897. (5) That his honor erred in assuming that there had been any settlement between Frank M. and Margaret L., when there was no evidence of such settlement, nor when it was made. (6) Or, in other words, that his honor erred in not allowing to Margaret L. Trimmier, as life tenant in the Petty note, all the interest that he actually paid thereon; and when he paid part of the principal to Frank M., and thereby stopped the interest on amount so paid, in not allowing her interest on the said amount in the hands of Frank M. from the time he received same until her death. (7) Or, if this cannot be allowed, that his honor erred in not finding that she was at least entitled to simple interest on the purchase price of the paper from the time it was sold until her death

(8) That his honor erred in overruling the 'defendant's exception about taxes for 1888,' and holding that Margaret L. Trimmier was liable as life tenant for taxes which accrued against Frank M. Trimmier during his lifetime, and in not holding that a life tenant is liable only for taxes which accrued during said life tenancy. (9) That his honor erred in confusing the item of \$301.68 paid for advertising by Capt. Trimmier in his lifetime by credit on the rent account, and the \$306.50 paid by Margaret L. Trimmier on January 21, 1892, for advertising for Frank's estate, out of the rents due her by Petty, and in holding that this item of \$306.50 had already been passed upon, and, after holding that 'it belonged of right to Margaret L.,' 'in not ordering that she be allowed credit for the same, and that it be added to her disbursements by the master.'"

The plaintiff's attorneys in their argument say: "The questions of law are: (1) What are the rights of the life tenant to recover from remainder-men for permanent improvements? (2) What are the rights of remainder-men in a fund collected by the life tenant in condemnation proceedings by railway to obtain right of way? (3) Then there is a mixed question of law and fact, viz.: What amount, if any, is due by F. M. Trimmier's estate to Margaret L. Trimmier's estate on account of the Spartan newspaper and the Spartan Building?"

1. We will first consider the rights of a life tenant to recover from remainder-men for permanent improvements. In *Corbett v. Laurens*, 5 Rich. Eq. 301, Chancellor Wardlaw, in behalf of the court, says: "The equity of a tenant for life against remainder-men for the benefit of his improvements is inferior to that of a tenant in common in like case. The tenant for life is exclusively entitled to the enjoyment of the estate for an indefinite term of time, as measured by the calendar, always long in his anticipation; and as to him the inference is more natural that he intends his improvements for his personal use. He is not interested in the inheritance, and has little pretension to anticipate the interests or the wishes of his successors. He is an implied trustee for the remainder-men, and, by general rule in equity, trustees are not entitled to the profits of their management of the trust estate. His estate is not infrequently given rather for the preservation of the rights of the remainder-men than for his own enjoyment. Where a bounty to him is clearly intended, it is commonly no more than the enjoyment of the estate, in the existing condition at the time of the gift, or in a progressive condition contemplated by the donor at the time of the gift. Courts of equity in England, which admit this equity as to improvements more liberally than we do between tenants in common, have not recognized the claim of a tenant for life to compensation for improvements, except in the case where he goes on to finish improvements

permanently beneficial to the estate which were begun by the donor." After stating that the doctrine, as limited, seems to be approved in *Ex parte Palmer*, 2 Hill, Eq. 217, the court, in commenting on that case, says: "There an allowance was made to an executor for improvements put by him on an unimproved lot in the city of Charleston, which by subsequent marriage with the widow of the testator he acquired for life; but the general rule against such allowance to a tenant for life is expressly stated. This, as a general rule, is not unconscientious; and in cases which may seem to be proper exceptions to its operation, as in a gift for life of wild lands in such terms as clearly import an intended bounty to the tenant for life, which cannot be enjoyed in the existing condition of the subject, the tenant may obtain by timely application to this court either a sale of the whole estate, so that he may enjoy the income, or authority to make improvements permanently beneficial; and he suffers from his own willfulness, if he proceeded upon his own notions of improvement, without asking aid or advice. The court may sanction what it would have previously authorized, but it encourages no experiments upon its power of retroactive relief." The general rule firmly established in this state is that a tenant for life who puts improvements on land is not entitled to compensation from the remainder-men. The right of a tenant for life to compensation for improvements on the land is even inferior to that of a tenant in common in like case, who is not allowed the exclusive benefit of his improvements, except "under circumstances which would make it a great and obvious hardship to be deprived of the benefit of such improvements." *Buck v. Martin*, 21 S. C. 590, 53 Am. Rep. 702, and cases therein cited. There are no such circumstances in this case.

2. It is contended, however, that the money expended in the improvements belongs to the estate of F. M. Trimmier, of which Margaret L. Trimmier was administratrix, and, as the investment of the trust funds by her as administratrix was judicious, her estate should receive credit for such expenditures. It cannot be said that the expenditures were made by her as administratrix, for she had no such power. The will of F. M. Trimmier contains the following provisions: "Item 3. In making collections and sales of my personal assets, necessary for the payments of my debts and expenses of administration, I direct that only such assets be converted into money as are necessary for that purpose, to be selected from those which are least secured. Item 4. All the rest and residue of my personal estate, whether the same be bonds, mortgages, notes, or otherwise, choses in action, goods, chattels, or other personalty, I direct to be turned over in kind (that is to say, unconverted into money) to a trustee to be appointed by the proper court of this state; and I give and bequeath all of my personal estate

(including cash unconsumed in the payment of debts and expenses of administration) unto and to the use of such trustee, his successor in office, their executors, administrators, and assigns, forever, to be held by him and them upon the following trusts. * * * It will thus be seen that it was made her duty to turn over in kind to the trustee therein mentioned all the personal property of the estate, except what was consumed in the payment of debts and expenses of administration. It would have been a violation of the trust if she had invested the funds of the estate in the erection of improvements.

3. We will next consider what her rights were with regard to the funds received by her under the condemnation proceedings to obtain the right of way by the railway company over the land. In the record appears this statement: "It is admitted that in the condemnation proceedings over the real estate of F. M. Trimmier, deceased, leading out to the Spartan Mills, Miss M. L. Trimmier received \$645, less her attorney's fee, who represented the estate in said proceedings." The record does not show that Miss Trimmier received compensation for any damages other than to her life estate. She could not be considered as holding the fund in trust unless it was shown that she received compensation not only for the damage to her life estate, but to the estate in remainder. She had the right to compensation for damage to her life estate, and could not, even if she had so desired, have deprived the remainder-men of the right to compensation allowed them by the constitution. *Cureton v. Railroad Co.*, 59 S. C. 377, 37 S. E. 914.

4. We proceed to a consideration of the third question, viz.: What amount, if any, is due by F. M. Trimmier's estate to Margaret L. Trimmier's estate on account of the Spartan newspaper and the Spartan Building? The presumption is that an instrument of writing is what upon its face it purports to be. The mortgage executed by Petty in favor of F. M. Trimmier shows upon its face that it was the sole property of F. M. Trimmier. The administratrix of Miss Trimmier's estate contends that this presumption is rebutted by the fact that the consideration of the mortgage was the sale of the property in which she had a life estate. It must, however, be remembered that, when F. M. Trimmier wanted to let it be known that his sister had an interest in certain of his property, he expressed it in writing. Furthermore, as said by his honor, the circuit judge, Miss Trimmier did not claim the said items in her returns. We do not think the presumption was rebutted.

5. These views dispose of all the other questions, except those raised by the defendant's eighth and ninth exceptions. Section 220 of the Revised Statutes shows that the eighth exception should be sustained.

6. The ninth exception should be sustained for the reasons therein stated.

It is the judgment of this court that the judgment of the circuit court be modified in the particulars hereinbefore mentioned.

(61 S. C. 255)

STATE ex rel. WALKER, Clerk of Court, v. DERHAM, Comptroller General.

(Supreme Court of South Carolina. July 24, 1901.)

PENSIONS—APPROPRIATION—WARRANT.

The sum of \$100,000, appropriated in the general appropriation act of 1901, is to be distributed according to the provisions of Act Feb. 19, 1900 (23 St. at Large, p. 409), as amended by Act Feb. 19, 1901 (23 St. at Large, p. 753), for pensions of soldiers and sailors, residents of the state, who were in the service of the state or the Confederate States in the late war between the states, and the comptroller general can only lawfully draw his warrant in favor of the clerk of the circuit court for a pro rata share of pensions going to his county appropriated by such general act.

Petition by J. Frost Walker, clerk of the court of the county of Richland, for mandamus against J. P. Derham, comptroller general, to draw his warrant for pensions for citizens of Richland county. Denied.

For former opinion, see 38 S. E. 857.

G. Duncan Bellinger, Atty. Gen., for petitioner. John P. Thomas, Jr., for respondent.

POPE, J. The petitioner, as clerk of court for the county of Richland, of the state of South Carolina, on the 29th April, 1901, made a demand upon the respondent, as comptroller general of the state of South Carolina, that he should issue to him his official warrant or warrants in the aggregate sum of \$3,731.60 on the state treasurer, as the amount due the pensioners of Richland county, S. C., who had been soldiers or sailors in the service of the state or in the Confederate States in the war from the year 1861 to 1865, inclusive, in accordance with the provisions of an act entitled "An act to amend 'An act to provide for pensions for certain soldiers and sailors now residents of South Carolina, who were in the service of the state or of the Confederate States in the late war between the states,' approved 19th February, 1900, by increasing the amount of appropriation, and further prescribing the distribution of the same." See 23 St. at Large, p. 753 et seq. This demand was refused by the comptroller general on the ground that the appropriation named in the aforesaid act, to wit, the sum of \$150,000, was not an appropriation of said specific sum, but that the only appropriation by law was the sum of \$100,000, which sum was set out as required in the appropriation act for the year 1901, and that instead of the petitioner, as clerk as aforesaid, being entitled to his warrant or warrants for the sum, in the aggregate, of \$3,731.60, he was only entitled to a warrant or warrants for the sum, in the aggregate, of \$2,476.84; whereupon the petitioner, as clerk as aforesaid, exhibited his petition in this court, in the original jurisdic

tion thereof, against the respondent, as comptroller general of this state, wherein he set out by appropriate allegations his right to demand of the respondent, as comptroller general, the warrants of the latter on the state treasurer for the sum of \$3,731.60, as pensions for soldiers and sailors, or the widows thereof, of the late war between the states, and residing in Richland county, in said state. The respondent in his return denied that he was entitled, as such comptroller general, under the laws of this state, to draw his warrant or warrants on the state treasurer for the sum of \$3,731.60, but, on the contrary, was only required under the laws of this state to draw his warrant for the sum, in the aggregate, of \$2,476.84, which latter he avowed his willingness to do.

There were no issues of fact raised; only conclusions of law. These issues were heard before this court on the 6th day of May, 1901, and, owing to the importance of a prompt payment of the pensions to those entitled to the same, the court pronounced its judgment on the 15th May, 1901, and stated that the reasons for such judgment would be given later in this term. The judgment was as follows: "Per Curiam. On hearing the petition herein and the return thereto, and after argument of counsel, it is ordered and adjudged that the prayer of the petition be refused, and the petition dismissed. It is further ordered and adjudged that the money appropriated in the general appropriation act passed at the last session of the general assembly, to wit, the sum of \$100,000, be distributed according to the provisions of the act entitled 'An act to provide for pensions for certain soldiers and sailors, now residents of South Carolina, who were in the service of the state or of the Confederate States in the late war between the states,' approved the 19th day of February, A. D. 1900 (23 St. at Large, p. 400), as amended by an act entitled 'An act to amend section 1 of an act entitled "An act to provide for pensions for certain soldiers and sailors, now residents of South Carolina, who were in the service of the state or of the Confederate States in the late war between the states," approved 19th February, 1900, by increasing the amount of appropriation, and further prescribing the distribution of the same,' approved the 19th day of February, A. D. 1901 (23 St. at Large, p. 753). The reasons for the foregoing judgment will be given in an opinion hereafter to be filed."

Briefly, our reasons for the above judgment are as follows: The act of the general assembly of this state entitled "An act to amend section 1 of an act entitled 'An act to provide for pensions,' etc., approved the 19th day of February, 1901 (23 St. at Large, p. 753), among other things provided as follows: That its purpose was to amend section 1 of an act to provide for pensions, etc., approved 19th February, 1900, by increasing the amount of appropriation from \$100,000 to \$150,000, and further prescribing the distribution of the

same. This was practically the title to said act of 1901. The language of section 1 of said act was as follows: "Be it enacted," etc., "that section 1 of an act entitled 'An act to provide for pensions for certain soldiers and sailors now residents of South Carolina, who were in the service of the state or of the Confederate States in the late war between the states,' approved 19th February, 1900, be and the same is hereby amended by striking out the words 'one hundred' and inserting in lieu thereof 'one hundred and fifty' before the word 'thousand,' on lines two and three of said section, and by adding at end of said section the following, to wit: *Provided, further*, in case the same or such amount as shall be appropriated shall be more than sufficient, then the amount so appropriated shall be distributed proportionally among all those legally entitled to receive the same; so that said section when so amended shall read as follows: Section 1. The sum of *at least* one hundred and fifty thousand dollars *shall be* annually appropriated to pay the pensions provided for by this act, and in case the same or *such amount as shall be appropriated* shall be insufficient, then the amount so appropriated shall be distributed proportionally among those legally entitled to receive the same: *provided*, that those pensioners described in subdivision (a), section 4, herein, shall have been first paid in full: *provided, further*, in case the same, or such amount as shall be *appropriated*, shall be more than sufficient, then the amount so appropriated shall be distributed proportionally among all those legally entitled to receive the same." Italics ours, except as applied to the words "*provided*" and "*provided, further*." The question meets us at the threshold, does this section 1 of the act of 1901 appropriate the sum of \$150,000, so that without further legislative action the state officers whose duty it was to draw and pay warrants for funds in the state treasury could be required to do so? We know of no law which confines the general assembly, in making appropriations, to embracing such appropriations in what is known as the act for general appropriations of any fiscal year, or to what is known as the act making appropriations to pay legislative expenses. It is competent, though unusual, for the general assembly to provide for appropriations of the public money by other acts than the two just mentioned. What is meant by the phrase "legislative appropriations of money"? To appropriate money is to set it apart,—to designate some specific sum of money for a particular purpose or individual. To do this effectually it is necessary that the power in the legislature to defeat the application of the money to some particular object or individual by providing for some other use thereof cannot exist except by some legislative action afterwards to the contrary. Thus, in 1878 certain money raised by taxes was ordered to be applied, set apart, or appropriated to the

payment of the interest on a particular public debt, but was not so applied, and thereafter the general assembly directed a different application of the money which by an act of the general assembly had been appropriated to the payment of interest on certain parts of the public debt. The state treasurer declined to pay the money in his hands as treasurer to any second object. Upon proceedings for mandamus in the original jurisdiction of this court, it was declared by the court that the legislature had control over the funds in the state treasury which had not been actually applied to an appropriation previously made by act, so that by a later act the money could be diverted. *State v. Leaphart*, 11 S. C. 458. In 1 *Rap. & L. Law Dict.* p. 72, it is said: "By Government. Appropriation of supplies is the mode by which the legislative branch of the government regulates the manner in which the public money voted at each session is to be applied to the various objects of expenditure, and the appropriation bills are annual statutes passed for that purpose,"—citing 1 *Bl. Comm.* 335, note; 2 *Steph. Comm.* 579, note; *Const. U. S. art. 1, § 9*. In *Webster's International Dictionary*, to appropriate money is "to set apart for or to assign to a particular person for use in exclusion of all others." In article 10, § 9, of the state constitution of 1895, it is provided: "Money shall be drawn from the treasury only in pursuance of appropriations made by law."

The next question we will consider is whether the sum of \$150,000 for pensions is in the act of 1901 provided as an appropriation of so much money. We do not think so, for: First, there is no definite sum set apart by said act for pensions. The language is, "the sum of at least \$150,000 shall be annually appropriated,"—thus showing that no definite sum is appropriated which the act says shall be appropriated; thus indicating that some action by the general assembly in the future is contemplated. Second, the section in question by its language negatives an actual appropriation of \$150,000 by the words, "and in case the same or such amount as shall be appropriated shall be insufficient, then the amount so appropriated shall be applied proportionately," etc. And, third, in the second proviso, it is stated in this section, in case "the same or such amount as shall be appropriated," which negatives the idea that this section carries an actual appropriation. Again, the policy of the state, as it is ascertained by the acts themselves since the year 1887, at which time pensions were first provided for soldiers, sailors, or the widows of soldiers or sailors, has always been to have an act fixing the amount to be appropriated for such pensions, and is always accompanied by an act making an actual appropriation of such amount,—what is called the general appropriation act. See act of 1887 (19 St. at Large, p. 826) providing for pensions. See act of 1887 (19 St. at Large, p.

848) appropriating the sum of \$50,000 to pay pensions, and contained in what is known as the general appropriation act. See act of 1888 amending the act of 1887, in regard to pensions, and found in 20 St. at Large, p. 29, providing \$50,000 as the amount to be paid for pensions. In the general appropriation act this sum is set apart. 20 St. at Large, p. 24. And so it continues down to the year 1901. In this last year the general appropriation act fixes the amount at \$100,000, while the act for pensions fixes at least \$150,000. As was suggested by counsel for respondent, it may be that the pension act approved February 19, 1901, was to guide future legislatures. So we fail to see that the petitioner has sustained his contention.

We have directed that the appropriation of \$100,000 shall be paid in accordance with the provisions of the act of 1900 (23 St. at Large, p. 409), but as amended by the act of 1901 (23 St. at Large, p. 754), because we hold that the said act of 1900 is still of force, except as amended by the said act of 1901, and it is expressly provided in the latter act that the pensions shall be governed by the said act of 1900; "provided further, in case the same or such amount as shall be appropriated shall be more than sufficient, then the amount so appropriated shall be distributed proportionally among all those entitled to receive the same." We do not think article 13, § 5, of the constitution of 1895, which merely requires the general assembly of this state, at its first session after the adoption of this constitution, to provide proper pensions, etc., affects the question of pensions in this state except as furnishing direct authority to the state legislature to provide pensions. It recognizes no particular amount as proper to be paid. The only plan it requires to be put in operation is that soldiers and sailors, etc., shall be guaranteed a pension. Thus it follows that our previously announced judgment is proper, for the reasons here assigned.

(61 S. C. 205)

CAROLINA GROCERY CO. v. BURNET,
County Treasurer.

(Supreme Court of South Carolina. July 22, 1901.)

SUPREME COURT — JURISDICTION — CONTROVERSY WITHOUT ACTION—CONSTITUTIONAL LAW—COUNTY GOVERNMENT—MANDAMUS.

1. Under Code Civ. Proc. § 374, providing for submission of controversy without action on an agreed case to any court which would have jurisdiction if an action had been brought, proceedings for mandamus may be brought originally in the supreme court.

2. Act Jan. 4, 1894 (21 St. at Large, p. 481), providing for a system of county government for the several counties of the state, was not repealed by Act Jan. 12, 1899 (23 St. at Large, p. 1), providing for the appointment of persons by the governor to act as commissioners of counties, and a county board of Charleston, composed of the supervisors and chairman of township boards, is a legal body.

3. Under Const. art. 1, § 29, enacting that the provisions of the constitution shall be con-

strued to be mandatory and prohibitory, and not merely directory, except where expressly made so by its own terms, the determination whether a general law can be applied so as to exclude special laws is a judicial question.

4. Act March 6, 1899 (23 St. at Large, p. 113), amending the act of January 12, 1899 (23 St. at Large, p. 1), relating to county and township government, which acts amend the act of January 4, 1894 (21 St. at Large, p. 481), are special laws, not in violation of Const. art. 3, § 34, subd. 2, being within the exemption of the proviso of such section of the constitution that nothing in such section shall prohibit the general assembly from enacting special provisions in general laws.

5. Mandamus is the proper remedy to compel a county treasurer to pay a county warrant, on his refusal on the ground that it was issued by a board of county commissioners illegally constituted.

Application by the Carolina Grocery Company for a writ of mandamus against Barnwell R. Burnet, county treasurer of Charleston county, requiring him to pay a warrant held by plaintiff. Writ granted.

W. M. Fitch, J. W. Barnwell, T. W. Baccot, and W. Turner Logan, for plaintiff. G. Duncan Bellinger, Atty. Gen., for defendant.

JONES, J. This is a controversy submitted without action on an agreed statement of facts in the original jurisdiction of this court. The plaintiff, a corporation of this state, seeks a writ of mandamus to compel the defendant, as county treasurer of Charleston county, to pay a warrant against said county for \$3.50, issued by W. P. Cantwell, the supervisor of said county, in favor of the plaintiff, upon the approval of the claim by the county board of commissioners of said county. The county treasurer refused to pay the claim on the ground that the board of county commissioners of Charleston county is not a legally constituted board and had no power to authorize payment. The purpose of this controversy is to determine whether the board of commissioners of Charleston county is a legal board.

1. Before proceeding further we will notice an inquiry made at the hearing,—whether this court has jurisdiction to hear this controversy. Section 374 of the Code of Civil Procedure provides: "Parties to a matter in dispute which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. . . ." This provision of the Code is applicable to this court in all matters within its original jurisdiction, and since this court has undoubted original jurisdiction to issue writs of mandamus under article 5, § 4, of the constitution, jurisdiction to hear this controversy, submitted under section 374 of the Code of Civil Procedure, is clear. *Simpson v. Willard*, 14 S. C. 191; *Macey v. Curtis*, 14 S. C. 367. This case is not like the case of *Nicholson v. Cousar*, 49 S. C. 329,

29 S. E. 1035, wherein it was sought to submit to this court a controversy without action involving the specific performance of a contract for the sale of land,—a matter not within the original jurisdiction of this court.

2. The county board of commissioners of Charleston county, whose authority to act as such is now questioned, is composed of W. P. Cantwell, the supervisor of the county, as ex officio chairman, and Morris Israel and others named in the proceedings, who are chairmen of the township boards of commissioners of the several townships of Charleston county, appointed by the governor on the 13th day of February, 1901, under the provisions of the act entitled "An act to provide a system of county government for the several counties of this state," approved January 4, 1894 (21 St. at Large, p. 481). If this act is now of force in Charleston county, in so far as it provides for the mode of organizing the county board of commissioners, then the writ of mandamus should issue to compel the county treasurer to pay the plaintiff's claim, which has been approved and duly ordered to be paid by said board and proper warrant issued therefor. At the session of 1898 the legislature passed an act entitled "An act to provide for the county government of the various counties of this state." This act was not approved by the governor, but, not having been returned by him to the general assembly, the act on the 12th day of January had the same force and effect as if he had signed it, under the provisions of section 23, art. 4, of the constitution. 23 St. at Large, p. 1. This act provided in section 2: "That the governor shall before the 1st day of February, A. D. 1899, upon the recommendation of the members of the general assembly from the several counties or a majority of them, and before the 1st day of February of each succeeding two years thereafter, appoint two persons from each county, who shall be known as the commissioners of the county, and who shall act with the supervisor in the governmental matters of the county," etc. In section 3 the act provides: "That on the 1st day of February, A. D. 1899, the office of county commissioners and township commissioners, as now provided by law to be appointed by the governor, shall be abolished, and the jurisdiction, powers and duties now devolved by law upon the appointive boards of county and township commissioners is hereby devolved upon the boards of county commissioners herein provided for, to consist of the county supervisor and two commissioners; and all claims against the counties to be valid shall be approved in writing by a majority of said board," etc. In sections 7 and 9 it was enacted that "the provisions of this act shall not apply to the counties of Bamberg, Barnwell, Chester, Spartanburg, Fairfield, Cherokee, Kershaw, Hampton and Beaufort," etc. Section 8 repeals all acts or parts of acts inconsistent with this act. This act on March

3, 1899 (23 St. at Large, p. 9), was so amended as to insert Charleston county in the list of excepted counties, and to strike Spartanburg out of said list. Then, on the 6th of March, 1899, another act was approved, entitled "An act to amend an act entitled 'An act to provide for the county government of the various counties of this state.'" 23 St. at Large, p. 113. This act purports to re-enact and amend the said act of January 12, 1899 (23 St. at Large, p. 1). It provides that the county board of commissioners shall consist of the supervisor and two commissioners, to be appointed by the governor. In section 4 provision is made for salaries of all the county supervisors in the state, including Charleston, and in section 6 provision is made for the selection and salary of a clerk of said board in the counties named therein, including Charleston county. Then in section 8 it is enacted "that the provisions of this act, except those of sections 4 and 6, shall not apply to the following named counties, to wit: Bamberg, Barnwell, Beaufort, Charleston, Cherokee, Chester, Kershaw, Hampton and Orangeburg"; and section 11 repeals all acts or parts of acts inconsistent with this act. Assuming the validity of the act of January 12, 1899, it is contended in behalf of the defendant that said act abolished the offices of county commissioners and township commissioners as then provided by law, to be appointed by the governor in all the counties of the state except those mentioned in sections 7 and 9, and substituted in place of the abolished offices those mentioned in section 2 of the act, and that Charleston, being among those excepted, became subject to the "Two Commissioners Act" of January 12, 1899; and further, that the act of March 3, 1899, supra, assuming its validity, by excepting Charleston from the operation of the act of January 12, 1899, abolished the new county government act so far as that county was concerned, and failed to provide any other in its stead. But we do not so hold. The acts on this subject should be construed together, in order to ascertain the legislative intent. We think it clear that the purpose of the acts of March 3, 1899, and March 6, 1899, supra, was to leave Charleston county subject to the act of 1894, supra, in the matter of the appointment and constitution of the county board of commissioners. The provision of section 37 of the Revised Statutes, viz. "The repeal of an act or joint resolution shall not revive any law theretofore repealed or superseded, nor any office theretofore abolished," does not apply. The effect of the act of January 12, 1899, and amending acts, was not to repeal, but to so amend the act of January 4, 1894, that in the matter of the appointment and constitution of the county board of commissioners in nine counties in the state, including Charleston county, the board shall be composed of the county supervisor and the chairmen of the boards of township commissioners appointed by the governor, while in

the remaining counties (speaking generally) the county board shall be composed of the county supervisor and two commissioners to be appointed by the governor. Under this view, the county board of commissioners of Charleston county is legally constituted, having been appointed and organized as required under the act of 1894, in force in said county. This same result would follow whether the act of January 12, 1899, supra, and the said amending acts, are unconstitutional as local or special legislation, or not. If the act of March 3, 1899, exempting Charleston county from the change proposed in the act of January 12, 1899, and the act of March 6, 1899, re-enacting and amending the act of January 12, 1899, and exempting Charleston county, are in conflict with article 3, § 34, of the constitution, as special legislation, for the same reason the act of January 12, 1899, would be unconstitutional, since it exempts from its operation certain counties therein named, and in this event the act of January 4, 1894, known as the "John Gary Evans Act," would be still of force in Charleston county.

3. This, perhaps, renders it improper to consider the constitutionality of said acts; but, as one of the main objects of this proceeding is to obtain an expression from this court on this subject, we will venture to state our view. Article 3, § 34, of the constitution provides: "The general assembly of this state shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit: 1. To change the name of persons or places. 2. To lay out, open, alter or work roads or highways. 3. To incorporate cities, towns or villages, or change, amend or extend the charter thereof. 4. To incorporate educational, religious, charitable, social, manufacturing or banking institutions not under the control of the state, or amend or extend the charters thereof. 5. To incorporate school districts. 6. To authorize the adoption or legitimation of children. 7. To provide for the protection of game. 8. To summon and empanel grand or petit jurors. 9. To provide for the age at which citizens shall be subject to road or other public duty. 10. To fix the amount or manner of compensation to be paid to any county officer, except that the laws may be so made as to grade the compensation in proportion to the population and necessary service required. 11. In all other cases, where a general law can be made applicable, no special law shall be enacted. 12. The general assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operations: provided, that nothing contained in this section shall prohibit the general assembly from enacting special provisions in general laws." The legislation in question does not relate to any of the 10 subjects enumerated above, being merely as to the number and manner of appointing the members of the county boards of commissioners in the various counties.

Does it fall under the eleventh subdivision above, forbidding any special law where a general law can be made applicable? If the act of January 12, 1899, and amending acts, be construed as special acts, there is much authority for the view that under a provision like subdivision 11 it belongs to the legislative, and not the judicial, department to determine whether a general law can be made applicable. *State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *State v. Boone Co.*, 50 Mo. 317, 11 Am. Rep. 415; *City of Indianapolis v. Navin* (Ind. Sup.) 47 N. E. 529; *Guthrie Nat. Bank v. City of Guthrie*, 19 Sup. Ct. 515, 43 L. Ed. 796; 15 Am. & Eng. Enc. Law, 978, and cases cited. We incline, however, to the view that in this state it must be held a judicial question to determine when a general law can be made applicable, since under article 1, § 29, of the constitution it is ordained that the provisions of the constitution shall be construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms. Such question was treated as a judicial one in *State v. Higgins*, 51 S. C. 54, 28 S. E. 15; and in *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226, whether compensation to county officers was graded in proportion to population and necessary service, under subdivision 10 above, was treated as a judicial question. As it is clearly manifest that a general law as to the number who shall compose, and the method of appointing, the county board of commissioners, could be made applicable if the act of January 12, 1899, *supra*, and amending acts, are to be construed as special acts, they must fall under the inhibition of subdivision 2, § 34, art. 3, of the constitution, unless some other portion of the constitution will support them. But, as we will now endeavor to show, the act of January 12, 1899, *supra*, should not be held a local or special act, prohibited by subdivision 2, *supra*, but as the enactment of "special provisions in general laws," as authorized by the proviso in subdivision 12 above. It may be regarded as settled that local or special statutes upon any of the 10 enumerated subjects above will be declared void, and that the express prohibition of special legislation on said subjects shall not be practically nullified or evaded under any form or guise of legislation. *State v. Higgins*, 51 S. C. 51, 28 S. E. 15; *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226; *Nance v. Anderson Co.*, 60 S. C. 501, 39 S. E. 5. But these cases do not determine the question now being considered, as they related to legislation in reference to the expressly prohibited subjects; whereas the statute in question relates to the constitution or formation of the county board of commissioners, which is not among the enumerated subjects as to which special legislation is expressly prohibited. We find, however, this language in the opinion by Mr. Justice Gary, in *Dean v. Spartanburg Co.*, which was approved in *Nance v. Anderson Co.*: "It is

manifest from even a casual reading of the constitution that 'local or special laws' and 'special provisions in general laws,' do not mean the same thing, and that they were intended to be construed in such a manner that neither would practically destroy the force of the other. * * * In order that a law may be general, it must be of force in every county in the state, and while it may contain special provisions making its effect different in certain counties, those counties cannot be exempt from its entire operation." Under this construction of the constitution, which we think is correct, the prohibition as to the enactment of local or special laws must not be held to practically nullify the right to enact special provisions in general laws. We think it safe to say that if it be competent for the legislature, while enacting a general law, to enact special provisions therein, it is also competent to enact similar special provisions by way of amending a general law. The former power would necessarily include the latter. The act of January 4, 1894, known as the "John Gary Evans Act," was adopted before the constitution of 1895, and was the general county government law in force at the time of the enactment of the said "Two Commissioners Act" of January 12, 1899. The said "Two Commissioners Act" recognized the existence of the said general county government act; and although it does not in express terms purport to amend the "Evans Act" of 1894, yet by necessary implication such is the purpose and effect. So that, reading the statutes on the same subject in *pari materia*, it is clear that the legislature intended to provide a system of county government in all the counties of the state, but in carrying out this scheme it was deemed proper to make special provision as to the number and mode of appointment of those who were to constitute the county board of commissioners. Thus, under general statutes and by way of amending general laws, there is provided a county board of commissioners in every county in the state, with like jurisdiction in county governmental affairs, with a special provision enacting as to the formation of the county board in the various counties of the state. There is another section of the constitution which may be referred to as giving some support to the legislation in question, *viz.* section 11, art. 7, which provides: "Each of the several townships of this state with names and boundaries as now established by law shall constitute a body politic and corporate; but this shall not prevent the general assembly from organizing other townships, or changing the boundaries of those already established; and the general assembly may provide such system of township government as it shall think proper in any and all the counties, and may make special provision for municipal government and for the protection of chartered rights and powers of municipalities." This would seem to give the legislature discretion to provide a system of

township government in any county of the state. It will be observed that the "Evans Act" provides for a kind of system of township government with township officers, a township board of commissioners with township duties to perform, and the county board, as already said, is composed of these various chairmen of the township boards. If the legislature has power to adopt a system of township government for Charleston county, it, of course, has power to retain in said county such system of township government as was previously established. But further, in the section quoted, the legislature has discretion to make "special provisions for municipal government." It is no doubt true that the strict application of the term "municipal" would limit it to incorporated cities, towns, and villages; but it is also true that it may properly be used in characterizing the government of a county or township. "Municipal corporations are administrative agencies established for the local government of towns, cities, counties or other particular districts," etc. Black, Const. Law, p. 374. In 15 Am. & Eng. Enc. Law, 953, it is stated: "A 'municipal corporation,' in its broader sense, is a body politic, such as a state and each of the governmental subdivisions of the state, such as counties, parishes, townships, hundreds, New England 'towns,' and school districts, as well as cities and incorporated towns, villages, and boroughs. Every one of these is properly susceptible of the general appellation." This broad sense seems to have been the one intended in this particular section, whatever may be said of its use in other sections or articles, for the article containing it is devoted, as shown by its title, to "counties and county government," whereas article 8 is devoted to the government of cities and towns. This section was evidently framed in view of the provisions of article 3, § 84, and was intended to give the legislature a wider latitude in the making of special provisions for county and township government. At any rate, there is a reasonable doubt whether the framers of the constitution intended to limit the powers of the general assembly in the enactment of "special provisions" in reference to township and county government on subjects not expressly prohibited, and this is sufficient to resolve the doubt in favor of the constitutionality of the statutes in question, for the general assembly has full power in all matters not clearly forbidden in the constitution.

4. Having reached the conclusion that the county board of commissioners of Charleston county is legally constituted under the "Evans Act" of 1894, it is the duty of the defendant treasurer to pay the warrant in favor of plaintiff, properly issued, out of funds in his hands properly applicable thereto, and mandamus should issue to compel the performance of such duty. It is therefore adjudged that writ of mandamus shall issue as prayed for.

(at S. C. 196)

HANKINSON v. HANKINSON.

(Supreme Court of South Carolina. July 23, 1901.)

TRIAL—ISSUES—DETERMINATION—LIEN—ADVANCES.

1. In an action for damages for illegal seizure of crops subject to a lien for advances, where answer raises issue of payment of rent, it was error to fail to pass on such issue.

2. A mule sold to a tenant to make a crop is not "advances," within the lien law.

3. One holding a prior lien on crops cannot allow such crops to be applied to the claim of a third person, and thus defeat the lien next in order to his own prior lien.

Appeal from common pleas circuit court of Aiken county; Gary, Judge.

Action by Frank H. Hankinson against Luther H. Hankinson. Judgment for plaintiff, and defendant appeals. Reversed.

The following is the circuit decree:

"The amended complaint upon which this case was heard by me was omitted from the record furnished me by the attorneys in the cause. As a consequence, I have some difficulty in stating the issues made by the pleadings. The action is for damages alleged to have been sustained by the plaintiff under the following circumstances: On the 10th day of February, 1897, Preston Tutson rented a certain farm from the plaintiff, Frank H. Hankinson, for which he agreed to pay as rent \$100. At this time it appears that Tutson was indebted to the plaintiff in the sum of \$166.06, purchase money of a mule sold by plaintiff to Tutson, and also for supplies advanced. As evidence of the debt, Tutson executed his note to Hankinson for the amount of \$266.06, bearing date 10th of February, 1897, and to secure the payment of said note Tutson at the same time executed a mortgage to Hankinson of two mules, and his crop of every kind grown during the year 1897 on the tract of land rented from plaintiff. This mortgage was recorded on the 18th day of February, 1897. It appears that in November of that year Tutson had harvested said cotton, amounting to three bales, and stored it in a barn on said premises, separate and apart to itself, and delivered it to the plaintiff, Hankinson, as part payment for the rent and mortgage debt due him. Shortly thereafter, and before Hankinson had removed said cotton, the defendant, Luther H. Hankinson, had the same seized under a warrant, foreclosing a lien which Tutson had given him, of date 12th March, 1897, and recorded 8th of April, 1897, for the sum of \$40. While the cotton was still in the possession of the plaintiff, in said barn, the defendant, Luther Hankinson, sent his wagon, with his agent or servant, and had the barn broken open, the cotton carried away, and ginned and marketed in Augusta, Ga., and with the proceeds he paid the amount of his said lien and the costs. The overplus he turned over to Tutson, the tenant of plaintiff. At the same time the cotton was levied upon ;

seized, the constable making the levy, under the same process, levied upon the cotton, corn, potatoes, and cane remaining in the field, and forbade Tutson from gathering the same. No effort was made on the part of the defendant, nor of the constable who levied upon the same, to gather said crop, or any part thereof, and the same was destroyed in the field, as a result. The defendant, while practically conceding these facts, insists that he is not liable, for the reason that the plaintiff has estopped himself by conduct from asserting his alleged claim of damages, under the following facts: In the spring of the year 1897 the firm of Nixon & Danforth, of Augusta, advanced to Tutson certain supplies, on the agreement of the plaintiff that Tutson would pay them out of the first cotton that was made in the premises. In accordance with this agreement, Tutson shipped eight bales of cotton grown on the place, and covered by the plaintiff's lien, to said Nixon & Danforth, with the knowledge and consent of plaintiff. This cotton was sold by Nixon & Danforth, and after satisfying their claim there was a balance, which was credited on the plaintiff's mortgage. The mule sold by Hankinson had also been returned, and a credit of \$85 allowed Tutson, that being the original price agreed upon. After these credits, there was still a balance due Hankinson of \$131. As already noted, the defendant's contention is the proceeds of this cotton should have been applied to this debt, and that the plaintiff, having consented for it to be applied to the debt of Nixon & Danforth, is now estopped from claiming damages from this defendant by reason of the seizure of the three bales of cotton, or by reason of the levy of the crops in the field that were not gathered and were wasted. I fail to see where the principle of estoppel should be invoked. Hankinson simply released his lien on a part of his security, knowing possibly that he was amply secured. Why, then, should this act on his part make his lien on that property which had not been released junior in rank to the lien of the defendant? There was no privity between the plaintiff and the defendant; no obligation on the plaintiff to aid the defendant, whose lien was junior to that of the plaintiff. Suppose, on the other hand, the plaintiff had failed to agree to release his lien on said cotton, but had sold it and applied enough of the proceeds to the payment of his debt, and turned the overplus over to Tutson, and Tutson had paid it on the account of Nixon & Danforth; would it be contended that defendant could call upon plaintiff to reimburse him the amount so paid? I think not. It is therefore ordered that the plea of estoppel be overruled.

"The next question, then, is, to what extent has the plaintiff been damaged by the acts of the defendant? Certainly to the value of three bales of cotton illegally appropriated by the defendant, which he sold at a net profit of \$68.32, as shown by statement of sales, and

to the value of the crop in the field, to the extent that his lien of the same has been impaired or destroyed. The evidence establishes the fact that the crop destroyed in the field was worth at least \$75. I conclude, therefore, as propositions of law, that the plaintiff's mortgage and his landlord's lien are superior to the lien of the defendant; that the mortgage was a lien on the crop grown on the premises that year, and was sufficient to pledge the same as a security to pay the debt of the plaintiff; that the plaintiff has been damaged to the extent of the debt remaining unpaid, to wit, \$129.57. A statement of which is as follows: Principal on note and mortgage, \$266.06; interest from 10th February, 1897, to 2d March, 1898, \$22.53,—\$288.59. Credits: By mule returned, \$85.00; by proceeds of cotton, \$74.02,—\$159.02. Amount due March 2, 1898, \$129.57. It is therefore adjudged that the plaintiff have judgment against the defendant for the sum of \$129.57."

Messrs. Hendersons, for appellant. G. W. Croft & Son and P. A. Emanuel, for respondent.

POPE, J. To understand the questions presented by this appeal, a brief recital of the facts upon which the action is bottomed should be made. It seems that on the 10th day of February, 1897, one Preston Tutson was indebted to the plaintiff, Frank H. Hankinson, in and for the sum of \$266.06, and on the same day, in order to secure the payment of said sum on or before the 15th day of October, 1897, the said Preston Tutson executed a chattel mortgage wherein he pledged to said plaintiff, Frank H. Hankinson, the following goods, chattels, crops, and stock, to wit: "All my household and kitchen furniture, books, pictures, jewelry, musical instruments, saddles, buggy and wagon, harness, farming tools, one gray mare mule, named 'Pet,' and one horse black mule, named 'Logan,' and all other goods, chattels, crops, and stock of every kind which I now have or may hereafter in any manner acquire before the payment of this note. And this debt is made and money obtained upon the positive representation that the above property is absolutely mine, and that no one has any claim whatever on it, and all the crop or crops planted by me, or by others for me, or in which I am or may be in [any] way interested, during the year 1897, on any place whatever, and especially on the Hawkinson Old Mill place, in Hammond township, Aiken county, and state of South Carolina, and bounded by lands of Dr. J. M. Galphin, Ramsey, and Pat. Calhoun, and others, and also on Mrs. Ida Calhoun's place, in Hammond township, Aiken county, and state of South Carolina, bounded by lands of Dr. Galphin, Ramsey, and others. To have and to hold all and singular, the said goods, chattels, crops, and stock, unto the said F. H. Hankinson and his assigns, forever: * * * and pro-

vided, further, that the mortgagor may retain possession of said goods and chattels until default shall be made in the payment of said note. * * * This chattel mortgage was duly recorded in the office of the register of mesne conveyance for Aiken county, S. C., on the 17th day of February, 1897. On the 12th day of March, 1897, the defendant, Luther H. Hankinson, agreed to and with the said Preston Tutson to advance to said Tutson two tons of commercial fertilizer, of the value of \$40, to cultivate a crop during the year 1897, on the plantation known as F. H. Hankinson's, situate in the county and state aforesaid, and as a security for said advance the said Preston Tutson gave to the defendant, Luther H. Hankinson, a lien on said Preston Tutson's crop to be raised on said plantation during said year (1897). This lien was duly filed and indexed on the 8th April, 1897, in the office of the register of mesne conveyance for Aiken county, S. C. Some time in the spring of 1897 the said Preston Tutson received \$180 and odd cents of supplies from the firm of Nixon & Danforth, with a verbal agreement of the plaintiff, Frank H. Hankinson, that he would postpone his lien until Preston Tutson paid that firm for said supplies, but no papers were signed by Preston Tutson nor by Frank Hankinson. All these things were arranged with said firm of Nixon & Danforth without the knowledge or consent of the defendant, Luther H. Hankinson. In the fall of the year 1897, without the knowledge or consent of the defendant, Luther H. Hankinson, the said Frank H. Hankinson and Preston Tutson shipped eight bales of cotton to the firm of Nixon & Danforth, who sold the same, and from the proceeds of such sale paid their account for over \$180, and the balance, some \$74.02, was paid to Frank H. Hankinson, and credited upon his note and mortgage. The said Frank H. Hankinson went to the house he had rented for the year 1897 to said Preston Tutson, and saw that said Tutson had gathered and placed in his (Tutson's) barn about three bales of cotton in the seed. He claims that Tutson told him on that occasion that he might take said three bales, but he did not remove the same. It was not weighed or marked. On the 3d November, 1897, the defendant, Luther H. Hankinson, set on foot proceedings in attachment under the agricultural lien law before and through J. W. Dunbar, Esq., a magistrate for Hammond township, in Aiken county. The warrant to seize the crop of Preston Tutson was issued on that day and placed in the hands of one Rountree for execution. He seized on 5th November, 1897, the three bales of cotton in the barn of said Tutson, and nailed up the door. Three persons made the appraisement, viz. the constable, T. D. Rountree, J. P. Hankinson, and E. W. McElmurray, as appraisers, which appraisement showed the following crops levied upon: "Cotton in barn, 1,200 pounds, value \$35;

cotton in house, 1,000 pounds, value \$25; sugar cane, value \$8; cotton in field, not open, value \$10; cotton in field, open, 250 pounds, value \$5; total amount, \$73." The three bales of cotton, after about four weeks' delay, were with the consent of Preston Tutson removed by Luther H. Hankinson, hauled to his gin, and there ginned. In its removal the said Tutson accompanied the wagons, carrying his bagging and ties, which were placed about the cotton. The cotton was carried to the city of Augusta, Ga., and there sold. It realized \$68.32. This sum paid the expenses of the magistrate and constable, expense of ginning and carrying to market, leaving \$40.40 paid to Luther H. Hankinson on his lien; and the balance, \$2 and some odd cents, was paid to Preston Tutson. The sugar cane and the cotton in the field were ungathered, except 400 or 500 pounds picked by Tutson and retained by him. Under these circumstances the plaintiff brought suit against Luther H. Hankinson to recover the sum of \$131 damages. In his complaint he alleges that the consideration of his note given by Preston Tutson for \$266.06 was for rent, \$100, and the further sum of \$166.07 "for advances and supplies" which the plaintiff had advanced to him to make his crop. The plaintiff allowed Preston Tutson credit for \$85 for the mule Pet, taken back, and the further sum of \$70 received through the sale of the eight bales of cotton sold by Nixon & Danforth; thus leaving \$131.06 still due, which the defendant was liable to pay. The defendant denied all these facts; then stated in his answer that any and all claims held by the plaintiff against the said Preston Tutson had been paid; that he seized the cotton of Tutson under an agricultural lien upon proper proceedings therefor, with the consent of said Tutson; and that plaintiff is estopped from any legal claim against defendant by reason of his having voluntarily postponed his lien on eight bales of cotton to Nixon & Danforth, of Augusta, Ga., who received \$130 therefrom. The cause came on before Judge Ernest Gary upon the pleadings and the testimony taken before a referee. The decree of the circuit judge should be set out in the report of the cause. From this decree the defendant has appealed on the following grounds: "First. Because it is respectfully submitted that his honor erred in not considering and not passing upon the distinct issue raised in the answer that the claim of plaintiff, Frank H. Hankinson, against Preston Tutson was paid, and in not decreeing, as matter of fact, that said claim was paid, and hence that the plaintiff's cause of action failed. Second. Because, it is respectfully submitted, his honor erred in finding, as matter of law, the fact that Preston Tutson delivered three bales of cotton in question to plaintiff as part payment of the rent and mortgage debt due him, whereas he should have found, as a matter of law, under the admitted testimony on the

part of the plaintiff, that there was no such actual delivery of the cotton to the plaintiff, and that no title thereto vested in the plaintiff, and that he could not maintain the action in question. Third. Because, it is submitted respectfully, his honor erred in finding that the defendant, Luther Hankinson, did anything whatsoever towards the impairment of the alleged lien of the plaintiff on the crops which were in the field, and should have found, to the contrary, that the defendant never touched the same or removed the same, but that they were taken in possession by an officer of the law, under legal proceedings, which officer of the law did not prohibit Tutson from gathering his crop, and that the defendant in no way received the same or interfered with the same, and hence, as the law took charge of it, Hankinson should not be held responsible. Fourth. Because, it is submitted respectfully, his honor should have found that, as to the three bales of cotton in question, the same was turned over to the defendant, Hankinson, by the consent of Tutson, and that Hankinson had a prior lien thereon; the same never having been delivered to the plaintiff, and no title thereto ever having accrued to the plaintiff. Fifth. That his honor, it is respectfully submitted, erred in finding that the plaintiff was not estopped from asserting any claim to the property in question by his actively consenting and permitting Tutson, the common debtor, to ship away to Augusta, Ga., enough cotton to pay his said mortgage debt, and that he should have held that said conduct on the part of the plaintiff, in equity and good conscience, estopped him from asserting said claim. Sixth. Because, it is submitted respectfully, his honor erred in treating the action under the amended complaint as an action brought for damages for the impairment of the security of the plaintiff, and in rendering any decree under such view of the case, as he failed to find any actual notice on the part of the defendant of the existence of the plaintiff's security, and that he should have treated the case simply as an action of trespass upon the alleged property of the plaintiff, and, so treating it, he should have found that there was no proof that the plaintiff was the owner of the property in question; no title thereto ever having been acquired by the plaintiff, as matter of law."

1. As to the first exception, it must be sustained, for the circuit judge fails to pass upon the issue of payment, which was directly tendered in the answer. It seems to us, however, that by indirection the circuit judge has passed upon this question when he in effect held that the plaintiff's debt due to him by Preston Tutson amounted to about \$286, subject to the two credits allowed by the plaintiff in his complaint. We sustain this exception, in regard to the error of the circuit judge in regard to the payment, for these reasons: It was the duty of the plaintiff to establish the allegations in his com-

plaint that his debt of \$286.06 arose from \$100 due him by Tutson for rent for the year 1897, and \$166.06 for supplies and advances furnished by him to Tutson in the year 1897. This he failed to do, for in his testimony he admitted that he included in this \$286.06 as a part thereof, \$85 for a mule, Pet, sold to Tutson, and the balance due him by Tutson for the mule Logan, which originally was \$150, with a credit of \$65, thus leaving only \$85. The three sums—\$100 for rent, \$85 for the mule Pet, and \$85 balance for the mule Logan—aggregated \$270, which last amount is \$3.94 in excess of the note for \$266.06. Nowhere in the plaintiff's testimony could he tell what amount he had advanced in supplies to Tutson. It has long been settled law in this state that a mule or horse cannot be included in an agricultural lien, under the term "advances or supplies with which to make a crop." See the case of *Ex parte Kibler*, 53 S. C. 461, 31 S. E. 274. So, \$170 included in plaintiff's note and mortgage is not a debt, so far as any lien in Tutson's crops for 1897 is concerned. The rent, \$100, would be good without a chattel mortgage or agricultural lien, but on this was paid to plaintiff \$70, from the proceeds of the eight bales of cotton of Tutson, which were sold by Nixon & Danforth in Augusta, Ga., about 15th October, 1897, thus leaving only \$30 due upon the rent; and this was paid, as we will hereafter show. We do not think it necessary to pass on exception 2. Nor do we regard it necessary to pass on exception 3.

2. We will treat in effect of the fourth, fifth, and sixth exceptions. We regard the plaintiff as holding a lien for rent for \$100, which was enforceable under the law regulating advances for agricultural purposes, and that such lien was the first lien on the crops of Preston Tutson for the year 1897. We regard the defendant as holding a valid lien for \$40 for the guano furnished for the crops of Tutson during the year 1897, and this lien of defendant is next in priority to that for \$100, as rent held by plaintiff. We hold that a person holding a lien prior in point of time and dignity cannot consent for the crops covered by his prior lien to be applied to the claim of a third person, and thus defeat the lien next in order to his own prior lien. This position does not affect the question passed upon in *Moore v. Byrum*, 10 S. C. 460, 30 Am. Rep. 58, for there the question was presented between the mortgagor and mortgagee, which is not like the parties to the present contention. If the question here was made between the prior lienee, F. H. Hankinson, on the one side, and the lienor, Preston Tutson, on the other side, the case would be like that presented in *Moore v. Byrum*, supra. Here the question is between the two lienees,—the two Hankinsons. This court held in the case of *Frost v. Weathersbee*, 23 S. C., at pages 368 and 369, that the lienors, Weathersbee & Co., could not direct payment of the debt for which one A. J.

Weathersbee had become guarantor out of cotton which had been purchased by the firm of Weathersbee & Co. with funds supplied by the same firm of E. H. Frost & Co., on an agreement for shipment of said cotton so shipped by Weathersbee & Co. We do not pretend that the same question as presented in the case at bar was presented in *Frost v. Weathersbee*, supra, but the principle is very nearly the same. In the case at bar the testimony shows that Luther H. Hankinson's lien for \$40 was given on the 13th March, 1897, and was indexed the 7th April, 1897. Therefore, when the senior lieene, F. H. Hankinson, attempted by parol to give the firm of Nixon & Danforth virtually a prior lien on Tutson's cotton, and afterwards, without the consent or even the knowledge of Luther H. Hankinson, actually applied \$130 from the eight bales of Tutson's cotton to the payment of the claim of Nixon & Danforth, in exoneration of the claim of said firm of Nixon & Danforth against the said Frank H. Hankinson, as the guarantor of Tutson, the said Frank H. Hankinson must give credit on his lien for rent, as far as was necessary to extinguish his claim for rent against Tutson, so far as the interests and rights of the defendant, Luther H. Hankinson, were concerned. We hold that, so far as Luther H. Hankinson is concerned, the transaction whereby \$130 of Tutson's crops were applied by the plaintiff to the payment of the unsecured claim of Nixon & Danforth operated as a payment on the rent due to the plaintiff, as senior lieene, and the balance was only \$30 and interest. This being so, the circuit judge was in error. He should have dismissed the plaintiff's complaint. It is the judgment of this court that the judgment of the circuit court should be reversed, and the action remitted to the circuit court, with directions to formulate a decree dismissing the plaintiff's complaint.

(61 S. C. 237)

CITY OF FLORENCE v. BERRY.

SAME v. ROLLINS.

(Supreme Court of South Carolina. July 23, 1901.)

CRIMINAL LAW—OATH TO WARRANT—WAIVER OF IRREGULARITY—VENUE—EVIDENCE—INTOXICATING LIQUORS—ILLEGAL SALE.

1. Where a warrant is sworn to before an officer not authorized to administer oaths for such purpose, and defendant pleads to the indictment, any objection that the court did not acquire jurisdiction of the person is waived.

2. It is not necessary, in a criminal case, that the venue should be proved affirmatively, if there is sufficient evidence from which it can be inferred.

3. Where an indictment alleges sales of spirituous, malt, alcoholic, vinous, or other intoxicating liquors, evidence of a sale of any such liquor, by whatever name it may be called, is not a fatal variance.

Appeal from common pleas circuit court of Florence county; Gary, Judge.

Indictment by city of Florence against W.

H. Berry and R. J. Rollins, in separate cases, for violating city ordinances. From affirmation in circuit court of judgment against defendants in mayor's court, defendants appeal on the following exceptions: "(1) Because the circuit judge erred in holding that the mayor had jurisdiction to try defendant, although it appeared upon the face of the proceedings that the prosecution against defendant was not based upon an oath or affidavit, as required by law. (2) Because the circuit judge erred in holding that while the city clerk was without authority to administer an oath, and that although the prosecution in this case was based upon a statement purporting to have been sworn to before said clerk, yet that, by appearing, the defendant waived the jurisdictional defect, and that the same was cured by verdict or sentence. (3) Because the circuit judge erred in holding that defendant, having voluntarily appeared before the mayor and having gone to trial without making objection to the warrant or the affirmation on which it was based, was then in the position after verdict as though he had voluntarily submitted himself to the jurisdiction of the court, and that in such case it would not be necessary for such clerk to be authorized to take the affirmation. (4) Because, in the case of the city of Florence against W. H. Berry, there being no proof as to the sale of whisky to James N. Purvis, his honor erred in not holding that there was no venue proven as to the sale of whisky to J. S. Dale, the sale to J. S. Dale being the only count in the warrant upon which there was any proof as to the sale of whisky. (5) Because, in the case of the city of Florence against W. H. Berry, while the defendant was charged with selling to J. S. Dale on the 15th day of July, 1900, one-half pint of rye whisky, of the value of twenty-five cents, the proof was that the defendant sold to Dale two drinks of whisky for fifteen cents, and his honor erred in not holding that there was a total variance between the charge and proof, thereby placing the defendant in the position to be charged with one offense and convicted by proof of a different offense, and thereby placing defendant in a position to be indicted for the same offense as proven, in which indictment he could not plead former conviction. (6) Because, in the case of the city of Florence against R. J. Rollins, while the defendant was charged with selling to Zehee one-half pint of corn whisky on February 6, 1900, and one-half pint of rye whisky on February 11, 1900, the proof was that the defendant sold to Zehee one-half pint of rye whisky on February 6, 1900, and one-half pint of corn whisky on February 11, 1900, thereby placing the defendant in the position to be charged with one offense and convicted by proof of a different offense, and thereby placing defendant in a position to be indicted for the same offense as proven, in which indictment he could not plead former conviction." Affirmed.

Willcox & Willcox, for appellants. W. H. Wells, for respondent.

McIVER, C. J. These two cases, being both prosecutions for violations of an ordinance of the city of Florence, forbidding the sale of spirituous liquors within the corporate limits of said city, were heard and will be considered together, as the most of the questions presented by the appeals are common to both. We propose to consider these questions in the order in which they are considered in the argument of the counsel for appellants.

Exceptions 1, 2, and 3 raise a jurisdictional point, and may be considered together. The point made is that the affidavits upon which these prosecutions were based purport to have been sworn to before the city clerk of Florence, an officer who it is claimed has no authority to administer an oath. Assuming, without deciding, that the city clerk has not been invested with power to administer an oath, we think that the jurisdictional point is not well taken. It must be remembered that jurisdiction is of two separate and distinct kinds: (1) Jurisdiction of the subject, or, as it is usually phrased, of the "subject-matter"; (2) jurisdiction of the person, —and very different rules apply where the question is as to the jurisdiction of the subject from those which are applicable where the question is as to the jurisdiction of the person. In the former the question of jurisdiction cannot be waived by any act or admission of the parties, for the very obvious reason that the parties have no power to invest any tribunal with jurisdiction of a subject over which the law has not conferred jurisdiction upon such tribunal. Hence the common expression, "Consent cannot confer jurisdiction." But in the latter the rule is very different. The party may, by consent, confer jurisdiction over his person, or may waive the right to raise the question, whether the proper steps prescribed by law for obtaining such jurisdiction have been taken, as is illustrated by the familiar instance of a party who, though not served with a summons, appears and answers, and is thereby precluded from afterwards raising the question as to whether the court had acquired jurisdiction of his person. See *Martin v. Fowler*, 51 S. C., at page 171, 28 S. E. 312; *Rosamond v. Earle*, 46 S. C. 9, 24 S. E. 44. Now, in this case, it is quite clear that the mayor's court had jurisdiction of the subject, —a violation of one of the ordinances of the city, —and it is equally clear that the appellants have waived any right they may have had to raise the question as to whether such court had acquired jurisdiction of their persons by appearing before said court and defending the cases. The case of *State v. Mays*, 24 S. C. 190, referred to both by the circuit judge and counsel for appellants, has been misconceived, and really has no application to the question raised by the exceptions we are now considering.

That case arose in 1885, prior to the compilation of the Revised Statutes of 1893, and the sections there referred to are designated by the numbers affixed to them by the General Statutes of 1882. For example, the section there referred to as section 830 is now, in the Revised Statutes of 1893, section 19 of the Criminal Statutes (2 Rev. St. 268); and section 2501, there referred to, is now section 166 of the Criminal Statutes (2 Rev. St. 323); while section 2507, there referred to, is now section 176 of the Criminal Statutes (2 Rev. St. 326). The objection made in the case of *State v. Mays*, supra, to the affidavit, was not like the one here made, —that the affidavit was not sworn to before an officer competent to administer an oath, —but the objection there made was to the allegations contained in the affidavit, which under section 830 of the General Statutes of 1882 (now section 19 of the Criminal Statutes of 1893) served as the information, or indictment, so to speak, brought against the defendant; and the objection there made was that the allegations made in the affidavit left it doubtful, to say the least of it, whether the defendant was charged with a violation of section 2501 of the General Statutes of 1882 (now section 166 of the Criminal Statutes of 1893), of which the trial justice would have no jurisdiction, or whether he was charged with a violation of section 2507 of the General Statutes of 1882 (now section 176 of the Criminal Statutes of 1893), of which the trial justice would have had jurisdiction. But, as the court held that the language used in the affidavit more properly brought the prosecution under section 2501 rather than under section 2507, it followed necessarily that the trial justice had no jurisdiction. It will thus be seen that the point decided in *State v. Mays* was very different from that presented here; for there can be no doubt that the language used in the affidavit did constitute a charge against the appellants, which the municipal court unquestionably had jurisdiction to try. The fact that the affidavit upon which the warrant was issued was not sworn to before a person authorized to administer an oath (if such be the fact), while it might have led to very serious consequences, if the appellants had seen fit to resist arrest, and might have justified the appellants in defying arrest under such unauthorized warrant (*State v. Wimbush*, 9 S. C. 309), but where a party charged with a criminal offense sees fit to make no resistance to arrest, and voluntarily subjects his person to the jurisdiction of the court before which he is called to answer for the offense charged (as was the case here), we are unable to perceive how any defect in the warrant or in the affidavit upon which it was issued can affect the merits of the issue presented by the charge made against him. The first, second, and third exceptions must therefore be overruled.

The fourth exception makes the point that, in the case against the appellant Berry, there

was no proof of the venue, as to the charge of selling whisky to J. S. Dale. The testimony was that the witness bought the whisky from Berry, "back of Mr. Stackley's place of business, near a pump in a room." If the jury knew that the place indicated was within the lines of Florence county, and within the corporate limits of the city of Florence, that would be sufficient proof of the venue. *State v. Williams*, 3 Hill, Law, 91, was a case very much like the present; for the testimony was that the liquor was bought at defendant's store, without stating where the store was situated. The circuit judge charged the jury that "whether the defendant's store was within Marion district or out of it was an inference of fact for them to decide; that it was not indispensably necessary for the witness to have said, in so many words, 'It is within the district;' if the truth were so it is enough; and, if the jury knew the place described to be within the district, that was enough." This charge was approved by the court of appeals in express terms. This case was recognized and followed in the case of *State v. Dent*, 6 S. C. 383, in a case of murder. To the same effect, see *State v. Vari*, 35 S. C. 175, 14 S. E. 392. The fourth exception is overruled.

Exceptions fifth and sixth may be considered together, as they both make the point that there was a variance between the allegations and the proof. To make such a point effective, it is necessary to show that the variance is material, but here the variances alleged are as to the kind and amount of whisky sold, and this is manifestly immaterial. The offense consists of the sale of "any spirituous, malt, alcoholic, vinous, or other intoxicating liquors or liquids," and it matters not what may be the particular kind or name of such liquors. These exceptions are overruled. The judgment of this court is that the judgment of the circuit court in each of the cases above named be affirmed.

(61 S. C. 243)

REYNOLDS et al. v. REYNOLDS et al.
(Supreme Court of South Carolina. July 24,
1901.)

TRUST DEED—CONSTRUCTION—DEATH OF TRUSTEE.

1. A deed of trust empowered the trustee to collect the rents and profits, and educate and maintain the beneficiaries, and keep the estate in repair, during the life of A. and her children, with power to sell and reinvest. Held an executory trust, and that the title to the property remained in the trustee so long as A. or any of her children lived.

2. The death of a trustee named in a deed creating a trust does not destroy the trust, but the oldest son of the trustee becomes his successor, in law, unless the court names and appoints another trustee.

Appeal from common pleas circuit court of Greenwood county; Klugh, Judge.

Action by Reynolds and others against Reynolds and others, in partition. Rule

against C. A. O. Waller and W. L. Durst to show cause why they had not complied with their bids on the sale of such lands. Rule made absolute, and respondents to rule appeal. Reversed.

Sheppards & Grier, for appellants. Graydon & Giles, for respondents.

POPE, J. The plaintiffs and defendants, under an impression that they were tenants in common in fee simple of a tract of land containing about 50 acres, in the town of Greenwood, set on foot an action for partition among themselves. A decree was passed in said action, requiring the lands to be sold, and the proceeds of sales to be divided as the decree announced. The lands, after being divided into lots, were sold, and at such sale the appellants, C. A. O. Waller and William L. Durst, became the purchasers of certain parcels of said lands; but, having taken the advice of counsel learned in the law, when titles were tendered them for such parcels of land they declined to comply, and rejected the titles tendered, upon the ground that by the terms of the deed from Bennett Reynolds, Sr., to Bennett Reynolds, Jr., as trustee, the widow and children of Bennett Reynolds, Jr., only had life estates in said tract of land, and that these purchasers had been induced to become such upon the pledge that the title to the same should convey said parcels of land in fee simple, and that if such title was in fee simple they would accept the same, but not otherwise. Therefore in 1901 a rule was issued requiring said Waller and Durst to show cause why they had not complied with their bids for said lands. The respondents made a formal return, submitting themselves to the court, but claiming that under said decree and said deed the interest of the parties to the action was only life estates. The circuit judge made the rule absolute, holding that by the rule in *Shelley's Case* the title to the plaintiffs and defendants, as the widow and children of Bennett Reynolds, Jr., became a fee-simple estate. From this decree the respondents to the rule, C. A. O. Waller and William L. Durst, have appealed upon the ground that the rule in *Shelley's Case* could not apply so as to enlarge the life estate into a fee simple. So it now becomes necessary to construe the deed in question, in order to ascertain if the appeal should or should not be sustained. The deed is as follows: "This indenture, made this fifth day of July, in the year eighteen hundred and seventy-seven, between Bennett Reynolds, Senior, and Bennett Reynolds, Junior, trustee, both of the state and county aforesaid, witnesseth: That the said Bennett Reynolds, Senior, in consideration of the natural love and affection which he bears for Henrietta R. Reynolds and her children, the issue of her present marriage, and in further consideration of the sum of ten dollars to him in hand paid by Bennett Reynolds, Junior, trustee, as aforesaid, the receipt whereof is hereby acknowl-

edged, hath bargained, sold, released, and conveyed, and by these presents do bargain, sell, release, and convey, unto the said Bennett Reynolds, trustee, as aforesaid, all that parcel or lot of land situated within and adjoining the town of Greenwood, in the state and county aforesaid, bounded on the north by lands of L. D. Merriman, east by lands of Bennett Reynolds, Sr., south by lands of A. P. Boozer, Main street, and L. D. Merriman, and west by lands of L. D. Merriman and W. H. Bailey, containing sixty-two acres, more or less, and has such shape, metes, and bounds as are represented by annexed plat made by B. F. Reynolds — day of —, 1877. Together with, all and singular, the rights, members, hereditaments, and appurtenances to the said premises belonging, or in anywise incident or appertaining. To have and to hold, all and singular, the said premises, with the appurtenances, unto the said Bennett Reynolds, Junior, trustee, as aforesaid, his successors and assigns. In trust, and to and for the several uses, intents, and purposes hereinafter mentioned, namely: First. In trust for the sole and separate use of Henrietta R. Reynolds, wife of the above-named Bennett Reynolds, Junior, and her children, the issue of her present marriage, during the term of their natural lives, free from the liabilities of any husband or husbands they or any of them now have or may hereafter have, and in trust for the survivor or survivors of them. Secondly. In trust to take the rents, issues, and profits there and out of the same to keep the estate in good repair and improve the same; to defray the expenses of maintaining and educating the said cestuy que trust. And the said Bennett Reynolds, Senior, hereby declares that upon the decease of the last surviving cestuy que trust the said trust estate shall cease and determine, and the said land above described shall belong in fee simple absolute to their heirs then living; and the said Bennett Reynolds, Senior, further declares that the said Bennett Reynolds, Junior, trustee, as aforesaid, may sell and convey the above-described trust estate, or any part thereof, and execute valid titles therefor, whenever in his judgment it may be for the interest of the estate, and for the benefit of the cestuy que trust, or any of them, and reinvest the proceeds thereof for the like uses, intents, and purposes, and with the same limitation, as the original estate. And the said Bennett Reynolds, Jr., hereby signifies his acceptance of this trust, and covenants and agrees to and with the said Bennett Reynolds, Senior, faithfully to discharge and execute the same according to the true intent and meaning of these presents. In witness whereof, I have hereunto set my hand and seal this fifth day of July, eighteen hundred and seventy-seven. Bennett Reynolds, Sr. [L. S.] Bennett Reynolds, Jr. [L. S.] Signed, sealed, and delivered in the presence of A. P. Boozer, J. O. Nickles."

The following are the grounds of appeal: "(1) Because it was error in his honor to hold

that under the trust deed, under the rule in Shelley's Case, Mrs. Reynolds and her children took an estate in fee, the errors being: (a) In defeating the clear intention of the parties to said trust deed, declared in express terms: First, that the said Mrs. Reynolds and her children, the issue of the marriage with said Bennett Reynolds, Jr., should take an estate for life only; second, that upon the determination of the trust estate the heirs of said cestui que trust then living should take an estate in fee simple. (b) Because the clear intention of the grantor was to convey a life estate only to Mrs. Reynolds and her children by the marriage with Bennett Reynolds, Jr., remainder over in fee to their heirs living at the time of termination of the trust estate, which was to continue until the death of the last surviving cestui que trust. (c) Because the words made use of by the said grantor are words of purchase, and not words of limitation, and the rule in Shelley's Case has no application whatever. (d) Because the use of the words, 'their heirs then living, in fee simple absolute,' cannot mean that they are to take by descent, but as purchasers, and therefore the rule in Shelley's Case cannot apply. (e) Because until the determination of the trust estate as limited in said trust deed no valid title in fee can be conveyed. (f) Because the rule in Shelley's Case does not apply in this case. (2) It was error in his honor to construe the said trust deed to convey a fee to Mrs. Reynolds and her children, and to require the respondents herein to comply with their said bid, when it is apparent by the terms of the said trust deed that the said Mrs. Reynolds and her said children have only a life estate, and under the proceedings herein the purchaser at said sale could acquire no greater interest, but would take a life estate only."

We will examine this deed to ascertain what was the intention of Bennett Reynolds, Sr., and also to see whether such intention, as developed by the terms of the deed, is contrary to law: (1) It is patent that a life estate has been carved out by the grantor. He uses these words: "First. In trust for the sole and separate use of Henrietta Reynolds, wife of the above-named Bennett Reynolds, Jr., and her children, the issue of her present marriage, during the term of their natural lives, * * * and in trust for the survivor or survivors of them. Second. In trust to take the rents, issues, and profits thereof, to keep the estate in good repair and improve the same; to defray the expenses of maintaining and educating the said cestuy que trust. And the said Bennett Reynolds, Sr., hereby declares that upon the decease of the last surviving cestuy que trust the said trust estate shall cease and determine, and the said land above described shall belong in fee simple absolute to their heirs then living. * * * " The parties entitled to this life estate are Mrs. Henrietta R. Reynolds and her children, one of whom, who had intermarried with Mr.

John A. Barksdale, has recently departed this life, childless, leaving her husband and her mother and brothers and sisters as her only heirs at law. So that now the life estate by the terms of the deed is confined to the said Mrs. Henrietta R. Reynolds and the living children of said Mrs. Reynolds. (2) It was the intention of the grantor at the expiration of the last life estate that the lands conveyed in trust should pass directly to the heirs of the life tenants, not through the life tenants, but directly from the grantor; the conveyance to the heirs of the life tenants should be "to their heirs then living." (3) The trustee, his successors or assigns, should hold such lands in trust for and during the natural lives of the life tenants, or the survivor or survivors of them, and no longer, for the deed declares "that upon the decease of the last surviving cestuy que trust the said trust estate shall cease and determine, 'and the said lands above described shall belong in fee simple absolute to their heirs then living.'" But while the trust lasted the trustee was directed to employ the rents, issues, and profits of the trust lands to keep the estate in good repair and improve the same; second, to defray therewith the expenses of maintaining and educating the said cestui que trust; and, third, the trustee was empowered to "sell and convey the above-described trust estate, or any part thereof, and execute valid titles therefor, whenever in his judgment it may be for the interest of the estate, and for the benefit of the cestuy que trust, or any of them, and reinvest the proceeds thereof for the like uses, intents, and purposes, and with the same limitations, as the original estate."

We will now consider if the expressed intention of Bennett Reynolds, Sr., in his deed to his son, Bennett Reynolds, Jr., as trustee, contravenes any principles of law, which will prevent the execution of such intention. The circuit judge has held in his decretal order "that the trusts created by the trust deed have been fully executed, as the youngest child of Bennett Reynolds, Junior, is about grown." "And it seems to the court that, under the rule in *Shelley's Case*, Mrs. Reynolds and her children took by said trust deed an estate in fee in the said lands, as tenants in common." We cannot agree with the circuit judge that the trusts created by the deed are fully executed. In *Porter v. Doby*, 2 Rich. Eq., at page 53, the court said: "The test of an executory trust is that the trustee has some duty to perform, for the performance of which it is necessary that the title be regarded as abiding in him." This definition has been several times recognized as correct. *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339. In *Porter v. Doby*, supra, it was held: "Here nothing can be plainer than that the trustee could not perform the trusts conferred on him without retaining the title and the property. His trust

was to maintain Edmund and Susannah during their joint lives, and Susannah, if she should be the survivor, out of the profits and income of the property. She actually survived, and it was therefore impossible that the trust should have been executed at any time during Edmund's life." In the case at bar the trustee was to take the rents and profits, and out of the same to keep the estate in good repair and improve the same,—a continuing duty,—and also to defray the expenses of maintaining and educating the said cestui que trust, and this duty of "maintaining" the cestui que trust is to continue as long as the trust lasts. There is no estate given by this deed directly to the cestui que trust, and it is limited to the persons named, and the survivors of them. One of them is dead. There are, therefore, already survivors. But it may be suggested that the trustee, Bennett Reynolds, Jr., is dead, and has been so since 1890. The death of a trustee named in a deed creating a trust does not destroy the trust. The court of equity will keep it alive as long as any duty as trustee shall continue. Besides, the oldest son of Bennett Reynolds, Jr., is his successor, in law, as such trustee, unless the court names and appoints another trustee. For the moment, no doubt, the circuit judge overlooked the fact that this deed of trust provides for the performance by the trustee, according to his best judgment, of the power to sell all or any part of this trust estate, and reinvest the proceeds. As was said in *Carrigan v. Drake*, supra, of precisely similar language in the deed of trust here under consideration, after quoting from the language used by Chancellor Harper in *Posey v. Cook*, 1 Hill, Law, 413: "In this case the trustee, when he deems best, is authorized to sell and reinvest. This he manifestly could not do unless the legal title remained in him." Bennett Reynolds, Jr., as trustee, or his successor in office, by this deed of trust is allowed to sell any part or all of the trust estate. This power exists today. Hence there is no marked power of trustee under this deed. It is not an executed, but an executory, trust. And it is well settled in this state that the rule in *Shelley's Case* cannot apply to executory trusts. *Posey v. Cook*, 1 Hill, Law, 413; *Porter v. Doby*, 2 Rich. Eq. 53; *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339; *Shaw v. Robinson*, 42 S. C. 346, 20 S. E. 161; *McIntyre v. McIntyre*, 16 S. C. 294; and many other cases. The rule as to heirs will be found in *Dukes v. Faulk*, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745. Then it is seen the exceptions are well taken, and therefore the decretal order must be set aside and reversed. The original decree cannot stand for want of the presence of a trustee as successor of Bennett Reynolds, Jr., as a party thereto. It is the judgment of this court that the judgment of the circuit court be reversed.

(113 Ga. 883)

**BOARD OF TRUSTEES OF GATE CITY
GUARD v. CITY OF ATLANTA.**

(Supreme Court of Georgia. July 19, 1901.)

**TAXATION—EXEMPTIONS—PUBLIC PROPERTY—
CONSTITUTIONAL LAW.**

1. Public property, within the meaning of that clause of the constitution which authorizes the general assembly to exempt from taxation "all public property," embraces only such property as is owned by the state, or some political division thereof, and title to which is vested directly in the state, or one of its subordinate political divisions, or in some person holding exclusively for the benefit of the state, or a subordinate public corporation.

2. It follows from the ruling stated in the preceding note that that portion of the act of the general assembly approved October 13, 1885, and now embodied in Pol. Code, § 1156, which declares that each armory "owned" and occupied by any command of the volunteer military forces of the state "shall be, to all intents and purposes, public property, * * * and as such public property * * * shall be exempt from any taxation, state, county or municipal," is in violation of the constitution, and therefore null and void.

(Syllabus by the Court.)

Error from superior court, Fulton county;
A. W. Fite, Judge.

Action between the Board of Trustees of the Gate City Guard and the city of Atlanta. From the judgment the board of trustees brings error. Affirmed.

Jas. F. O'Neill, for plaintiff in error. Jas. L. Mayson and W. P. Hill, for defendant in error.

COBB, J. On October 13, 1885, an act was approved which declared: "Each armory owned and occupied by any command of said volunteer forces shall be, to all intents and purposes, public property—that is to say, the state shall have the right to use the same for public purposes of a military character, to quarter troops therein in times of emergency, to be judged of by the commander-in-chief, and to otherwise use the same for military purposes, such use, however to be consistent with the occupation of the same by said command holding the legal title thereto, and so as not to oust the said command therefrom, and as such public property, each said armory, and the land upon which it is situated while it is used and occupied as such, shall be exempt from any taxation, state, county or municipal. The adjutant and inspector general shall see that all such armories are kept in serviceable condition, and shall report on the same to the commander-in-chief in his annual report. All rents or income of any portions of such armories shall be the property of the command owning the same. The state shall not appropriate any money for the repair of such buildings, but all repairs and other expenses incident to preserving and repairing such buildings shall be paid by the command owning the same." Acts 1884-85, p. 84, § 15 (Pol. Code, § 1156). Under the constitution "the general assembly may, by law, exempt from taxation all public prop-

ty." Civ. Code, § 5884. The general assembly, under the authority thus granted, has declared that "all public property" shall be exempt from taxation. Pol. Code, § 762. In *Mundy v. Van Hoose*, 104 Ga. 290, 30 S. E. 783, Mr. Justice Little says: "'Public property,' in the sense as used in the provision for rendering property exempt, means property belonging to the state, or the political divisions thereof, such as counties, cities, towns, and the like." Taxation is the rule, and exemption the exception. *Athens City Waterworks Co. v. Mayor, etc., of City of Athens*, 74 Ga. 413. The general assembly has no authority whatever to exempt from taxation any species of property except those specifically mentioned in the constitution. Any one claiming an exemption from taxation must show an act of the general assembly, passed in pursuance of the constitution, authorizing the exemption; and in construing such an act every doubt is to be resolved in favor of taxation and against exemption. In the present case an effort is made to enforce an attempt by the general assembly to exempt from taxation the property of a private corporation known as the "Board of Trustees of the Gate City Guard." The exemption from taxation is claimed under that part of the act above referred to which declares that an armory owned and occupied by the volunteer military forces of the state shall be public property to all intents and purposes. It is not pretended that the building in which the armory of the Gate City Guard is located is owned by the state, or any political division thereof, or that the corporation which holds the title to the building holds it exclusively for the benefit of the state, or a subordinate public corporation. It is claimed, however, that a portion of the building is used entirely for purposes which are of a public nature; and that, while the corporation derives an income from the remaining portion of the building, this income, after paying the debts of the corporation incurred in the erection and maintenance of the property, is used exclusively for public purposes in maintaining the military company known as the "Gate City Guard," which is a part of the regular volunteer military forces of the state. That private property is used exclusively for public purposes does not change the nature of the property, or the title thereto, so as to convert it into public property. It is not necessary in the present case to determine who would be the owners of this property in the event it should ever cease to be used for the purposes for which the military company was organized and the property acquired, but it is sufficient to determine, as it can be without difficulty decided, under the facts of the present case, that neither the legal nor equitable title to the property is in the state, or any political division thereof. It is therefore not public property, within the meaning of the clause of the constitution which declares that the general assembly shall have authority to

exempt public property from taxation. Private property cannot be converted into public property by the simple declaration of the general assembly; and especially is this true when the purpose of the declaration is to relieve private property from a burden which the constitution says in unmistakable terms shall be borne by it for the benefit of the public. The act of 1885 above referred to, which attempted to exempt from taxation armories owned by military companies, is unconstitutional and void, and the court did not err in so treating it, and in holding that the armory owned by the Board of Trustees of the Gate City Guard was subject to taxation at the instance of the authorities of the city of Atlanta. Judgment affirmed. All the justices concurring.

(113 Ga. 889)

ALMAND et al. v. WHITAKER et al.

(Supreme Court of Georgia. July 19, 1901.)

WILL—CONSTRUCTION—RIGHTS OF BENEFICIARIES.

Under the general rule of construction, a will whereby property is given to the named "children" of A., to the named "heirs" of B., and to C., with provision for an "equal division," must, when there is nothing to indicate a contrary intention on the part of the testator, be so interpreted and carried into effect as that the beneficiaries shall take per capita, and not per stirpes.

(Syllabus by the Court.)

Error from superior court, Rockdale county; E. J. Reagan, Judge.

Action between E. B. Almand and others and A. Whitaker, executor, and others. From the judgment, Almand and others bring error. Reversed.

A. C. McCalla and J. R. Irwin, for plaintiffs in error. Geo. W. Gleaton and A. C. McCalla, for defendants in error.

LUMPKIN, P. J. In the second item of the will of James H. Smith he devised certain land to his two daughters, Mrs. Jane E. Overton and Mary O. Cowen. The third item of his will read as follows: "I give and bequeath the balance of my lands, consisting of three hundred and fifty acres, to the following named heirs of my estate: To Mrs. Nancy A. McDonald's children, names as follows: Mrs. E. B. Almand, Mrs. Martha L. Still, James M. McDonald, Benjamin B. McDonald, Howard C. McDonald; to the heirs of H. F. Smith, Mrs. Elma M. Harper, William C. Smith, Isaac D. H. Smith, Wilmer Z. Smith, and Bettie Nannie M. Smith. The above-named lands to be sold by my executor, and equal division made between the above-named heirs as soon as practicable after my decease; also John H. Smith, who is now living in Texas, who is my eldest son." The question for decision is whether, under the latter item, the named devisees each took an undivided eleventh of the proceeds of the 350 acres of land; or whether the proceeds thereof were to be divided into three equal shares, one

of which should go to the five children of Mrs. McDonald, another to the five heirs of H. F. Smith, and the remaining share to John H. Smith, the testator's son, who lived in Texas. The trial judge held that the division should be made as last indicated; that is, per stirpes. We are of the opinion that it should be made per capita. The general rule of construction is that, "under a gift to 'children and grandchildren,' or to A. and the children of B., or the children of A. and B., or to the children of A. and the children of B., or to A. and B. and their children, or to a class and their children, all take per capita"; though the "presumption in favor of a per capita distribution yields readily in favor of any indication of a contrary intent." 29 Am. & Eng. Enc. Law, 421-424. To the same effect, see 2 Jarm. Wills, 756, and Schouler, Wills, § 540. This general rule applies, we think, to the present case; for there is not in the will now before us "any indication of a contrary intent," or what Mr. Jarman terms "a very faint glimpse of a different intention in the context." On the contrary, the testator named *eis nominibus* the precise persons who were to receive the proceeds of the lands mentioned in the third item of his will. He further declared, in the most distinct and unequivocal language, that these lands should be sold by his executor, "and equal division made between" the 10 persons first mentioned as heirs and his son, John H. An equal division could not possibly be made among these 11 persons without giving to each of them an eleventh of the proceeds of the realty. A division on any other plan would, it seems, defeat the express direction of the testator, so far as the same may be gathered from the language he employed in framing his will.

It was insisted on the argument here that as the word "between" was used after designating by groups the children of Mrs. McDonald and the heirs of H. F. Smith, and, as this term could be properly employed, relatively to devisees, only with reference to two persons or groups of persons, it indicated an intention on the part of the testator to make a division per stirpes. Grammatically, this is true as to the word "between," and if the will had, in this connection, made no mention of John H. Smith, the testator's eldest son, the contention of counsel would be forcible indeed. But, as John H. was specifically named, and as he was to share equally with the others in the division contemplated by the testator, it is manifest that the latter did not employ the term "between" in its usual and proper grammatical sense. This case is clearly distinguishable from that of *White v. Holland*, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87, for there the will under consideration, though quite similar to the one now before us, was construed with reference to competent allunde evidence throwing light upon the testamentary intention. Judgment reversed. All the justices concurring.

(113 Ga. 920)

SCALES et al. v. CHAMBERS.

(Supreme Court of Georgia. July 23, 1901.)

SALE OF DECEDENT'S LAND—OPPORTUNITY TO BID—DUTIES OF CRIER.

1. When the issue in controversy was whether a crier had knocked off property without giving persons at the sale fair and reasonable opportunity to bid, it was competent to show by one present that, but for the premature termination of the sale, he would have run the property up higher.

2. A mere crier, employed by an administrator, does not control the sale, but is simply the mouthpiece of the latter, and cannot, over his protest, complete the sale; certainly not when there are present one or more persons willing to bid higher if allowed an opportunity to do so.

3. Applying to the facts disclosed by the record the rulings above announced, the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Banks county; R. B. Russell, Judge.

Action between I. F. Scales, administrator, and others, and J. S. Chambers. From the judgment the administrator and others bring error. Reversed.

Fletcher M. Johnson and H. H. Perry, for plaintiffs in error. W. I. Pike, A. P. Wofford, and N. L. Hutchins, for defendant in error.

COBB, J. Land belonging to the estate of a decedent can be sold in this state only in the manner prescribed by law. If the decedent dies intestate, the land must be sold by the administrator. If the decedent dies testate, the land must be sold by the executor or administrator with the will annexed in the manner provided in the will. In the absence of provisions in the will on the subject, the lands must be sold in the manner prescribed by law for sales by administrators. Prior to the adoption of the Code, it seems that it was absolutely essential to the validity of a sale of land belonging to the estate of a person who died testate that the executor should personally make the sale, and that he had no authority to delegate this power to an agent. See *Atkinson v. Manufacturing Co.*, 58 Ga. 230. It seems, however, that, even before the adoption of the Code, an administrator might sell the lands of his intestate by an agent. *Cheever v. Hora*, 22 Ga. 600; *Bond v. Watson*, Id. 637. And this would seem to be also true in regard to executors who were not vested by the will with any discretion as to the time, place, manner, etc., of making the sales, and who were bound by the laws in reference to sales by administrators. The Code provides that executors, administrators, guardians, and trustees are authorized to sell and convey property by attorney in fact in all cases where they may lawfully sell and convey in person. Civ. Code, § 3000. It would seem from this that since the Code, if an executor or administrator desires to sell the land of the estate by an agent, the agency must be created in writing, as that is the usual mode

of appointing attorneys in fact. It is not, however, necessary to decide in the present case whether an agency created by parol would be valid. An administrator can undoubtedly appoint, in writing, an agent to sell the property of the estate; and such agent may be both the agent to sell and the crier at the sale; and, when he acts in both capacities under the authority thus given, each and every act of the agent which was within the authority given would, in the absence of fraud, bind the administrator; the administrator, of course, being responsible to those interested in the estate for the mistakes, misconduct, and negligence of his agent. In a case where the administrator makes the sale himself it is not absolutely essential to the validity of the sale that he should be the actual crier at the sale, but he may employ a person for the sole purpose of crying the sale, and this employment may be either in writing or in parol; and, if the purpose of such employment extends no further than that of engaging the services of a mere crier, then the crier has no right or authority to do anything in connection with the sale except under the immediate supervision of the administration. He is not in any sense the agent or attorney in fact of the administrator. He is a mere servant, and acts solely as the mouthpiece of the administrator, and must do nothing which the administrator forbids, and must not refuse to do anything which he commands. He must cry the sale so long as the administrator requires it to be cried, and must not accept any one as a purchaser of the property until authorized to do so by the administrator. An auctioneer is sometimes also the crier at the sale, but he is always more than a crier. An auctioneer is for some purposes the agent of the person who has placed the property in his hands for sale. See Civ. Code, § 3527. If an administrator create an agency to sell the property of his intestate by the employment in the manner prescribed by law of one who is both auctioneer and crier, then the auctioneer as agent, but not solely as crier, would have a right to accept a bid, and close the sale, and bind the administrator by such acceptance. In such a case, of course, the auctioneer would be liable to the administrator for any loss that might result to him or the estate he represented on account of the auctioneer's misconduct, mistake, or negligence.

When the principles above stated are applied to the facts of the present case, a reversal of the judgment refusing to grant a new trial is the result. The evidence clearly shows that the administrator employed the person who cried the property as a mere crier, and did not confer upon him any authority as agent or attorney in fact to represent him. He was the mere mouthpiece of the administrator. When he attempted to close the sale, and accept a bid from a person who had made an offer for the property, and the administrator's attention was called to this,

and acceptance of the bid as final promptly repudiated by him, no complete sale was made, for the simple reason that the offer of the bidder was never accepted by the administrator, and the two parties essential to a complete sale were wanting. The administrator could have accepted the bid if he had seen proper to do so; but he saw proper to refuse to accept the bid, and when he did this the sale was incomplete, and the bidder was released. It was argued here that, because the bidder would have been bound to have complied with the bid if the administrator had accepted it, therefore the administrator was bound to accept the bid. The fallacy of this reasoning is apparent. The bid was an offer to take the property at a certain price. If accepted, the sale was complete; if refused, there was no sale. The evidence shows that it was refused, and therefore the bidder was not only released from his bid, but deprived of any right to claim the property as having been purchased by him at the sale. The trial judge overruled the motion for a new trial upon the assumption that the evidence would have authorized a finding that, on account of the close proximity of the administrator to the crier at the time the property was knocked down by the crier, the administrator had assented to the acceptance of the bid by the crier. We have carefully read the brief of evidence in the case with this point in mind, and we are constrained to disagree with our Brother of the circuit bench in the conclusion he has reached. It seems to us that not only was there no evidence to authorize a finding that there was an implied assent by the conduct of the administrator at the time the property was knocked down, but the evidence rather demanded a finding that there was a prompt repudiation of the bid as soon as the attention of the administrator was called to the fact that the bid had been accepted by the crier, and the sale attempted to be completed; the attention of the administrator having been for the moment diverted from the actual crying of the sale. As the case is remanded for a new trial, we have ruled upon the controlling question in the case, and also upon the question of the admissibility of certain evidence; the last ruling being contained in the first headnote. Judgment reversed. All the justices concurring.

(112 Ga. 970)

NORWICH UNION FIRE INS. SOC. v. WELLHOUSE.

(Supreme Court of Georgia. July 20, 1901.)

INSURANCE — MORTGAGED PROPERTY — PAYMENT TO MORTGAGEE—ACTION BY OWNER.

1. Where an owner of property which was destroyed by fire had taken out a number of insurance policies on the same, each of which contained a "mortgage clause," making the insurance payable to a mortgagee of the property, and the full value of the property destroyed was paid to such mortgagee by some of the insurance companies, such owner thereafter had no right of action against another insur-

ance company, even if before such settlement of the loss it may have been liable to him upon its policy.

2. If a plaintiff has himself no legal right to bring a particular action, he cannot sustain the same by amending his petition so as to sue for the use of another party.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Louis Wellhouse, for the use of, etc., against the Norwich Union Fire Insurance Society. Judgment for plaintiff. Defendant brings error. Reversed.

King & Spalding, for plaintiff in error. Frazer & Hynds and Dorsey, Brewster & Howell, for defendant in error.

FISH, J. Wellhouse brought a suit against the Norwich Union Fire Insurance Society, in which he alleged that the defendant was indebted to him in the sum of \$1,909.50, as principal, as its pro rata share of the loss sustained by him in consequence of the almost complete destruction by fire of a building which belonged to him, and on which he held a policy of insurance issued by the defendant. In the petition the plaintiff alleged: The policy sued on had attached thereto "a 'mortgage clause with full contribution,' which provided that the 'loss or damage, if any, under this policy, shall be payable to Southern Trust & Banking Company, as trustee,' etc. Petitioner says, however, that said trustee has no vested interest in said policy, and hence petitioner brings this suit on said policy to recover his said amount of damages and loss occasioned by said fire." It appears from an agreed statement of facts introduced in evidence at the trial that at the time of the fire there were in existence a number of other policies covering the property damaged, issued by several other insurance companies, among which was a policy issued by the Germania Fire Insurance Company for the sum of \$2,000; that the entire amount of the loss occasioned by the fire was paid by these other insurance companies, each company paying a stated sum as its pro rata share of the same, the Germania Insurance Company paying the sum of \$1,909.50; that each of these policies contained "a clause known as the 'mortgage clause,' with full contribution, which provided that the loss or damage under such policy should be payable to the Southern Trust & Banking Company, as trustee, said Southern Trust & Banking Company holding a mortgage or deed to secure an indebtedness on said property exceeding the amount paid on said loss; and all of said sums of money were paid to said Southern Trust & Banking Company, and were by it applied to the payment of said debt." The Germania Company's policy contained a clause reserving the right to cancel the policy at any time, as therein provided, but stipulated, "In such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee

(or trustee) of such cancellation, and shall then cease." It appeared from the testimony that prior to the date of the fire one Whitney, the agent of the Germania Insurance Company, had given to one Hass, as agent of Wellhouse, notice of the cancellation of the policy issued by that company, and that Whitney thereupon undertook to procure for Wellhouse an equal amount of insurance in some other insurance company. For this purpose he applied to the agents of the Norwich Union Fire Insurance Society, and they agreed, in behalf of that company, to issue a policy on the property for the sum of \$2,000, the same amount as that named in the Germania policy. This policy was written by the agents of the Norwich Company, and was delivered to Whitney on the day before the fire occurred, but was not delivered by Whitney to Wellhouse until after the fire. At the trial there was a dispute between the parties as to whether Whitney, when he applied for and when he received this policy, was acting as the agent of Wellhouse, or as the agent of the Germania Insurance Company, but, in the view which we take of the case, this question is immaterial. Like the other policies, the policy of the Norwich Company, as alleged in the petition, contained a clause making the loss, if any, payable to the Southern Trust & Banking Company, as trustee. "When the plaintiff had nearly concluded the introduction of his testimony, he amended" his petition, so as to sue for the use of the Germania Fire Insurance Company. This amendment to the petition set forth the plaintiff's version of facts as to the Germania policy, and the facts as to the Norwich policy, and alleged: "(5) That on the 19th day of October, 1895, the property insured under said defendant's said policy, and which had been insured under the said policy of the Germania Fire Insurance Company, was destroyed by fire. That the fire occurred eight days after the notice of cancellation had been given by the Germania Fire Insurance Company, as above set out, seven days after the said agents of defendant society had agreed to write the policy sued on in this case, and the day following its actual delivery by the defendant society to the agent of said Wellhouse. That under the terms of said Germania Company's policy, and the said mortgage clause attached thereto, said Wellhouse was entitled to five days' notice of cancellation, while said banking and trust company was entitled to ten days' notice of cancellation. That, therefore, at the time of said fire * * * the situation as to said two policies was as follows: As to the Germania policy, it was not subsisting insurance as to said Wellhouse, the owner of said property, but was subsisting insurance as to said banking and trust company, mortgagee. As to the defendant society, its said policy was subsisting insurance as to said Wellhouse, but was not subsisting insurance as to said banking and trust company, for the reason that it had not

been accepted by them in lieu of the said Germania policy, which they held at the time of the fire aforesaid. Therefore, under the terms of its said policy, the said Germania Fire Insurance Company was liable to said banking and trust company, and did, on February 28, 1896, pay to said banking and trust company the sum of nineteen hundred and nine and $\frac{50}{100}$ dollars, * * * which was its pro rata part of the total loss occasioned to said property by said fire. (6) That, for the reasons set out above, the payment of said nineteen hundred and nine and $\frac{50}{100}$ dollars to said Southern Banking & Trust Company by said Germania Fire Insurance Company was obligatory, and, said payment going to the credit of said Wellhouse on his indebtedness to said banking and trust company, the same inured to the use of said Wellhouse, and he received the full benefit thereof. Wherefore the said Wellhouse became indebted to said Germania Fire Insurance Company to the extent of the amount thus paid, with legal interest thereon. For this reason said Wellhouse brings this suit for the use of said Germania Fire Insurance Company, in order that he may get the just and full benefits from said defendant society's said policy, and discharge his said obligation to said Germania Fire Insurance Company arising in the way and manner aforesaid." This amendment was allowed by the court, over certain objections thereto by the defendant. At the conclusion of the evidence offered by the plaintiff, the defendant moved for a nonsuit, which the court refused to grant. The jury returned a verdict for the plaintiff. The defendant moved for a new trial, which was overruled by the court, and the defendant excepted.

1, 2. One of the grounds of the motion for a new trial was that the court erred in refusing to grant a nonsuit. Another ground was that the court erred in charging the jury as follows: "If the policy in the Germania Company which had been issued to Wellhouse and made payable to the trust company was still valid as to the trust company, but had become invalid, by cancellation, as to Wellhouse, then Wellhouse had the legal right to take out another policy of insurance in any company to cover this same property; and, if he did legally procure a policy, he would have the right to maintain an action for the use of the Germania Company after the Germania Company had paid his debt, and after the entire loss on the building had been paid." One of the assignments of error, in the motion for a new trial, upon the refusal of the court to grant a nonsuit, is, because the evidence showed that Wellhouse had been fully paid all of his loss; and one of the assignments of error in this motion upon the above-quoted charge of the court is, "because the evidence showed that Wellhouse had no legal right of action on said policy." We think that the court should have granted the nonsuit, and, for the same reason that it should have been granted, the court erred in

this charge to the jury. In *Insurance Co. v. Gwinn*, 88 Ga. 65, 13 S. E. 837, it was held: "Where one is insured concurrently in seven companies, and makes claim for his whole loss against six of the companies, and the whole loss is thus settled conformably to the terms of the policies, and paid, the seventh company is discharged as to him, and its liability, if any, is to the other companies for contribution." The principle there ruled controls this case. All of the insurance policies, including the one sued on, contained a clause under which the loss was payable to the trust company, as mortgagee. If the defendant insurance company was ever liable to Wellhouse for any portion of the loss sustained by him, when the full amount of that loss was, conformably to the terms of the policies, paid by the other insurance companies, the defendant was discharged as to him, and, being so discharged, he, of course, thereafter had no cause of action upon which to bring a suit against it. So far as the settlement of the loss was concerned, the payment of the entire amount thereof to the trustee, who held the mortgage upon the property, to be applied by it to the debt of Wellhouse which the mortgage was given to secure, was the same as if the payment had been made to Wellhouse himself. When the full amount of the loss was thus paid, Wellhouse received full compensation for the destruction of the insured property, and thereafter had no cause of action against any insurance company. It is only where there is a legal cause of action in a plaintiff that he can maintain a suit, in his own name, for the benefit of another as usee. *Mitchell v. Railway Co.*, 111 Ga. 760 (2), 36 S. E. 971, 51 L. R. A. 622. Wellhouse came into court without a cause of action, and, consequently, had no right to recover either for himself or for the benefit of any one else. Judgment reversed. All the justices concurring.

(112 Ga. 916)

SAVANNAH, F. & W. RY. CO. v. POSTAL TEL. CABLE CO.

(Supreme Court of Georgia. July 19, 1901.)

MANDAMUS TO COURT—INJUNCTION—SECOND APPLICATION.

1. This court has no authority by mandamus to compel the judge of the superior court to grant a protective order in the nature of a supersedeas, where he refuses an injunction, and declines to grant such order.

2. While a second application for an injunction may be made where an injunction was refused on the first application, such second application is addressed to the discretion of the judge, and should not, as a general rule, be granted unless based upon grounds which were unknown to the applicant at the time of the first application, and which could not, by the exercise of ordinary diligence, have been discovered by him.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by the Savannah, Florida & Western Railway Company against the Postal Telegraph Cable Company. Judgment for defendant, and plaintiff brings error, and applies for a writ of mandamus. Application denied, and judgment affirmed.

Chisholm & Clay, for plaintiff in error. Garrard & Meldrim and J. R. McIntosh, for defendant in error.

COBB, J. The Savannah, Florida & Western Railway Company brought an equitable petition against the Postal Telegraph Cable Company seeking to enjoin it from proceeding to condemn certain portions of the right of way of the railway company. Upon the hearing the judge refused to grant an interlocutory injunction. The railway company brought the case to this court upon a writ of error, and the judgment was affirmed. 112 Ga. 941, 38 S. E. 856. Thereafter the railway company filed an amendment to its petition, setting forth various reasons why the condemnation proceedings should be enjoined. Upon this amendment the judge granted a rule calling upon the telegraph company to show cause why an injunction should not be granted, and, after a hearing, refused to grant an injunction. To this ruling the railway company excepted.

1. When the railway company tendered to the judge the bill of exceptions, it also presented an application asking that an order be passed preserving and protecting the rights of the parties until the judgment of the supreme court could be had upon the bill of exceptions. The judge refused to grant this order. The railway company then applied to this court for a writ of mandamus to compel the judge to make an order preserving and protecting the rights of the parties while the case was pending in this court. The Code declares that either party may have a writ of error to the supreme court from a decision of the judge of the superior court granting or refusing an injunction, but that "no such writ of error, or other proceeding for the obtaining of the same, shall have the effect to establish or deny any injunction independently of the order of such judge, who shall, on rendering the decision, or in granting the writ of error, make such order and require such bond as may be necessary to preserve and protect the rights of the parties until the judgment of the supreme court can be had thereon, and which he shall do as well in cases of refusal as of granting." Civ. Code, § 4925. Even if the granting of a supersedeas, or a protective order, when the application for injunction is refused, is not within the discretion of the judge of the superior court, this court cannot review a ruling of the judge on this subject in any other way than that prescribed by law for bringing under review the decisions of the judge of the superior court. This court has no original jurisdiction. It is a court alone

for the correction of the errors of the superior and certain city courts, and, no matter how grave might be the error committed by a judge of the superior court, or how irreparable the injury which might result therefrom, this court has no power by an original writ directed to him to compel him to enter a judgment or order which the law requires him to enter, or to refrain from doing that which the law prohibits him from doing. The application for mandamus in the present case must be denied for want of jurisdiction in this court to grant it. If there is any law authorizing this court to issue a mandamus except in the case where the judge refuses to sign a bill of exceptions, we are not aware of it.

2. All of the questions presented by the present writ of error were passed upon and decided when the case was here before, save only those which seek to call in question the validity of the law upon which the condemnation proceeding was founded, and make an attack upon that law for the reason that it is violative of the constitution in various particulars. There was an effort made, when the case was here before, to present for decision these very questions in reference to the constitutionality of the statute, and this effort failed because the pleadings did not present the questions in such a way that the court would be authorized to decide questions of this character. The amendment to the petition must, therefore, be considered as a second application for an injunction in the same case; and it is to be determined whether there can be a second application for an injunction when the first application has been refused, as well as what is the authority of the judge to whom the second application is presented. The Code declares that "a second injunction may be granted in the discretion of the judge." Civ. Code, § 4921. See, also, *Cox v. Mayor, etc.*, 17 Ga. 249. While this section does not, in terms, provide that a second application for an injunction may be granted when the judge has refused the first one, still, upon the same principle which would allow the judge to grant a second injunction if, for any reason, the first has become inoperative, we see no good reason why the judge, after having refused to grant an injunction, may not, upon a second application, grant the same, provided he becomes satisfied that the ends of justice require him to do so; and for this reason such applications are as much addressed to his discretion as applications coming within the literal meaning of the section of the Code. In the case of *Glass v. Clark*, 41 Ga. 544, it was held that a refusal to grant an injunction does not estop the party applying therefor from asking for another in the same case. In the opinion Mr. Chief Justice Lochrane said: "We are all concurrent in the opinion that the previous dismissal of a bill in this case did not operate as an estoppel of the present application, and that the right of parties to be

heard on applications for injunctions, except on facts identical, and as between the same parties and privies, is one of clear and unquestioned authority. And we hold that, even as between the same parties, the right of applying to the chancellor for an order granting an injunction may be renewed, and only by the decree of the court on a full and final hearing as between parties and privies does the decision become a final adjudication, estopping other and unnecessary litigation." In *Blizzard v. Nosworthy*, 50 Ga. 514, it was held that the refusal of an injunction does not bar the complainant from making a second application, when he presents new and additional matter, discovered since the hearing. In the opinion, on page 520, Judge Trippe says: "There is no good, legal reason why a complainant may not, after a refusal of an injunction by the chancellor, make a second application; especially when he presents new and additional matter, discovered since the former hearing. By analogy to the rule for granting new trials for newly-discovered testimony, it would be but reasonable that a chancellor could thus rehear a second application for injunction. A second injunction may be granted in the discretion of the judge. New Code, § 3223." Civ. Code 1896, § 4921. The right of the railway company to present a second application for injunction seems, under these decisions, to be unquestioned; but such an application is addressed to the discretion of the judge, which ordinarily should not be exercised in granting the second application, unless it is based upon grounds which were not known, and could not have been discovered by the exercise of reasonable diligence, at the time the first application was made. Not only was every ground upon which the second application in the present case is based known to the railway company at the time the first application was made, but some of them were actually presented in the pleadings as reasons for granting an injunction; and there was an effort, though ineffectual, to present every question that is now presented. Under such circumstances the judge not only did not abuse his discretion in refusing the application, but the grant of an injunction would have been entirely unwarranted. Application for mandamus denied, and judgment affirmed. All the justices concurring.

(113 Ga. 877)

WOODSIDE et al. v. LIPPOLD et al.

(Supreme Court of Georgia. July 19, 1901.)
MORTGAGE—SATISFACTION—EXTINGUISHMENT
OF LIEN.

Where a mortgagee, to avoid the expense of a foreclosure sale, took from the mortgagor, in settlement of the debt secured by the mortgage, a conveyance of the mortgaged property at its full valuation, retaining his mortgage uncanceled, and subsequently conveyed the property to a third person, at the same time delivering to him, without any assignment thereof, the mortgage, still uncanceled; and where the

mortgagee afterwards, at the instance and request of his grantee, made an entry of satisfaction upon his mortgage, and had the same canceled of record, both the mortgagee and his grantee having at the time actual notice of an intervening mortgage, but acting under a misapprehension, for which the holder of the intervening mortgage was in no wise responsible, that he would not insist upon the enforcement of the same,—the lien of the first mortgage was extinguished, and equity will not restore it to its priority over the intervening mortgage.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by J. J. Woodside and the American Trust & Banking Company against C. G. Lippold and others. Verdict for defendants. Plaintiffs bring error. Affirmed.

On February 26, 1892, Mrs. Venable, to secure a loan of \$10,000, executed to the American Trust & Banking Company a mortgage on certain described realty. To secure a loan of \$2,000, she, on the following day, executed a mortgage on the same property to Skinner, who transferred it to the American Trust & Banking Company. These mortgages were duly recorded. On December 26, 1893, she executed a mortgage to the Empire State Bank on the same property, to secure a debt of \$1,592, which mortgage was transferred to Lippold, and it and the transfer duly recorded. On March 18, 1896, Mrs. Venable conveyed the mortgaged premises in fee simple, with warranty of title, to the American Trust & Banking Company. At the time this conveyance was made the banking company had no actual notice of the mortgage held by Lippold, and Mrs. Venable was insolvent, and owned no property except the mortgaged premises. She had paid no part of the principal of the mortgage debt held by the banking company, and had been unable to pay the interest thereon as it accrued. The total amount of her indebtedness to the banking company at the time of the conveyance, consisting of principal, interest, and certain taxes on the property, paid by the company, was \$16,254. The consideration named in the deed was \$14,582. The property, when conveyed, was not worth more than the consideration named, and probably not as much. The banking company credited Mrs. Venable with \$14,582, and charged the balance to profit and loss. Neither the notes nor the mortgages were delivered to Mrs. Venable. The company, being afraid of the title, kept the mortgages open, there being no agreement as to whether or not they should be satisfied. Prior to the conveyance the banking company had obtained judgments on the notes it held, secured by the mortgages, and the deed recited that it was executed for the purpose of avoiding further expense and a forced sale of the property. On April 12, 1897, the American Trust & Banking Company conveyed the premises by warranty deed to Woodside. At the time of this conveyance the banking company still held its mortgages, uncanceled. J.

H. Gray, whose law firm was general counsel for the American Trust & Banking Company, testified that, after the sale by the banking company to Woodside, Mr. C. W. Smith, Woodside's attorney, after investigating the title, reported to the counsel of the banking company that he had had an interview with Mr. P. F. Smith, Lippold's attorney, who had his mortgage for foreclosure, and that Lippold had abandoned his mortgage, and there would be no effort to foreclose it; that, acting upon this information, and at the request of Mr. C. W. Smith, the banking company made an entry of satisfaction upon its mortgages, and had the same canceled of record. The Skinner mortgage was canceled April 30, 1897, and the mortgage to the banking company was canceled May 7, 1897. There was evidence that the banking company would not have canceled its mortgages but for the fact that it believed that there would be no effort to set up the Lippold mortgage. Subsequently Lippold filed a petition to foreclose the mortgage held by him, and Woodside and the American Trust & Banking Company filed the present petition to enjoin Lippold from foreclosing his mortgage, and to have it canceled, and prayed that the cancellation of the mortgages held by the banking company be treated as of no effect; that the lien of the banking company be upheld; that its mortgages be foreclosed; and that a decree be entered in its favor for the sum alleged to be due it, to be enforced by sale of the property; and for general relief. Mrs. Venable was made a party defendant to this petition. Upon the trial there was a verdict for the defendants. The petitioners made a motion for a new trial, complaining that the verdict was contrary to law and the evidence and of specified parts of the charge of the court. The motion was overruled, and the petitioners excepted.

Ellis & Ellis, Brown & Randolph, and C. W. Smith, for plaintiffs in error. Chas. A. Read, for defendants in error.

FISH, J. This case turns upon the question whether, under the facts stated, equity will restore the liens of the mortgages canceled by the American Trust & Banking Company to their original priority over the mortgage held by Lippold. Under the view we take of the matter, it is unnecessary to determine whether, according to the equitable doctrine relating to merger, the liens of the mortgages held by the banking company were merged in the title when Mrs. Venable conveyed the premises to the company, or were extinguished by the settlement of the mortgage debt in that transaction; for, in our opinion, there can be no doubt that the liens of such mortgages were absolutely extinguished when, at the request of Woodside, who had purchased the mortgaged property from the banking company, and taken a warranty deed thereto, the banking company made the en-

tries of full satisfaction upon such mortgages, and had them canceled of record; this being done in order to clear the record of liens against the property. If, up to the date of Woodside's purchase, there had been no merger, and the banking company's mortgages were then alive, and if the banking company and Woodside intended when he purchased that he should take all the interests and rights which the banking company held in and to the property, and if, under such circumstances, no merger or extinguishment of the banking company's mortgages occurred, in equity, when Woodside acquired the title, yet when the banking company subsequently, and at his instance and request, deliberately marked the mortgages satisfied, and had them canceled of record, they never having been assigned to Woodside, there was then manifested an express and unequivocal intention on the part of both Woodside and the banking company that the liens of its mortgages should no longer exist,—that they should merge in the title which Woodside had acquired,—and such intention became effective, and the mortgages were extinguished. It has been uniformly held, in the application of the equitable doctrine concerning merger, that the intention, when expressed, of the person in whom the two estates or interests meet, must control. 2 Pom. Eq. Jur. (2d Ed.) § 791; 15 Am. & Eng. Enc. Law (1st Ed.) 325; *Ferris v. Van Ingen*, 110 Ga. 111, 35 S. E. 347. In *Weidner v. Thompson*, 69 Iowa, 36, 28 N. W. 422, the mortgagor conveyed the mortgaged property to the mortgagee, who conveyed it to a third person, who gave his note in substitution of the note of the mortgagor, and the holder of the mortgagor's note delivered it to such third person, marked "Paid," and canceled the mortgage of record. A judgment was rendered against the mortgagor after his execution of the mortgage, but prior to his conveyance to the mortgagee. In an action by the purchaser from the mortgagee to have the cancellation of the mortgage set aside on the ground that it was not the purpose of the parties to cancel it, and that it was against their interests to do so, it was held that the cancellation could not be set aside. In the opinion, Beck, J., said: "It cannot be doubted that the law will look to the intention of the parties, and the interest of the plaintiff, in order to determine whether the mortgage is to be regarded as paid and canceled. The fact that it was canceled of record will not avail to discharge the mortgage if the parties intended that the lien should continue, and the plaintiff's interests demanded it. But if the parties intended to discharge the mortgage, and the debt was in fact paid, and not transferred to the plaintiff, the cancellation must stand, and the lien be regarded as discharged. The mere fact that plaintiff's interests would have been better protected by permitting the lien to stand will not control against the intention, clearly established. The law will permit a party in such a case, as in

others, to act and contract in a manner which would not result to his interest." See *Campbell v. Carter*, 14 Ill. 288. The satisfaction and cancellation of the banking company's mortgages seem to have been made under a mistake of fact, that Lippold had abandoned his mortgage, and would make no effort to foreclose it. While equity will grant relief against a mistake of fact, it is well established that such a mistake must be of such a nature that it could not, by reasonable diligence, have been avoided at the time. Equity will not relieve against the results of culpable and inexcusable negligence. By the exercise of the slightest diligence on the part of Woodside and the banking company, they could have readily ascertained the intention of Lippold in reference to the enforcement of his mortgage. It does not appear that he or his attorney ever intimated that the mortgage had been abandoned. The attorney for the banking company gave as a reason for the satisfaction and cancellation of the company's mortgages that the attorney for Woodside reported that he had had an interview with the attorney for Lippold, and that Lippold would not enforce his mortgage. Equity will not grant relief under such circumstances. The verdict being demanded by the undisputed facts, there was no error in refusing to grant a new trial. Judgment affirmed. All the justices concurring.

(113 Ga. 396)

GUERNSEY et al. v. PHINIZY.

(Supreme Court of Georgia. July 19, 1901.)

CONVERSION—PERSONALTY INTO REALTY— SALE—LOSS BY FIRE—MONEY JUDG- MENTS—INTEREST—COSTS.

1. Personality, such as bricks and lumber, when used in building a house upon land, becomes realty, and constitutes a part of the land. If the house is destroyed by an accidental fire, and the bricks and other debris fall upon the land, they still remain a part of the realty. If the owner does nothing to show an intention to sever them, and convert them again into personality. In such a case the owner cannot remove them from the land after a sale of the land to another, nor hold the vendee accountable for them.

2. Money judgments bear interest from their dates. Where two parties disagree as to the amount to be paid under a contract of sale as recited above, and the vendee files an equitable petition against the vendor, on the trial of which it is adjudicated that the vendee pay to the vendor a certain sum, greater than that tendered in court, but less than that claimed and demanded by the vendor, it is the right of either party to have the decree entered up. If the vendor neglects to have the decree entered for the amount found in his favor, and the plaintiff also neglects to have this done until more than a month after the verdict, the amount found by the jury bears interest only from the date of the decree, and not from the time of the rendition of the verdict.

3. In equitable proceedings it is the duty of the judge to determine who shall pay the costs. This discretion, vested in the judge by section 4850 of the Civil Code, cannot be interfered with by this court, unless it is manifestly abused. It does not appear to have been abused in the present case.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by Leonard Phinzy against C. S. Guernsey and another. Judgment for plaintiff. Defendants bring error. Affirmed.

Jos. B. & Bryan Cumming, for plaintiffs in error. J. R. Lamar, for defendant in error.

SIMMONS, C. J. It appears from the record that Mrs. Guernsey and Harvey S. Hoadley owned a lot of land in the city of Augusta. On the lot was a brick building. They offered the property for sale through an agent, and by him it was sold to Phinzy at the price of \$16,000. Prior to this the vendors had given a security deed to Stetson, the latter giving them a bond for titles to reconvey upon the payment of the money loaned. By the contract of sale this security deed was to be paid off, and the property reconveyed, before Phinzy was to pay for it in full. Considerable delay occurred by reason of the loss of the bond for titles made by Stetson, the latter refusing to reconvey until the bond was produced, or a bond of indemnity given him. Pending the negotiations the house was accidentally destroyed by fire. After the fire it appears that the vendors undertook to rescind the contract of sale. Phinzy refused to rescind, and tendered for the lot a certain amount of money, less than the original contract price. This was refused, the vendors demanding the full contract price. Thereupon the vendee filed an equitable petition, setting out these facts, and praying a specific performance of the contract, and that a deduction be made because of the destruction by fire of the improvements upon the lot. Upon the trial the jury found that, at the time the contract was entered into, the land itself, without the improvements, was worth \$8,000, and that since the fire the vendee had tendered that amount for the land. The court decreed that the plaintiff should pay to the vendors the sum of \$8,000, and that they should make him a deed to the land, and remove therefrom certain incumbrances, including that of Stetson. This verdict and decree were not excepted to by either party, but between the rendition of the verdict and the making of the decree a dispute arose as to the ownership of the brick left upon the lot after the fire. It appears that some of these brick constituted a part of the remaining foundations of the building, while the remainder were part of the debris which had fallen, and which remained on the land after the fire. The defendants amended their answer after verdict by setting out these facts, and praying that the brick be decreed to belong to them. Phinzy resisted this by a demurrer and by an answer. The court decided that the brick belonged to Phinzy. The court also decreed that the \$8,000 bear interest from the date of the decree, and not from the time of the rendition of the verdict, some time having elapsed between the verdict and the

decree. It was also decreed that the defendants should pay all costs. The defendants excepted to the decree as to the ownership of the brick, as to the interest, and as to the costs, and by writ of error brought these questions to this court for review.

1. Whatever may be the law of fixtures with regard to articles not firmly annexed to the soil, it is clear that, when the owner of land uses brick, lumber, and other personalty for the construction of a substantial and permanent building upon his land, they become a part of the realty. Brick, though personal property before they are put in the house, become afterwards attached to and a part of the land, and so remain until severed, and reconverted into personalty, by the owner. If a house of brick be destroyed by accident, and the walls fall, the brick may be converted into personalty by any act of the owner which evidences his intention to so sever them. As long, however, as the owner leaves them as they have fallen, some of them in the foundation walls, and some scattered over the land, they remain real property, and a part of the land. In the case of *Rogers v. Gillinger*, 30 Pa. 185, 72 Am. Dec. 694, it appeared that a house was blown down by a storm, the lumber of which it had been composed falling upon the land. Subsequently the land was sold, and a contest arose over the ownership of this lumber. It was held that the lumber remained realty, and a part of the land, and passed, with the land, to the vendees. In the opinion Mr. Justice Strong said: "What, then, is the criterion by which we are to determine whether that which was once part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet it remains realty. The true rule would rather seem to be that that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character." This decision was cited, approved, and followed in *Ledy v. Proctor*, 97 Pa. 486, the court holding that timber which had fallen, but which had not been converted into rails, etc., by the owner, passed to the purchaser as a part of the realty. The case of *Rogers v. Gillinger* is also cited with approval in 1 Washb. Real Prop. (5th Ed.) p. 16; 4 Shars. & B. Lead. Cas. Real Prop. 518. 1 Kerr, Real Prop. p. 96. In the present case the record does not disclose that the vendors of the premises severed the bricks from the land, or did any act evincing an intention to reconvert them into personalty. We think that the bricks remain, therefore, a part of the realty, and that the judge did not err in holding that they belonged to the purchaser.

2. It appears from the record that some time elapsed after the verdict of the jury before the decree was entered by the court. The plaintiffs in error contended that they

ought to have interest on the principal amount from the time of the verdict, and not merely from the date of the decree, as it was the duty of the plaintiff's counsel to have the decree entered. Under our Code, judgments at law bear interest only from the time they are entered and signed. This being a judgment or decree in equity for a specific sum of money, we see no reason why the same rule should not be applied. The plaintiffs in error, if they intended to abide by the verdict, had the right to move the court to enter the decree as soon as the verdict was received. They were entitled to the money found by the verdict, and, if they wished it to bear interest, they should have moved that the decree be entered. Inasmuch as they did not do so, and the plaintiff waited some time after the verdict before having the decree entered, it should bear interest from its date only.

3. The trial judge decreed that the defendants in the court below pay the costs of the suit. In cases in equity it is the duty of the judge to determine which party shall pay the costs, or whether he shall divide them between the parties. Civ. Code, § 4850. It is a matter within his discretion. The jury having found that the plaintiff had tendered the true value of the land to the vendees, and that the latter had refused it, and insisted on a greater price, there was certainly no abuse of discretion in the adjudication as to costs. Judgment affirmed. All the justices concurring.

(113 Ga. 924)

KING HARDWARE CO. v. BOWDEN.

(Supreme Court of Georgia. July 19, 1901.)

APPEAL—BOND—AMENDMENT.

A bond filed for the purpose of entering an appeal in behalf of a partnership or of a corporation must, on its face, show that the appellant's name was affixed thereto by some one duly authorized to do so; and an offered amendment, designed to make complete an instrument in the form of an appeal bond, but defective in the respect indicated, is properly rejected if, even after its allowance, the paper would still fail to meet the legal requirement herein stated.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Jones, Judge.

Action by the King Hardware Company against J. J. Bowden before a justice court, and on appeal plaintiff moves to dismiss appeal. Appeal dismissed, and plaintiff brings error. Affirmed.

H. H. Dean and R. L. J. Smith, for plaintiff in error. H. H. Perry, J. C. Edwards, and Geo. P. Erwin, for defendant in error.

LUMPKIN, P. J. The King Hardware Company brought an action against J. J. Bowden in a justice's court upon two promissory notes. A judgment was rendered in his favor. Subsequently, in the superior court, Bowden moved to dismiss what pur-

ported to be an appeal entered by the company. The paper relied on by it as constituting the appeal bond, after stating the case, read as follows: "And now, within the time allowed by law, come the King Hardware Company, and, being dissatisfied with the judgment in the above-stated case, enter this, their appeal to a jury in the superior court; and they, the said King Hardware Company, as principals, and W. D. Burch, as security, hereby acknowledge themselves bound to the defendant, J. J. Bowden, for the eventual condemnation money in said case. Witness our hands and seals, this 24th day of June, 1899. [Signed] King Hardware Co., [L. S.] per Clyde L. King, Sec. & Treas., Prin., W. D. Burch, [L. S.] Secty. Approved by me this June 26th, 1899. [Signed] Robt. McMillan, N. P. & J. P." One ground of the motion to dismiss was: "Because the appeal bond was signed by the King Hardware Company, per Clyde L. King, Secty. & Treas., instead of having been signed by the president of said company." Counsel for the company "stated in his place, as an attorney at law, that C. L. King, the secretary and treasurer of the King Hardware Company, who signed said appeal bond, was the agent of the King Hardware Company managing said case, and that the said C. L. King was the only officer or agent of said company with whom plaintiff's attorney had any correspondence concerning said case." Counsel "also moved to amend said appeal bond by signing thereto the name of the King Hardware Company by himself, as their attorney at law, which motion was overruled by the court," and the motion to dismiss sustained. Error is assigned on both of these rulings.

The first inquiry addressed to our consideration is, was the so-called "appeal bond" sufficient upon its face? It is impossible to determine, from the record before us, whether the hardware company was a partnership or a corporation. If the former, the paper relied on as a bond was certainly insufficient, for section 4400 of the Civil Code provides that, when partners are sued as such, any one of them "may enter an appeal in the name of such firm, * * * and sign the name of such firm * * * to the bond required by law, which shall be binding on the firm." If the firm name alone appeared, the presumption would be that it was signed by a member of the partnership, for it will never be arbitrarily assumed that a forgery has been committed. But we have no statute authorizing the secretary or treasurer of a partnership to sign its name to an appeal bond, if, indeed, either of these titles can be appropriately applied to an employee of a partnership. If the hardware company was a corporation, the alleged bond was not executed in the manner prescribed by that section, which further declares that "in case of corporations the appeal may be entered by the president or any agent thereof managing the case, or by the attorney of record." Apparently, counsel for

the company sought to have it regarded as a corporation, for he undertook to state in his place that C. L. King, who signed the company's name, was its agent "managing said case." Evidently, this was an effort to bring the case within the provision of the section just cited, indicating the manner in which the appeal bond of a corporation shall be executed. Taking the paper as it stood, it was insufficient, because it did not on its face show that an appeal had been duly entered. In cases of this character the bond is itself the foundation of the appeal, and stands in the place of pleading. It should, therefore, affirmatively disclose that it was executed by some person authorized by law to sign thereto the appellant's name. The trial judge was certainly right in disregarding the statement of counsel as to what was the real truth of the matter. Conceding this statement to be true, it could not have had the legal effect of putting the bond in proper shape. The case was one, not for the introduction of evidence, but for the amendment of defective pleadings. Had counsel offered to amend the so-called "bond" by placing after the signature of C. L. King words disclosing that he signed it as the company's agent in charge of and managing the case, the proffered amendment should, in view of the provisions of section 5123 of the Civil Code, have been allowed. But no such offer was made. On the contrary, the only proposition to amend was embraced in the offer of counsel to sign the name of the hardware company "by himself as their attorney at law." This would have been the equivalent of making an entirely new bond. In support of the contention that this was allowable, counsel for the plaintiff in error relied on the case of *Anthanissen v. Wrecking Co.*, 92 Ga. 409, 17 S. E. 951. Even if that case goes to the extent claimed, the offered amendment would not have rendered the bond good on its face. Referring again to section 4460 of the Civil Code, it will be seen that, when an appeal is sought to be entered in behalf of a corporation by one undertaking to act as its counsel, the bond must show on its face that he was the attorney at the time of entering the appeal, for that section provides that only "the attorney of record" has authority to sign the name of a corporation to an appeal bond. Whether counsel was in a position to offer to sign a bond as "the attorney of record" in this case does not appear. He did not, in point of fact, make any proposal so to do. Judgment affirmed. All the justices concurring.

(112 Ga. 1871)

BEYSIEGEL et al. v. ROME MUT. LOAN ASS'N.

(Supreme Court of Georgia. July 23, 1901.)

INJUNCTION—REMEDY AT LAW—MULTIPLICITY OF SUITS.

1. An injunction should not be granted when the plaintiff in the petition therefor has a complete and adequate remedy at law.

2. The defendant in error in the present case had such a remedy by claim, the successful prosecution of which would, for all essential purposes, have been as effectual as the equitable proceeding; nor was this proceeding maintainable on the theory that it was necessary to prevent a multiplicity of suits.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Suit by the Rome Mutual Loan Association against W. E. Beysiegel and others. Judgment for plaintiff, and defendants bring error. Reversed.

Geo. A. H. Harris & Son and R. L. Chamlee, for plaintiffs in error. Halsted Smith, for defendant in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1072)

McFARLAND v. PARK WOOLEN MILLS.

(Supreme Court of Georgia. July 23, 1901.)

INJUNCTION—USE OF EASEMENT—CONFLICTING EVIDENCE.

Under the facts disclosed by the record, there was no abuse of discretion in refusing to grant an injunction.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Petition by John M. McFarland against the Park Woollen Mills. From an order denying an injunction, plaintiff brings error. Affirmed.

Tomlinson Fort and Payne & Payne, for plaintiff in error. Pritchard & Sizer, for defendant in error.

COBB, J. Upon the building and equipping of a woollen mill, begun within 60 days from May 18, 1895, and completed within a reasonable time thereafter, the grantees in the deed from McFarland of that date, and their successors and assigns, were entitled under the terms of the deed to conduct, in pipes laid upon the land of McFarland, water from the lake situated on his land in such quantities as was necessary for the use and operation of the manufacturing plant. Under the very terms of the grant they were to have "the right to use all the water that may be necessary for" the operation of the manufacturing plant. The number and sizes of the pipes which were to be used to accomplish this purpose were not specified in the deed. They were entitled to use pipes of such sizes and of such number as were necessary to accomplish the purpose. The right to conduct and use the water was to continue as long as the grantees, or their successors, saw fit to use and operate the plant, and the right to enter upon the land of McFarland and make all necessary repairs upon the pipes laid thereon was distinctly provided for in the grant. In the exercise of the powers thus granted, the parties laid a two-inch pipe, through which the water necessary for the use of the m

has been conducted since the mill was built, up to a short time before the beginning of the present litigation. The defendant in error, which is the successor of the grantees in the deed from McFarland, has recently laid a four-inch pipe, which is to be used in conducting the water from the lake to its plant, and the present application is brought to enjoin it from connecting this pipe with the lake and to prevent it from using the pipe. The judge refused to grant the injunction. Under the grant in the deed, the defendant in error has a right to the use of all the water that is necessary for the operation of its plant, including the use of water for protection against fire, in such quantities as are ordinarily and usually required about manufacturing plants of the character of that operated by the defendant in error. It is claimed by the defendant in error that it has used water for all of these purposes in the past; that it is intended in the future to use only such water as is necessary for the same purposes; that it is not its purpose, by laying the larger pipe, to increase the quantity of water that is to be used, but simply to provide a less expensive method of procuring the same quantity of water that it had been heretofore able to obtain through a smaller pipe in a more inconvenient and expensive way; that it does not expect to maintain the two lines of pipe; and that the old line of pipe will be necessarily abandoned, because it is worn out, and will soon become useless. All of this is denied by the plaintiff in error, who claims that it is the purpose of the defendant in error to use both lines of pipe, and to use an increased quantity of water, and for purposes for which it has not been used in the past. The evidence upon all of these points was directly conflicting. The judge has seen proper to refuse to grant an injunction, but has left the parties to their remedy before a jury upon a final hearing of the case. In the light of the fact that there is no allegation that the defendant is insolvent, and that the allegations do not make a case where the damages would be irreparable, but would be capable of almost exact computation, the discretion of the trial judge in refusing to grant the injunction was wisely exercised. Judgment affirmed. All the justices concurring.

(113 Ga. 1043)

HERRY et al. v. BURKHALTER.

BURKHALTER v. HERRY et al.

(Supreme Court of Georgia. July 22, 1901.)

ASSIGNMENT OF ERROR—NEW TRIAL—MOTION TO DISMISS.

1. A direct assignment of error upon a ruling made during the progress of a trial comes too late if for the first time presented in a bill of exceptions sued out more than 30 days after the adjournment of the term at which such ruling was made.

2. The overruling of a motion to dismiss an action which, for any good reason, should

not be tried on its merits, cannot properly be made a ground of a motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action by W. T. Burkhalter against J. H. Heery and others. From the judgment, defendants bring error. Plaintiff assigns cross error. Judgment on main bill of exceptions affirmed, and cross bill dismissed.

W. T. Burkhalter and O. L. Morgan, for plaintiff. J. V. Kelley, for defendants.

LUMPKIN, P. J. This case originated in a justice's court, the same being an action for triple damages for the killing of a cow, predicated upon section 1768 of the Political Code. The plaintiff obtained a judgment, and the defendants entered an appeal to the superior court. When it came on for trial, they made a motion "to dismiss said case for want of jurisdiction in the justice's court to try cases of damage arising under" the above-cited section of the Code. This motion was overruled, and the case was heard on its merits, the trial resulting in a verdict for the plaintiff. A motion for a new trial was made by the defendants, to the overruling of which they excepted. They also assign error upon the court's refusal to sustain their motion to dismiss the action. By a cross bill of exceptions the plaintiff below seeks to bring under review the refusal of the judge to dismiss the defendants' motion for a new trial.

1. The case was tried at the October term, 1900, of Tattnall superior court, which was finally adjourned on October 12th. The motion for a new trial was overruled on the 27th of November, and the bill of exceptions sued out by the defendants was not tendered to the judge until a subsequent date. As no exceptions pendente lite were filed, it is obvious that the assignment of error upon the court's refusal to dismiss the action comes too late, not having been presented within 30 days from the adjournment of the term at which the ruling complained of was made. See *Carter v. Johnson*, 112 Ga. 494, 87 S. E. 786, following *Diets v. Fahy*, 107 Ga. 325, 33 S. E. 51, and the cases therein cited.

2. It is equally clear that such a ruling cannot properly be made a ground of a motion for a new trial. *Cedartown v. Freeman*, 89 Ga. 451, 15 S. E. 481; *Commission Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428; *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448; *Carter v. Johnson*, *supra*, and cases cited. That a trial judge improperly declined to dismiss an action which could not in the first instance be lawfully tried affords no logical reason for perpetuating the error thus committed by ordering another hearing of the case upon its merits. It follows that the court below did not err in refusing to sustain that ground of the defendants' motion for a new trial in which complaint was made that the action should have been dismissed at their instance; and, as this was the only ground of the mo-

tion insisted upon here, we must necessarily rule that for no reason assigned did the judge improperly refuse to grant a new trial. In view of the disposition made of the main bill of exceptions, there is no occasion for passing upon the point presented by the cross bill. Judgment on main bill of exceptions affirmed; cross bill of exceptions dismissed. All the justices concurring.

(113 Ga. 1050)

SIMKINS v. CORDELE COMPRESS CO.

(Supreme Court of Georgia. July 22, 1901.)

LEASE—CONSTRUCTION—REPAIRS.

When, by the terms of a lease covering realty and machinery thereto attached, it is stipulated that the lessor shall make repairs of a specified character upon the machinery, and that the lessee shall thereafter keep the same in good repair, and at the termination of the lease return it to the lessor in good repair, and the lessee, after such stipulated repairs were made by the lessor, entered into possession, the lessee, notwithstanding there may have been latent defects in the machinery so leased at the time the latter took possession, is, in the absence of fraud or concealment on the part of the lessor in the execution of the contract, chargeable with the expense of maintaining the property in good order. Under the terms of such a contract, the law applicable to an implied warranty and of failure of consideration relating to sales of personalty is inapplicable.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by the Cordele Compress Company against W. D. Simkins. Judgment for plaintiff. Defendant brings error. Affirmed.

Ohlsholm & Clay and Shelby Myrick, for plaintiff in error. Denmark, Adams & Freeman, for defendant in error.

LITTLE, J. From the view we take of the rule of law which controls this case, it is unnecessary to consider in detail the 25 separate grounds of the motion for new trial. It appears that the defendant in error was the owner of a certain cotton compress, and that the plaintiff in error desired to lease the premises on which it was situated, together with the compress and machinery attached thereto, and in June, 1898, the parties entered into a written contract consummating the lease for a year, containing certain terms and stipulations by which their rights in this case must be determined. The compress company agreed to put a new cylinder of given dimensions in said press, together with other separate pieces of machinery, which are fully described. The Georgia Cotton Company agreed that, when these improvements had been made, it would pay certain sums of money specified in the lease contract for a lease of the property for one year, and covenanted to "keep the premises in good repair while [they] continue to occupy the same (fire ex-

cepted), and to return the same to the * * * parties of the first part * * * in such good repair * * * at the end and expiration of this lease." The contract is plain and unambiguous. It is to be presumed that the cotton company was fully aware of the condition of the property which it agreed to lease. Certainly, if it was not, that fact, in the absence on its part of fraud, was not chargeable to the lessor; and when it was stipulated that the owner should make certain repairs in and additions to the press, and the lessor then covenanted to keep the same in good repair, and return the property to the owner in such good repair at the expiration of the lease, it, in law, covenanted with the owner that the repairs stipulated for would be all that the lessor would be required to make, and the lessee would keep up the property and return it in good condition to the owner. Hence, when the evidence showed, as substantially it did, that the repairs stipulated for had been made, the obligation on the part of the lessee to keep the property in good repair went into effect; so that it was the duty of the lessee, under the terms of the contract, to put the press in good repair, when, in October, it became disabled, and, if it failed to do so, the owner of the press had a right to charge said lessee with the expense of such repairs. Whether these repairs were in good faith made, or whether the restoration to good order was made by distinct additions to it, for which the lessee was not chargeable, were questions of fact which were settled by the verdict of the jury. In any event, it was not the right of the lessee, under the contract which it had entered into, to abandon the press when, during its term, it had gotten out of repair, and refuse to pay rental for the same, no fraud or misrepresentations on the part of the owner in procuring the execution of the lease contract having been alleged or shown. With these views of the relative rights of the parties under the terms of their contract, we have examined the specifications of error made in the different grounds of the motion for new trial, and are of opinion that the verdict rendered was not excessive. And while we find that certain specific portions of the charge to which exceptions are taken may be inaccurate in some particulars, in every instance where such inaccuracies exist, the error is immaterial, and should not work a reversal of the judgment. Taken as a whole, the rulings of the trial judge were correct, and his expressed views of the law of the case are sound, and his instructions to the jury fully covered the law of the case and the contentions of the parties. And, as the record contains evidence sufficient to support the verdict, there was no error in overruling the motion for a new trial for any of the errors assigned therein. Judgment affirmed. All the justices concurring.

(113 Ga. 1065)

RAY v. STATE.

(Supreme Court of Georgia. July 23, 1901.)

**PROFANITY IN PRESENCE OF FEMALE—
PROVOCATION.**

Upon the trial of one charged with the offense of using profane language, without provocation, in the presence of a female, the accused may defend by showing that he was provoked to use the language by one other than such female; the sufficiency of the provocation being a question for the jury, under all the circumstances of the case.

(Syllabus by the Court.)

Error from city court of Baxley; T. A. Parker, Judge.

A. Ray was convicted of using profane language in the presence of a female, and brings error. Reversed.

E. P. Padgett & Son, for plaintiff in error.
J. H. Thomas, for the State.

FISH, J. The only question made in this case is whether one charged in an indictment with the offense of using, without provocation, profane language in the presence of a female, can, when the proof shows that he did use such language in her presence, defend himself against the charge by showing that he was, at the time and place in question, provoked by a third person to use the language. The indictment charged and the evidence for the state showed that the accused addressed certain profane language to W. C. Dykes, the prosecutor, in the presence of his wife. The court charged the jury that "no provocation can be considered * * * except such provocation as was given by the female in whose presence the language was used." This charge was excepted to, and error is assigned thereon.

This is the first time that this question has been before this court, and the only light that is thrown upon it is that which is derived from the wording of the statute itself, and the well-established rule that criminal statutes must be construed strictly, in favor of liberty. The statute under which the accused was tried and convicted reads as follows: "Any person who shall, without provocation, use to, or of, another and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, * * * shall be guilty of a misdemeanor." Pen. Code, § 396. The words "in like manner," as used in the statute, are equivalent to "without provocation," and were so construed by the trial judge and the counsel engaged in the case. But it was contended by counsel for the state that the only provocation for the use of the words, which could be set up as a defense, would be provocation given by the female in whose presence the words were used, while counsel for the accused contended that provocation given by a third party at the time the language was used might be sufficient to legally justify the

accused in using profane language in the presence of a female. Of course, the legal meaning of the words "without provocation" is "without sufficient provocation," and the jury trying a case of this character are the judges of the sufficiency of the provocation. The particular offense with which the accused was charged is committed when profane language is used in the presence of a female without provocation. If the profane language is used in her presence with provocation, no criminal offense is committed. This is all that the statute shows. It is evident that one may, with provocation, use profane words in the presence of a female, who does nothing whatever to provoke the person using them; the provocation which causes the use of the words may be given by another person. Take the present case, for instance. The agreed brief of evidence concludes with the following statement: "The evidence of W. C. Dykes and his wife showed that the defendant used the language charged without provocation from Mrs. W. C. Dykes or from W. C. Dykes. Evidence of Dave Ray and Mollie, children of the defendant, makes a defense of provocation from W. C. Dykes." Granting that the accused used the profane language charged in the presence of Mrs. Dykes, and, upon the subject of provocation, taking the evidence for the defendant and his statement to be true, it cannot be said that the profane language was used in the presence of Mrs. Dykes without provocation, but it can be said that this language was used by the accused in her presence without provocation on her part. To construe the statute to mean that the provocation for the use of the profane language must be by the female in whose presence such language is used would be to read into it something which is neither expressed nor clearly indicated by the words therein employed. This cannot be done in construing a statute which defines a criminal offense. Where such a statute is of doubtful construction, that construction must be placed upon it which is most favorable to the accused. For these reasons we are of opinion that the court erred in giving the instruction complained of.

Counsel for the defendant presented to the trial judge a written request to give the jury certain instructions on the subject of provocation, which the judge refused to give, and this refusal is alleged to have been erroneous. Under the views presented above, this request to charge contained a nearly accurate presentation of the law applicable to the facts, in the event the jury found that the accused was provoked by the prosecutor to use the profane language in question. But it was defective in not clearly showing that, in passing upon the sufficiency of the provocation as a defense, the jury should determine whether or not such provocation was sufficient to legally justify the use, in the presence of the female, of the language charged. The question was not whether the provocation given by the prosecutor was sufficient to justify the use

of the language to him, or in his presence, but whether the provocation which he gave was sufficient to justify the accused in using the language in the presence of the prosecutor's wife. We think that counsel for the accused had this idea in mind when the request was prepared, but the latter portion of the same, to wit, "then it would be for you to say whether or not the provocation given by W. C. Dykes was sufficient to justify the use of the language, and, if you find that the provocation given by W. C. Dykes was sufficient to authorize the use of the language, you would be authorized and it would be your duty to acquit the defendant," if given in *hæc verba*, might have misled the jury. We think that the expression, "sufficient to justify the use of the language," should have been qualified by the words, "in the presence of Mrs. Dykes," and the expression, "sufficient to authorize the use of the language," should have been followed by words of like import. Judgment reversed. All the justices concurring.

(113 Ga. 1151)

WARNOCK v. CITY OF ATLANTA et al.
(Supreme Court of Georgia. July 24, 1901.)

REVIEW—INSTRUCTIONS.

The charges excepted to were abstractly correct, and not open to the criticism that they were calculated to confuse or mislead the jury; nor were they, in view of the pleadings, altogether inappropriate. The real issue in controversy was fairly and distinctly submitted to the jury, and the verdict was fully warranted by the evidence.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between M. J. Warnock and the city of Atlanta and others. From the judgment, Warnock brings error. Affirmed.

Slaton & Phillips and Arnold & Arnold, for plaintiff in error. J. A. Anderson, J. T. Pendleton, J. L. Mayson, and W. P. Hill, for defendants in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1152)

GWINN v. ALMAND et al.

(Supreme Court of Georgia. July 24, 1901.)

BILL OF EXCEPTIONS—CERTIFICATION.

When a bill of exceptions recites that a demurrer to a petition was sustained, and that the plaintiff excepted to this ruling, and the certificate of the judge, instead of verifying, without qualification, the bill of exceptions as written, embraces a statement to the effect that, before the court passed upon the demurrer, counsel for the plaintiff informed the court that they did "not care to submit any argument nor to resist the demurrer," and that the judge signed the order of dismissal, "considering it a consent order," such bill of exceptions is not duly certified, and presents no question for determination by the supreme court.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by G. W. Gwinn, administrator, against A. J. Almand and others. Judgment for defendants, and plaintiff brings error. Dismissed.

A. C. McCalla, for plaintiff in error. W. W. Braswell, for defendants in error.

PER CURIAM. Writ of error dismissed.

(113 Ga. 1144)

BURT v. RUBLEY.

(Supreme Court of Georgia. July 23, 1901.)

EXECUTION—LEVY—STATEMENT IN ENTRY—CLAIM OF THIRD PERSON.

1. A statement in an entry of levy that the defendant in execution was in possession at the date of the levy is *prima facie* evidence of that fact.

2. Proof that title to the property levied on was at the date of the levy in a person other than the defendant in execution, and that the claimant acquired title since the filing of the claim, will not authorize a verdict in his favor.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Action by W. H. Burt against N. Kuhn. Judgment for plaintiff. On levy of execution, John Rubley interposed a claim. Judgment for claimant, and plaintiff in execution brings error. Reversed.

J. C. Edwards, M. T. Perkins, and J. C. Kilpatrick, for plaintiff in error. Hubert Estes and Robt. McMillan, for defendant in error.

COBB, J. This was a claim case in which W. H. Burt was plaintiff in execution, N. Kuhn defendant in execution, and John Rubley claimant. The plaintiff in execution introduced in evidence the execution, which was issued in April, 1896, and recited that it was based on a judgment rendered August 24, 1895. This execution was properly recorded in the general execution docket in April, 1896. An entry of *nulla bona*, dated July 2, 1896, appears on the execution. On September 25, 1899, the levying officer, after making an entry on the execution reciting that no personal property could be found, levied the execution on the land now in controversy. The entry of this levy recited that the property levied on was in the possession of the defendant in execution at the date of the levy. The claim was interposed November 24, 1899. The claimant introduced in evidence a deed from N. Kuhn to John Rubley, dated June 25, 1898, and recorded January 3, 1899; also, a deed from N. Kuhn to Mrs. A. M. Kuhn, his wife, dated November 27, 1894, and recorded September 25, 1899; also a deed from Mrs. A. M. Kuhn to John Rubley, dated July 9, 1900. The plaintiff in execution then introduced in evidence a deed from Kimsey to N. Kuhn, dated October 27, 1887, and recorded December 20, 1898. The court direc

ed a verdict in favor of the claimant, and the plaintiff in execution filed a motion for a new trial, which was overruled, and he excepted.

1. "It is the duty of the sheriff to state in his entry of levy who was in possession of the property at the time of the levy, and his entry is evidence upon that point." *Lamkin v. Clary*, 103 Ga. 635, 80 S. E. 596, citing *Williams v. Hart*, 85 Ga. 201. As possession is prima facie proof of ownership, the evidence offered by the plaintiff in execution was sufficient to cast upon the claimant the burden of showing that the property levied on was not the property of the defendant in execution, but was that of the claimant. Civ. Code, § 4624.

2. Was this burden successfully carried? A claimant must recover on his own title, and proof of title outstanding in a third person at the date of the levy is not sufficient. *Thompson v. Waterman*, 100 Ga. 586, 28 S. E. 286, and cases cited. Nor can a recovery be had by the claimant on a title acquired by him after issue joined. *MacIntyre v. Ferst*, 101 Ga. 682, 28 S. E. 989; *Oatts v. Wilkins*, 110 Ga. 319, 35 S. E. 345. Applying these principles to the facts of the present case, what is the result? The claimant offered in evidence, first, a deed from the defendant in execution to himself dated in 1898, long after the judgment was rendered and the execution issued and recorded on the general execution docket. The lien of the judgment had attached to the property before this deed was made, and consequently it interposed no obstacle to the levy and sale of the property under the execution. So that, even if the deed of 1898 is superior to the deed of Kuhnien to his wife dated in 1894, but not recorded until the day of the levy, it cannot be relied upon to defeat the plaintiff's lien. The claimant cannot rely on his deed from Mrs. Kuhnien, executed in July, 1900, because this was after the claim was interposed. Nor can he recover the property on the theory that title was in Kuhnien's wife at the date of the levy. He must show a title in himself at that date which is superior to the lien of the plaintiff's judgment. The plaintiff in execution having, by his evidence, made out a prima facie case, and the claimant having failed to offer evidence sufficient to overcome this prima facie proof, it was error to direct a verdict in favor of the claimant, but a verdict should have been directed finding the property subject to the execution. Judgment reversed. All the justices concurring.

(113 Ga. 976)

SMITH et al. v. GEORGIA LOAN, SAVINGS & BANKING CO.

(Supreme Court of Georgia. July 20, 1901.)

CONTRACTS—RESCISSION—ACTION FOR BREACH—PERFORMANCE OF OBLIGATIONS.

1. After the renunciation by one party of a continuing contract consisting of mutual obligations, the other party is at liberty either to immediately treat such renunciation as a breach

of the contract, and sue for any damages he has sustained by reason of the breach, or to treat the contract as still binding, and wait until the time arrives for its performance in order to give the party who has repudiated the contract an opportunity to comply with its terms.

2. If, after the attempted renunciation by one party to the contract, the other party elects to treat the contract as still binding, and await the time for full performance, it is incumbent upon the party making such election to perform such of the obligations as may, in the meantime, devolve upon him under the terms of the contract. Especially is this true when such performance is demanded by the party who has attempted to renounce.

3. Applying the principles above laid down to the facts of the present case, the plea of the defendants was properly stricken on motion.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Georgia Loan, Savings & Banking Company against Burton Smith and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Rosser & Carter and Burton Smith, for plaintiffs in error. Dorsey, Brewster & Howell and Hugh M. Dorsey, for defendant in error.

COBB, J. It was argued for the defendants that, as the plaintiff had made what is known to the law as a renunciation or anticipatory breach of the contract, the defendants were no longer bound thereby, and could repudiate the contract whenever the plaintiff endeavored to enforce it. The rule of law sought to be invoked was laid down by the supreme court of the United States in a recent case after an elaborate consideration of the authorities. The conclusion reached by the court is thus succinctly stated in the headnotes: "After a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract, by a refusal on the part of one party to it to perform it, the court holds that the rule laid down in *Hochster v. De la Tour*, 2 El. & Bl. 678, is a reasonable and proper rule to be applied in this case. That rule is that, after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it, but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option." *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. This rule was expressly limited by the court to contracts containing mutual obligations. See page 17, 178 U. S., page 786, 20 Sup. Ct., and page 959, 44 L. Ed. The agreement under consideration in the present case is of such a character. But giving to the defendants' plea that construction which is most favorable to their conten-

tion, we do not understand that they have brought themselves within the rule above quoted. They did not immediately, upon the renunciation of the contract by the plaintiff, elect to repudiate the contract, and sue for whatever damages they had sustained by reason of its breach. Not having so elected, but one other course was open to them, and that was to wait until the maturity of the contract, and see if the plaintiff would, notwithstanding its former renunciation of the contract, comply with its terms. As they elected to pursue this course, it was incumbent upon them to comply with the obligations which under the contract devolved upon them from time to time,—that is, to pay installments of interest as they became due. If the contract was valid and enforceable, the plaintiff could, under its express terms, upon default in the payment of interest by the defendants, treat the principal sum as due and collectible. As we understand the law, when the defendants failed to immediately take advantage of the plaintiff's renunciation of the contract, it left it optional with the plaintiff to afterwards elect to perform notwithstanding its former renunciation; in other words, after the defendants elected not to sue as for a breach, the contract remained valid and enforceable by the plaintiff, notwithstanding its former repudiation. This being so, when the defendants made default in the payment of interest, the principal sum for which they were bound became due and collectible. By express terms of the contract, such a default on the part of the defendants released the plaintiff from compliance with its agreement to accept certain bonds in payment of the principal sum due by the defendants. This release was, however, attributable solely to the action of the defendants, and they have no just cause of complaint by reason thereof. When they failed to treat the contract as having been broken immediately upon its renunciation by the plaintiff, and elected to give the plaintiff further opportunity to perform when the contract matured, they should have paid up the interest as it matured, and then, when the time for performance of the contract arrived, they would have been in a position to tender the bonds, and, if the plaintiff refused to accept them, to maintain an action for whatever damages they had thereby sustained; and we apprehend that in such a suit they could have recovered whatever sums they had paid as interest under the assumption that the plaintiff would comply with its agreement. A construction of the defendants' plea which would make necessary the foregoing discussion is, however, more liberal to them than they are entitled to. Had it not been for the argument made in this court, we would have been at a loss to understand what rule of law they were invoking. They pray for no relief whatever. They say the plaintiff "declines" to carry out its contract; but no facts are set forth to show upon what this allegation is based, and the court is not

informed to what portion of the contract this declination applies. The allegation is a mere conclusion of the pleader. The plea avers a willingness on the part of the defendants to comply with the obligations imposed upon them by the contract, and to pay any interest due by them. It would seem that a prayer for specific performance would have been appropriate to this allegation. It certainly evidences a desire on the part of the defendants to have the contract enforced, and they do not even now claim the benefit of the plaintiff's renunciation. Had the plea alleged that the defendants accepted the plaintiff's renunciation of the contract, and for that reason did not pay the interest installments as they fell due; that they did not desire to sue the plaintiff for any damages; but that they had all along treated the contract as not being enforceable against them by reason of the renunciation of the same by the plaintiff,—a defense to the action might have been presented; but we are clear that the allegations of the plea as framed set up no defense to the action, and that the plea was properly stricken on motion. Judgment affirmed. All the justices concurring.

(113 Ga. 1105)

LYNCH v. FLORIDA CENT. & P. R. CO.

(Supreme Court of Georgia. July 23, 1901.)

CARRIER—ASSAULT BY STATION AGENT—LIABILITIES.

A railroad company is not liable for damages resulting from an assault and battery inflicted by its station agent and another upon a third person, when it appears that the difficulty which gave rise to the beating arose out of a personal quarrel, and that the agent, so far as related to his participation therein, was acting upon his individual responsibility, and not within the scope of the business of his agency as an employé of the company.

(Syllabus by the Court.)

Error from superior court, Effingham county; P. E. Seabrook, Judge.

Action by W. S. Lynch against the Florida Central & Peninsular Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

D. H. Clark, for plaintiff in error. Denmark, Adams & Freeman, for defendant in error.

LITTLE, J. It cannot be denied that the plaintiff was very imprudent in his actions towards the agent of defendant, in refusing to obey his instructions in reference to driving into the cut with his loaded wagon, and it is apparent from the evidence that he drew the difficulty in which he was injured upon himself. The station agent presumably represented the railroad company in an attempt to enforce against the plaintiff certain regulations in relation to the loading of cars, which the agent claimed existed. It was, as will be seen from the report of the evidence, a reprehensible act on the part of the plain-

tiff, not only to refuse to conform to such regulations, but also in denying the right of the agent to enforce them. It was not becoming in him to question the authority of the agent to enforce the regulations which the latter said existed. He should have submitted, and made his complaint to the proper and superior authority, and obtained redress in that way.

Two other things are also apparent from the evidence. The first is that the injuries from which the plaintiff really suffered were not by the younger Simmons, who was the company's agent, but by his father, and, also, at the time he received the beating, he had not approached the agent on the business of the company, but to settle a personal grievance. Surely, no one can entertain such a distorted view of the law as to claim that the railroad company was responsible to the plaintiff for a battery inflicted upon him by the elder Simmons, who, so far as the evidence shows, was not connected with the railroad company in any capacity. Nor can it be successfully claimed that if the plaintiff sought the defendant, even on the premises belonging to the railroad company, for the purpose of adjusting a private grievance, although the one so sought was at the time its agent, the company would be held liable for personal injuries inflicted on the plaintiff by such agent, as the result of an unsuccessful effort to adjust their personal differences. The rules of law which control the question of the liability of a master to respond in damages for a tort of this character, committed by its agent on a third person, have been repeatedly considered by this court. In the case of *Christian v. Railway Co.*, 79 Ga. 460, 7 S. E. 216, it was ruled that a railroad company was liable in damages for the wrongful homicide of its customer committed by its depot agent in its office while the customer was lawfully there for the transaction of business with such agent pertaining to his agency. When the same case was for the third time before this court, as reported in *Railway Co. v. Christian*, 97 Ga. 56, 25 S. E. 411, the proposition of law announced in the first decision of the case was more fully explained, and this court ruled that "for the wrongful act of an employé of a railroad company resulting in injury to another, committed while engaged in the performance of the company's business in the line of his duty, the company is liable. But if, while so engaged, upon some private feud previously existing or suddenly arising, wholly disconnected with his duties as such employé, and not pertaining to the business then in process of transaction (the company then not owing to the other person the duty of personal protection), he commit injury upon the person of another, the company would not be liable." In delivering the opinion in that case Mr. Justice Atkinson, further elaborating the proposition of law then in question, said: "If, while the employé is engaged about the business of the master, upon

some matter or some provocation wholly disconnected with the performance of his duties as a servant, upon some private feud, in an altercation with a third person, he should commit an injury upon such third person, such injury would not fall within the class for which the master is liable, unless it be a case in which, by reason of the relation existing between the person thus injured and the railroad company, the latter owed to the former the special duty of personal protection," etc. Again, in the case of *Banking Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565, where the facts brought into consideration the principle of law we are now considering, this court ruled that if the real purpose of the person assaulted, in returning to the station, was not to look after or arrange for checking baggage, or to attend to other legitimate business with the agent, but merely to upbraid him for a real or supposed breach of duty occurring at an earlier hour of the day, and the difficulty thereupon ensued, the two met as ordinary citizens, and the railroad company had no concern in what passed between them. In delivering the opinion in that case Mr. Justice Lumpkin, after stating the proposition that if the injured person went to the station to attend to business connected with the railroad company, and conducted himself properly, he was entitled to respectful treatment from the agent, "and if the latter, under these circumstances, unlawfully assaulted and beat him, it was his right to hold the company responsible in damages," also there said: "It may, in this connection, be proper to add, however, that, even if Richmond went to the station for the lawful purpose of attending to the business above mentioned, it was nevertheless incumbent upon him to treat the agent with the same respect due him by the agent. Therefore, if, instead of so doing, he without provocation used insulting and opprobrious language to the agent, which naturally enough resulted in a difficulty, the company should not be held responsible." Mr. Justice Lumpkin also said in the case of *Railway Co. v. Shropshire*, 101 Ga. 37, 28 S. E. 508, that "one who voluntarily, and by his own misconduct, places it beyond the power of a master to protect him, surely cannot complain of an omission so to do. Especially is this true where he practically invites the master's servant to disregard and abandon his official duties, and enter into a personal encounter on his own account and upon his individual responsibility." See, also, *Banking Co. v. Hopkins*, 108 Ga. 324, 33 S. E. 905. According to the testimony of the plaintiff himself, he repeatedly persisted in driving his wagon within the cut next the side track, which the agent insisted that he must not do, as it was in violation of a rule established by the company. Paying no heed to the repeated remonstrances of the agent, he sought advice from another employé of the railroad company, not shown to have had any connection whatever with the care of the sta-

tion and ground, and then apparently defied the authority of the agent to compel him to desist from doing what he had been forbidden. Not only so, but he also subsequently left the car in which he was placing his wood, and sought the father of the agent, who was engaged in the same work some hundred yards down the track, for the purpose, as he states, of getting his father to tell his son not to go down there any more to disturb him, telling the father of the treatment which the son had given him. Then, at the request of the father, they both walked up to the warehouse, and the agent was asked by his father whether he had insulted the plaintiff, and, receiving a reply that he had not, the father and the plaintiff became engaged in an altercation in which the agent participated. So that it is evident that plaintiff did not go to the warehouse, at the time, because of any business he had with the plaintiff as agent of the company, but for the purpose of adjusting a personal grievance, and, if it was not adjusted in a manner entirely agreeable to him, he should not attribute the fault to the railroad company. It was purely a personal matter between the three, and, if the plaintiff has any cause to complain, it is against the individuals who inflicted the injuries upon him, and not against the railroad company, who at that time owed him no duty of protection. There was no error in the judgment awarding a nonsuit. Judgment affirmed. All the justices concurring.

(112 Ga. 779)

CITY OF BARNESVILLE et al. v. MURPHEY et al.

MURPHEY et al. v. CITY OF BARNESVILLE et al.

(Supreme Court of Georgia. July 18, 1901.)

MUNICIPAL CORPORATIONS—SALE OF LIQUORS—WRIT OF ERROR—DIVIDED COURT.

1. Under a legislative provision declaring that the municipal authorities of a named city "shall have the power and authority to regulate and control the sale [therein] of spirituous and malt liquors, wine and ciders for medicinal, mechanical and sacramental purposes only," such authorities have no power to embark the city upon its own account in the business of buying and selling spirituous or other liquors.

2. When any decision rendered by a trial court is under review here, and is to be passed upon by the "court as a whole," and the six justices are evenly divided in opinion, such decision stands affirmed by operation of law.

(Syllabus by the Court.)

Error from superior court, Pike county; **E. J. Reagan**, Judge.

Action by **A. A. Murphey** and others against the city of Barnesville and others. Judgment for plaintiffs, and defendants bring error, and plaintiffs assign cross error. Affirmed.

W. W. Lambdin, **J. F. Redding**, and **Estes & Jones**, for plaintiffs in error. **C. J. Lester** and **A. A. Murphey**, for defendants in error.

LUMPKIN, P. J. Certain citizens and taxpayers of the city of Barnesville brought against the municipal authorities thereof an equitable petition to enjoin them from further operating a dispensary for the sale of spirituous and other intoxicating liquors, which they had for several years been conducting in the name and behalf of the city, and also from paying bills amounting to several thousand dollars, which divers persons claimed were due to them for liquors sold and delivered to the city, and used in conducting the dispensary. The liquor dealers holding the claims just mentioned were, by amendment, made parties defendant. They and the municipal authorities set up by way of defense that the dispensary had been legally established and operated, and that the claims in question constituted a valid and binding indebtedness of the city, and therefore should be paid. At the interlocutory hearing there was evidence tending to show that money to the aggregate amount of the liquor bills above referred to, which had been derived from the sale of liquors furnished by these dealers, was used in paying off and discharging legitimate demands against the municipality. The judge rendered a decision granting an injunction restraining the further operation of the dispensary, but refusing to enjoin the payment of the alleged indebtedness. The municipal authorities excepted to so much of the decision as granted the injunction against them, and the plaintiffs excepted to the refusal of the judge to enjoin the municipal authorities from paying the claims of the liquor dealers.

1. All of us agree that the judge was right in enjoining the further operation of the dispensary. The only legislation upon which the municipal authorities based their alleged right to carry on a dispensary is embraced in the second section of the act of October 29, 1889, which declares that "the mayor and council of Barnesville shall have the power and authority to regulate and control the sale in Barnesville of spirituous and malt liquors, wine and ciders for medicinal, mechanical, and sacramental purposes only." Acts 1889, p. 1369. We hold, without hesitation or difficulty, that this statutory provision did not confer upon the mayor and council of Barnesville any right whatever to embark the municipality in the business of buying and selling liquors. At most, their only power thereunder was to authorize an individual or individuals, on his or their own account, to open and conduct a dispensary under municipal regulation. The question in hand is controlled by the decision which this court rendered in the case of Mayor, etc., v. Putnam, 103 Ga. 110, 29 S. E. 602, in which it was held that express legislative authority was requisite to the lawful establishment and conduct of a liquor dispensary by municipal authorities. On pages 114, 115, 103 Ga., and page 604, 29 S. E., Mr. Justice Cobb cited the case of **Chambers v. Town of Barnesville**, 89 Ga. 7

15 S. E. 634, and pointed out the distinction between the ruling therein made and the decision rendered in the Putnam Case. Referring to the Chambers Case, he said: "The right of the city authorities to operate a dispensary directly was not involved in that case, and it does not appear from the record that the dispensary was operated directly by the city. The sole question involved was whether, if the city of Barnesville had established a lawful dispensary, they could prohibit by ordinance, under a penalty, the sale of liquors by persons other than those whom they placed in charge of the dispensary." The ruling in the Putnam Case was cited approvingly by Mr. Justice Lewis in *Plumb v. Christie*, 103 Ga. 688, 30 S. E. 759, 42 L. R. A. 181, and its correctness was also fully recognized in the case of *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366.

2. The six justices of this court are evenly divided in opinion as to whether or not the trial judge erred in refusing to enjoin the municipal authorities of Barnesville from paying the claims of the liquor dealers. This being so, and the case being for decision by the court as a whole, the judgment of the court below on this point stands affirmed by operation of law. Judgment on both bills of exceptions affirmed. All the justices concurring.

(113 Ga. 1142)

BURT v. KUHNEN.

(Supreme Court of Georgia. July 23, 1901.)

WIFE'S SEPARATE ESTATE—JUDGMENT AGAINST HUSBAND—LIEN.

1. Land bought by a husband for his wife, and paid for with her money, is equitably her property; and, though he takes the legal title to the same, it cannot, as against a claim by her, be lawfully subjected to the satisfaction of a judgment against him, if, at the time of the creation of the debt on which the judgment is founded, credit was not given to the husband on the faith of his apparent ownership of such land.

2. The evidence in the present case demanded the verdict which the court directed, and no sufficient cause for setting it aside appears.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Action by W. H. Burt against N. Kuhnen. Judgment for plaintiff. On levy of execution, the wife of the defendant filed claim. Judgment for claimant. Plaintiff in execution brings error. Affirmed.

J. C. Edwards, M. I. Perkins, and J. C. Kilpatrick, for plaintiff in error. Hubert Estes and Robt. McMillan, for defendant in error.

LUMPKIN, P. J. On the 24th of August, 1895, W. H. Burt obtained a judgment against

N. Kuhnen. Subsequently, an execution based thereon was levied on a tract of land as the property of the latter. A claim thereto was interposed by Mrs. Kuhnen. By way of amendment to her claim affidavit, she alleged that she had an equitable title to the land levied on, as it "was bought and paid for with money belonging to" her, and "by mistake and inadvertence the deed to same was made to N. Kuhnen, when it should have been made to claimant." At the conclusion of the evidence introduced at the trial of the issue thus made, the court directed the jury to return a verdict in her favor. Burt filed a motion for a new trial, which was overruled. The complaint urged here is that the trial court erred in not sustaining the same.

1. The claimant was permitted to introduce evidence tending to support her contention that, as alleged, the land in controversy was purchased with money belonging exclusively to her. Objection was made to this evidence on the ground that the claimant thereby sought "to set up a secret equity" in fraud of plaintiff's rights in the premises. There was no merit in this objection. As has been seen, Burt obtained his judgment in August, 1895, and there was no pretense on his part that he extended credit on the faith of Kuhnen's apparent title to the land levied on. In point of fact, the latter did not get a deed thereto until 1897, when he finished paying for the property, though he "bought it in 1886, and paid one hundred dollars down." It does not appear that he was in possession of this property at the time credit was extended to him, or at any other time prior to 1897. Nor was it shown that Kuhnen ever made any representations to Burt concerning the ownership of the land, either before or after credit was extended, or that the latter did not have actual knowledge all along of Mrs. Kuhnen's equitable claim. Unless Burt was misled into extending credit on the faith of her husband's apparent ownership of the land, he had no right to subject it to the payment of his judgment against Kuhnen. See *Gray v. Perry*, 51 Ga. 181; *Zimmer v. Dansby*, 56 Ga. 79, 82; *Kennedy v. Lee*, 72 Ga. 39, 42; *Bell v. Stewart*, 98 Ga. 669, 27 S. E. 153.

2. As the claimant fully established by evidence her equitable title to the property in dispute, and as the plaintiff in execution introduced no evidence whatever on the subject, it follows that the trial judge very properly directed the jury to return a verdict finding the property not subject. This being so, it is unnecessary for us to notice any of the assignments of error in the motion for a new trial not covered by what is said above, further than to remark that they obviously relate to rulings which, whether erroneous or not, were not of sufficient materiality to affect the result. Judgment affirmed. All the justices concurring.

(113 Ga. 908)

SINNOTT et al. v. MOORE et al.

MOORE v. SINNOTT et al.

(Supreme Court of Georgia. July 19, 1901.)

SPENDTHRIFT TRUST — VALIDITY — FOREIGN WILL — CONSTRUCTION — INVALID REMAINDER CLAUSE—RECEIVER SALE—TITLE CONVEYED.

1. Where the law permits the creation of a spendthrift trust, and a will or deed creates such a trust, the trust is prima facie valid, and the burden is on the beneficiaries to show that they are not within any of the classes described in the statute allowing such trusts to be created.

2. A trust of this character, created in the state of Pennsylvania, whose laws allow such trusts, is valid under the laws of this state, provided the beneficiaries are within any of the classes for whom such trusts are permitted here.

3. Real or personal property in this state, devised in a will made in Pennsylvania to trustees for the benefit of certain beneficiaries, with whom the will deals as spendthrifts, passes to the trustees, there being a sufficiency of assets in Pennsylvania to pay all the debts of the estate, and there being no creditors of the estate resident in this state.

4. A valid trust can be created in this state for the benefit of a person sui juris for life, with remainder over in trust for another person sui juris for life; and the fact that there is an ultimate remainder over to a third person which is invalid under the statute forbidding, under certain conditions, donations to charities, does not destroy or execute the trusts created for the benefit of the life tenants.

5. Where a will creating such trusts was made and probated in Pennsylvania, and, upon proper proof, was admitted to probate in this state, and an administrator with the will annexed appointed, and several suits were commenced against him, and he filed an equitable petition for a construction of the will and for direction as to how to administer the estate in this state, and praying that the other suits be enjoined, and, at the instance of one of the suitors, a receiver was appointed to take charge of and administer the estate, if the property is sold under a proper order of court by the receiver, a deed by the latter would convey a good title to the purchaser upon his complying with the conditions of the sale.

6. The proceeds of such a sale, whether treated as realty or as personalty, belong, under the will, to the trustees.

7. In view of what is above laid down, there is no merit in any of the assignments of error embraced in the cross bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Richmond county; *El. L. Brinson, Judge.*

Action between *J. F. Sinnott and others*, executors, and *G. M. Moore and others*. From the decree, *Sinnott and others* bring error, and *Moore* assigns cross error. Judgment on main bill of exceptions reversed; on cross bill affirmed.

It appears from the record that *Andrew M. Moore*, a resident of the state of Pennsylvania, died in the year 1898. A few days before his death he had made and executed a will, wherein he appointed *Sinnott*, *Pennell*, and the *Fidelity Insurance, Trust & Safe-Deposit Company of Philadelphia* as his executors and trustees, made several specific bequests to relatives and friends, and then, in the eleventh item, gave all the residue of

his estate, both real and personal, to his executors and trustees in trust, with direction to divide the property into three equal parts or shares for the use and benefit of his three sons, *Albert*, *Henry*, and *George*. Under this item, each son was to receive the income and profits of one of these equal one-third parts of the residue of the estate, not subject to his debts or to be disposed of by him, the receipts of the son alone to be a sufficient voucher for the trustees as to the disposition of the income and profits. In the case of each son, this interest was given for life. If he died before the others, the income from his share was to go to the other two sons, and, upon the death of one of the latter, then to the survivor. Upon the death of all of the sons, the property was to go to the executors and trustees, with full power and direction to found and maintain such charitable or educational institutions as they might deem best, the institutions to be nonsectarian in their character. The will also gave the executors and trustees full power to sell any real or personal property belonging to the estate, and to reinvest the proceeds as they saw best. This will was, upon application of the executors, admitted to probate in the courts of Pennsylvania. The testator had a city lot, with buildings thereon, in the city of *Augusta*, *Richmond county*, *Ga.* The executors under the will, residing in another state, were unable, as executors, to have the will probated in this state. They, therefore, as trustees claiming an interest under the will, offered the same for probate in *Richmond county*. Upon proper proof the will was admitted to record, and *Armstrong* was appointed by the ordinary as administrator with the will annexed. Shortly after his appointment, an equitable petition for specific performance was filed against him by *White*, who claimed to have made a contract of sale for the property with the executors and trustees. Soon thereafter *George M. Moore*, one of the sons, filed a suit in ejectment against the administrator, claiming an undivided one-third interest in the city lot. He also filed in the court of ordinary a petition to have the letters of administration to *Armstrong* revoked on the ground that there was an intestacy as to this land in *Georgia*, that there were no debts of the testator in this state, and that there were sufficient assets in the state of *Pennsylvania* to pay all the debts of the estate; that, there being no necessity for administration, the land descended to him and his two brothers, the only heirs at law of the testator. After the filing of these suits, *Armstrong*, as administrator, filed an equitable petition against the executors and trustees, the three sons, and *White*. In it he alleged the above facts, that the various suits had been filed against him, and that there was a dispute between the sons and the executors and trustees as to the proper construction of the eleventh item of the will; that the son claimed it was void—First, because the char

itable bequest contained therein was made within less than a calendar month before the death of the testator, and the law of Pennsylvania declares such a bequest under such circumstances invalid, and, second, the trust sought to be created for the benefit of the sons was void under the laws of this state because the sons were *sui juris*, and not within any of the classes of persons for whom trusts may be created; that the executors and trustees claimed that the item was valid under the laws of this state and of Pennsylvania, except as to the charitable bequest, and that they were entitled to the control of the property, or to receive the proceeds of any sale of it that might be had. The administrator therefore prayed the court for a construction of the will and for direction as to how to administer the estate. He also prayed that the other suits be enjoined, and the parties thereto required to interplead in their answers to his petition. George M. Moore answered, setting up substantially the foregoing facts and contentions as to the invalidity of the will, and also, for reasons stated, praying that a receiver be appointed by the court to take charge of the property until the final decree. The executors and trustees in their answer alleged substantially the facts set forth in the petition of the administrator, and also that the trust, except as to the charitable bequest, was valid; that the testator knew the character and habits of his sons, and made the trust for their benefit. White filed no answer. It was conceded by all parties that the charitable bequest was void under the laws of both Georgia and Pennsylvania. When the case came on for an interlocutory hearing, the trial judge enjoined the ejectment suit brought by George M. Moore, refused to enjoin the proceedings in the court of ordinary for the revocation of the letters of administration, enjoined White's suit for specific performance, and appointed Armstrong (the administrator with the will annexed) as receiver of the court to take charge of and hold the property. In construing the will the judge held that the charitable bequest was void, and that, as there was no proof by the executors and trustees that the sons were proper subjects of a trust on account of weakness of mind, intemperate habits, or wasteful and profligate habits, "the trust attempted to be created in the several life estates, * * * with cross remainders, being for persons *sui juris*, also became executed *eo instanti*." He also ruled that the invalidity of the charitable bequest did not affect the validity of the other parts of the will. He declined to charge the administrator with the rents and profits of the land paid over to the executors and trustees in Pennsylvania before he had received notice of the claim of the sons to such rents and profits. All parties consenting, he directed the receiver to sell the property to White for a certain amount, the deed to be made upon certain conditions not necessary to de-

tail. He ordered that the interest of all the parties be divested from the land, and transferred to the fund received from its sale, and that such fund should stand charged in the same manner and to the same extent as the realty, and not, by reason of the sale, be made chargeable as personal property. To these rulings the executors and trustees excepted on many grounds which will not be stated here, but which will be dealt with hereafter in the opinion. George M. Moore was also dissatisfied with some of the rulings of the judge, and filed a cross bill of exceptions, which will likewise be dealt with below.

Wm. K. Miller, for plaintiffs. Frank H. Miller, J. C. C. Black, D. G. Fogarty, E. H. Callaway, J. R. Lamar, and M. P. Carroll, for defendants.

SIMMONS, C. J. (after stating the facts as above). 1. As will be seen from the above statement of facts, the eleventh item of the will creates what is known as a "spendthrift trust." There was no positive or direct proof before the trial judge that the sons of the testator were of weak minds or of intemperate or wasteful and profligate habits. The answer of the executors and trustees did not specifically allege that the sons came within any of the classes for whom trusts may be created either in Pennsylvania or in Georgia; it simply asserted that the testator knew the character and habits of his sons, and accordingly made provisions for their benefit. George M. Moore did not specifically allude to the question in his answer, but relied upon the fact that the executors and trustees did not show that the sons were within the classes for whom trusts may be created. The trial judge ruled that the burden was upon the trustees to make this proof, and that, as they had not made it, and as the law presumes every man to be *compos mentis*, the spendthrift trust sought to be created must be held to be executed. This ruling is the subject-matter of the first exception made by the plaintiffs in error. The law of this state (Civ. Code, § 3149) allows property to be devised or bequeathed in trust for the benefit of any minor, person non *compos mentis*, or any male person of age, who is, "on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be intrusted with the right and management of property." The law of Pennsylvania is, we understand, even more liberal in this respect. See *In re Moore's Estate* (Pa. Sup.) 48 Atl. 885, where this same will was under consideration. When, therefore, a father has a son who belongs to one of the classes enumerated in the Code, the law gives such father the right and power to make a will or deed by which he can create a trust of this character. When he makes such a will or deed, it is *prima facie* evidence that, in his judgment, such a trust is necessary for the protection

of the son and for the preservation of the property. While it is true that the law presumes every man to be of sound mind and of good habits, it also presumes that a man knows the law, and will not willfully violate it in making a disposition of his property. Thus, there is one presumption against another, and we think the first should yield to the other. When, by the disposition made of his property, a father declares that in his judgment it is necessary to create a trust for his son, the presumption in favor of the validity of the act of the father overrides the presumption, acted on by the trial judge in his decision, that all men are *sui juris*. We think the burden is upon the person contesting the trust to show that the named beneficiary does not come within the classes for whom trusts may be created. Indeed, our Code seems to place this burden upon the beneficiary or his creditor, for it provides that the beneficiary or creditor may show that, even if the beneficiary has been within one of the classes enumerated, the grounds of the trust have ceased to exist. Civ. Code, § 3149. Some person interested must file his petition in the superior court of the county where the trustee resides, and show to the court that the grounds of the trust have ceased. The trust then becomes executed. Moreover, it is scarcely to be presumed that a father would willfully and knowingly, in his last will, place his son in such a class unless he had the best of reasons for so doing. The father has seen the son grow up from infancy, and is familiar with his habits, his expenditures, and his use of money, and no one is better fitted than the father who reared him to determine his capacity to take charge of an estate. We think it cannot be said that a father will put upon the records of the country an instrument which classes his son as one incapable of being intrusted with the management of property unless absolutely convinced that it is necessary to do so. If the father wishes to punish the son for misbehavior, this can be much better accomplished by disinheriting the son or by leaving him but a small portion of the estate. After a careful consideration of the whole matter, we have come to the conclusion that the burden is upon the beneficiaries to show either that the grounds of the trust have never existed, or else that they have ceased.

2. The law of Pennsylvania permits trusts which are created for the purpose of protecting the beneficiary from his own improvidence and from the demands of his creditors. Such a trust is valid under the laws of that state, and is also valid under the laws of this state, if the beneficiary is within one of the classes designated by our Code. If the beneficiaries in the trust under consideration are within these classes, we see no reason why the trust for them, created in Pennsylvania, is not valid and binding in this state.

3. A father, resident in Pennsylvania and owning land in Georgia of which he is about

to dispose, is presumed to know the law of this state upon the subject. When, therefore, he creates a trust for the benefit of his sons, and places the title in his executors and trustees, the trust will, until some proof is offered to show that the sons do not come within any of the classes enumerated in our Code as proper beneficiaries of a trust, be held valid here, and the property devised in trust will pass to the executors and trustees under the will. If the executors and trustees reside in a foreign state, and for that reason cannot qualify as executors in this state, and an administrator with the will annexed be appointed, the latter stands in the shoes of the executors nominated by the testator, and is entitled to take possession of the property and administer it under the will. The trust being valid, the beneficiaries have no right to interfere with the administration in this state, and, as all parties admitted that there were no debts due by the estate to creditors in this state, and that the assets in Pennsylvania were more than sufficient to pay all the debts of the estate and all special legacies, it would be the duty of the administrator to account to the executors and trustees in Pennsylvania for the proceeds of any sale of the property he might make.

4. Whether the foregoing as to the right to create a spendthrift trust be correct or not, we are clear that the three sons of the testator have no right to interfere with the administrator with the will annexed in the discharge of his duties in the administration of the property under the will. It will be seen by reference to the statement of facts that the beneficiaries have only a life interest in the property left in trust for them. The will expressly puts the title to this property in the executors and trustees, with directions to them to pay the income, rents, and profits to the beneficiaries. But it was said that this part of the will was void because such a trust cannot be created under the laws of this state,—that our law does not permit a trust to be created for the benefit of a person *sui juris*. We concede that a trust cannot be created here for the benefit of a person *sui juris* without limitation over, but that is not what was attempted in the will now under discussion. This will created a trust for the benefit of each of the sons for life, with limitation after his death in trust for the benefit of his brothers. There is, we think, no statute here or elsewhere which prevents the creation of a trust for the benefit of one person *sui juris* for life, with limitation over to another person *sui juris*. There is quite a difference between creating a trust for the benefit of one person *sui juris* alone and creating a trust for his benefit for life with remainder over in trust for another. The case of *Lester v. Stephens*, 113 Ga. 495, 39 S. E. 109, ruled against the validity of the trust because there was no limitation over. If Mrs.

phens had given her property in trust for her brothers and sisters for life, with limitation over to their children or to other persons, the case would have been quite different. So with the other cases relied on by the defendants in error. It was also claimed that the trust was invalidated by the fact that the ultimate remainder to charitable uses had failed, the will having been executed within less than a calendar month before the death of the testator. Under the law of Pennsylvania, a bequest to charitable uses is void unless made more than a calendar month before the testator's death. In Georgia, a bequest to a charitable institution is void unless the will was "executed at least ninety days before the death of the testator." Civ. Code, § 3277. It was conceded by all parties that the charitable bequest was void for the reason stated, but we think that this does not make the entire will void. Section 3259 of the Civil Code expressly declares that, "If a will be legal in part and illegal in part, that which is legal may be sustained unless the whole will so constitute one testamentary scheme that the legal alone cannot give effect to the testator's intention; in such case the whole will falls." This charitable bequest was not illegal when executed, but became inoperative from the fact that the testator died within a few days after the execution of the will. This does not avoid the entire will. The whole testamentary scheme does not depend upon this bequest, and the rest of the will may be given effect without enforcing the bequest to charities. See, as to this matter, *In re Moore's Estate* (Pa. Sup.) 48 Atl. 887. Each of the sons may still enjoy his life estate, and, in the event of the death of one, his share goes to the others. When all of the sons have died, the testator desired that the property should be devoted to charity. That portion of the will having failed, it would seem clear that there is a resulting trust for the benefit of the heirs of the testator, though that is a matter we need not decide, as we are dealing with the present, and not with the distant future. What we do decide is that a trust may be created for the benefit of a person sui juris for life, with remainder over in trust for the benefit of another person sui juris. That, we hold, is what is done by the eleventh item of this will.

5. Under the facts of the case as stated above, we think that a sale of the property in Augusta by the receiver, under a proper order of court for \$40,000 (which all parties agree is a fair price), and a deed made by the receiver, would convey the title and interest of all the parties; and this is true whether the beneficiaries under the eleventh item agree to the sale or not.

6. The proceeds of such a sale, whether treated as realty or personalty, would belong to the trustees, to whom it should be paid after deducting the necessary expenses incur-

red in the administration of this portion of the estate of the testator.

7. The exceptions made in the cross bill of exceptions by George M. Moore, one of the beneficiaries, are contrary to the rulings made above, and we will not deal with them seriatim, or further than is done in the above opinion. If we are right in the rulings made, none of the exceptions made in the cross bill can be sustained, and the trial judge committed no error against the beneficiaries in any of the rulings there complained of.

Judgment on main bill of exceptions reversed; on cross bill affirmed. All the justices concurring.

(113 Ga. 681)

COLLIER v. MEANS et al.

(Supreme Court of Georgia. May 23, 1901.)
CITY COURT—JURISDICTION—WRIT OF ERROR.

A city court, established in a "city" which is not the county site of the county wherein the same is located, and whose jurisdiction extends only over the city and one militia district of that county, is not a court "like" either the city court of Atlanta or the city court of Savannah, as they existed at the time of the ratification of the present constitution of this state, and consequently a writ of error does not lie from a court so established to the supreme court.

(Syllabus by the Court.)

Error from city court of Barnesville; C. J. Lester, Judge.

Action between J. C. Collier and W. V. and F. M. Means. From the judgment, Collier brings error. Dismissed.

W. W. Lambdin, for plaintiff in error. Persons & Persons and J. J. Rogers, for defendants in error.

PER CURIAM. Writ of error dismissed.

(113 Ga. 896)

FINCH v. WOODS.

(Supreme Court of Georgia. July 20, 1901.)
VOLUNTARY CONVEYANCE—BONA FIDE PURCHASER—EVIDENCE.

1. In order "to sustain a voluntary conveyance against a subsequent bona fide purchaser for valuable consideration, notice to the purchaser must be actual," and the "registration of the conveyance is not such notice as will deprive" such bona fide purchaser of the preference to which he is entitled.

2. Applying the rule above announced to the facts of the present case, the court erred in directing a verdict in favor of the plaintiff, but ought to have directed a verdict in favor of the defendant.

(Syllabus by the Court.)

Error from superior court, Bulloch county; B. D. Evans, Judge.

Action by Martha A. Woods against D. O. Finch. From a judgment for plaintiff, defendant brings error. Reversed.

Moore & Deal, for plaintiff in error. H. B. Strange, for defendant in error.

CORB, J. Martha A. Woods brought an action against Finch to recover possession of a described parcel of land. At the trial the court directed a verdict in favor of the plaintiff, and the defendant made a motion for a new trial. The motion having been overruled, he excepted. Both parties claimed under Madison Woods as a common grantor. The plaintiff relied upon a deed from Madison Woods which conveyed to her a life estate, with remainder to her children, dated November 4, 1875, recorded November 10, 1875, and reciting a consideration of \$5 and natural love and affection; the grantee being the wife of the grantor. The defendant claimed under a warranty deed from Madison Woods to him dated January 27, 1899, recorded February 3, 1899, and reciting a consideration of \$1,127. The plaintiff testified that her husband bought the land about 30 years ago, and that he deeded it to her. She further testified: "I did not buy it from him. He just deeded it to me. I never paid him anything for it, but I helped to pay for the land. I never paid him any consideration at the time this deed was made, any more than I helped to pay for the land." The defendant testified that he paid full value for the land, that the plaintiff was present when he bought it from her husband, that he did not know that she had any claim upon the land, and that he never knew of the existence of the deed from Madison Woods to his wife and children until some time in July or August, 1899, after he had bought the land. It is not necessary to determine in the present case whether a deed which recites as a consideration to support it love and affection and a nominal sum of money is a voluntary conveyance. Some courts hold that if there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary, while other courts hold that a merely nominal money consideration will not save the deed from being classified as voluntary. See *Rump*, *Fraud. Conv.* (4th Ed., by Gray) § 238, and notes; also notes to *Hagerman v. Buchanan* (N. J. Eq.) 14 Am. St. Rep. 739 (s. c. 17 Atl. 946). A deed which purports to be founded upon a valuable consideration can be shown to have been based either upon simply a good consideration or upon no consideration (Civ. Code, § 3599); and when this is conclusively done the deed stands as a voluntary conveyance, without regard to the consideration expressed therein. The testimony of the plaintiff above referred to, which is all the evidence there is on the subject of what was the real consideration moving to Madison Woods in making the deed to his wife, clearly shows that the conveyance was purely voluntary, and not intended by either the grantor or the grantee to be based upon other than a consideration of love and affection. No money passed from her to him at the time the conveyance was executed. Love and affection are given the

prominent place in the recitals of the consideration, and the nominal amount of money stated in connection therewith negatives any idea that the parties intended the deed as a payment by the husband of any debt due the wife, or as a recognition by him of a resulting trust in her favor. Under the evidence of the plaintiff, the jury would have been compelled to find that the conveyance was purely voluntary. This being true, the question arises, which of the two deeds is entitled to preference,—the earlier deed, founded upon a consideration of love and affection, or the younger deed, founded upon a valuable consideration? Both were duly recorded. If both deeds were founded upon a valuable consideration, then under the registry laws the deed which was prior in date, as well as prior in time of record, would be entitled to preference. But the registry laws were not intended for the protection of those who claim under voluntary conveyances. In *Fleming v. Townsend*, 6 Ga. 104, it was held that, to sustain a voluntary conveyance against a subsequent bona fide purchaser for a valuable consideration, notice to the purchaser of the prior voluntary deed must be actual, and that such a purchaser who has no actual notice is protected, notwithstanding the prior voluntary conveyance has been duly recorded. See, also, *Fowler v. Waldrip*, 10 Ga. 357; *Jordan v. Pollock*, 14 Ga. 145, 156; *Toole v. Toole*, 107 Ga. 472, 33 S. E. 686; *Byrd v. Aspinwall*, 108 Ga. 1, 33 S. E. 688. The uncontradicted evidence showing that the defendant was a bona fide purchaser for value at the time that he took his conveyance, and had no actual notice of the prior voluntary conveyance which had been made by Woods to his wife, the court erred in directing a verdict in favor of the plaintiff, but, upon the record as it now stands, should have directed a verdict in favor of the defendant. Judgment reversed. All the justices concurring.

(113 Ga. 1024)

THOMPSON v. SANDERS.

(Supreme Court of Georgia. July 20, 1901.)

TENANTS IN COMMON—OUSTER—EVIDENCE.

1. One tenant in common of land cannot maintain against a co-tenant an equitable proceeding having for its purpose the complete ousting of the latter from the possession of the land held in common, and from all participation in the profits thereof.

2. Even if the will under consideration in the present case did not clothe the defendant in error with any title in his individual right, he certainly inherited an undivided one-fourth of his deceased wife's share of the land; and therefore the rule stated above applies.

(Syllabus by the Court.)

Error from superior court, Banks county; R. B. Russell, Judge.

Action by J. K. Thompson against W. S. Sanders. Judgment for defendant. Plaintiff brings error. Affirmed.

Fletcher M. Johnson, for plaintiff in error.
W. W. Stark and J. L. Perkins, for defendant
in error.

COBB, J. 1. As a general rule, the remedy of one tenant in common, who desires to obtain possession of his portion of the property, as against his co-tenant, is to institute proceedings at law to have the land partitioned. Civ. Code, §§ 3146, 4786. In *Logan v. Goodall*, 42 Ga. 96 (5), it was held that one tenant in common might maintain against his co-tenant an action of ejectment, and obtain a judgment placing him in possession jointly with the defendant, and that any equities between them could be thereafter settled by a writ of partition or a bill in equity. The ruling made in that case was, however, disapproved as obiter in *Sanford v. Sanford*, 58 Ga. 259, 261, where it was held that a tenant in common might sue severally in ejectment, but could recover no more than his own interest. See, also, *Wilson v. Chandler*, 60 Ga. 130; *Dupon v. McLaren*, 63 Ga. 470; *Baker v. Middlebrooks*, 81 Ga. 494, 8 S. E. 320. It seems, therefore, that a tenant in common may recover in ejectment from his co-tenant his interest in the property. If one tenant in common is in possession of more than his share of the property, or is committing waste, or is receiving more than his share of the rents and profits, he is liable to account to his co-tenant. Civ. Code, § 3144. Where a tenant in common is receiving more than his share of the rents and profits, equity will take jurisdiction of the matter, and adjust the accounts between them. Civ. Code, §§ 3147, 3989. See, also, *Daniel v. Daniel*, 102 Ga. 184, 28 S. E. 167. And, where the peculiar circumstances render a proceeding in equity more suitable and just, equity will take jurisdiction, and partition the property. Civ. Code, § 4783; *Tate v. Goff*, 89 Ga. 184, 15 S. E. 30, and cases cited. But an equitable petition having for its object the complete ousting of a tenant in common from the possession of the property, and from all participation in the profits thereof, is certainly not maintainable by a co-tenant. In order for a co-tenant to get a standing in a court of equity, he must come willing to do equity, and to do equity he must concede and accord to his co-tenant whatever rights he may have in the property.

2. In the present case it appears on the face of the petition that the defendant is the owner in fee of a one-sixteenth undivided interest in the land in controversy as one of the heirs at law of his wife, who, so far as appears from the allegations of the petition, died possessed of a one-fourth undivided interest in the property. The defendant is therefore a tenant in common with the plaintiff. The petition was framed on the idea that the defendant had no interest whatever in the property, and prays for a decree to that effect. It can in no view be treated as an action to recover simply the plaintiff's interest in the land as a tenant in common. Nor can

it be treated as a petition for an accounting between tenants in common. It is true, the petition alleges that the defendant has never "accounted to the plaintiff for the rents." But the plaintiff is claiming a right to all the rents. He is not willing to do equity, and accord to the defendant his portion of the rents or of the land. According to the allegations of the petition, the defendant is already a wrongdoer, and the plaintiff seeks to become one. The defendant has collected and appropriated to his own use all of the rents and profits, and the plaintiff prays that he may be allowed to do the same thing. A court of equity has no ears for such a plea, but will leave the parties where it finds them.

It was argued that the defendant, Wiley S. Sanders, acquired a life estate in the property under the above-quoted item of his father's will. We have not deemed it necessary to decide this question, since we are of opinion that the ground of the demurrer which raised the point that the defendant was a tenant in common with the plaintiff, and that the plaintiff was, for that reason, not entitled to the relief prayed for, was well taken. There was no error in dismissing the petition. Judgment affirmed. All the justices concurring.

(113 Ga. 901)

PACE v. NEELY.

(Supreme Court of Georgia. July 19, 1901.)

INJUNCTION—RESTRAINING ACTION AT LAW.

When the superior court, by means of an equitable petition, has obtained jurisdiction of a case in which a decree that the plaintiff is the rightful owner of land is sought, an injunction should, on application therefor by the plaintiff, by a proper amendment, be granted to restrain, pending the determination of the equitable petition, proceedings instituted after the filing thereof by the defendant against the plaintiff to distrain for rent, and to evict the latter from the premises, when it appears that the petition was brought in good faith, and under its allegations was apparently based on good grounds.

(Syllabus by the Court.)

Error from superior court, Burke county;
E. L. Brinson, Judge.

Petition by Mattie O. Pace against R. O. Neely. Judgment for defendant. Plaintiff brings error. Reversed.

W. H. Davis and W. K. Miller, for plaintiff in error. P. P. Johnston and Callaway & Fulbright, for defendant in error.

LITTLE, J. We reverse the ruling made by our Brother of the trial bench refusing the injunction. In his order this ruling is based on the ground that the petitioner could fully set up her defenses against the distress warrant and the warrant against her as a tenant holding over by proceedings authorized by statute to be taken by the person against whom such processes may issue. Assuming this to be true, we yet find the circumstances of the case, as presented in the petition, call very loudly for the grant of

the writ. The petitioner declares that she is not a tenant of the defendant in error, and was not at the time these processes were issued against her. If she was not, they were, of course, improperly issued. Certain it is that prior to their issue the plaintiff in error had instituted an action to compel the specific performance by the defendant in error of a contract which in terms gives her an option to terminate her tenancy, and become the legal owner of the land, on certain conditions. The contract on which that petition is based, the execution of which is not denied, seems to be sufficiently explicit to afford a basis for the decree sought. At the time it was filed, no injunction was necessary to protect her rights, as no action had then been taken seeking to fix her status as a tenant. She is entitled to have her relation to this land fixed and determined, and that, too, without a multiplicity of suits against her. On the other hand, the defendant in error is entitled to be placed in a safe and secure position as to the rental value of the land, should it ultimately be determined that plaintiff has not properly exercised the right to purchase, which is clearly given by the contract. The superior court having acquired jurisdiction in the case on an equitable petition, all collateral issues affecting the rights of the parties should be brought into it, and these rights settled by a single decree, when the facts which determine the right shall have been ascertained in the proper manner. The judgment of the court below is reversed. All the justices concurring.

(113 Ga. 1010)

GERMANIA BANK v. COLLINS et al.

(Supreme Court of Georgia. July 20, 1901.)

PLEADING—AMENDMENT OF DECLARATION.

In a suit upon a chose in action by the holder of the equitable title thereto the plaintiff may amend his declaration by adding the name of the person who holds the legal title, suing for his use.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by the Germania Bank against Collins, Grayson & Co. Judgment for defendants, and plaintiff brings error. Reversed.

Geo. W. Owens, for plaintiff in error. Osborne & Lawrence, for defendants in error.

LEWIS, J. The Germania Bank sued Collins, Grayson & Co. on an open account for a sum alleged to be due the bank as the purchase money of 256 bales of hay, which the petition alleged was the property of the bank, and was sold to the defendants by the bank's agents, W. G. Cooper & Co. The defendants, in their answer, denied the alleged indebtedness, and denied that they had bought the hay from the bank. At the trial a motion

for a nonsuit on the ground that the evidence showed that the bank had only a special title to the hay, and that the general title was in W. G. Cooper & Co., was made by the defendants at the conclusion of the evidence introduced by the plaintiff; and, the court having announced that this motion would be sustained, the plaintiff moved to amend the petition so as to sue in the name of W. G. Cooper & Co. for the use of the Germania Bank. The court refused to allow this amendment, and granted a nonsuit, to which ruling the plaintiff excepts.

The refusal to allow the plaintiff to amend was clearly error. The question is settled by section 5105 of the Civil Code, which declares: "When several plaintiffs sue jointly, the declaration may be amended by striking out the name of one or more of such plaintiffs. And when it becomes necessary for the purpose of enforcing the rights of such plaintiff, he may amend by substituting the name of another person in his stead, suing for his use." The principle is very clearly stated in the case of *Estes v. Thompson*, 90 Ga. 698, 17 S. E. 98, in the following language: "A party who brings a suit upon a chose in action, though it be an open account, and he has only the equitable title thereto, may amend his declaration by adding the name of the person who has the legal title, suing for his use. Such amendment does not make a new cause of action, nor is it demurrable because of want of privity between the usor and usee." See, also, the cases of *Winter v. Matthews*, 41 Ga. 652, and *Adams v. Barlow*, 69 Ga. 302, cited on page 699, 90 Ga., and page 98, 17 S. E., in the able opinion of present Chief Justice Simmons. It is hardly necessary to add anything to these citations. The refusal of the amendment offered was plainly error, and the judgment of the court below is accordingly reversed. All the justices concurring.

(113 Ga. 938)

ALMAND et al. v. EQUITABLE MORTG. CO.

(Supreme Court of Georgia. July 20, 1901.)

EXECUTION—LEVY ON LAND—CLAIM OF THIRD PARTY—DEED OF CORPORATION—AGENCY—EVIDENCE.

1. One who bases a claim to land upon the proposition that he purchased it at an administrator's sale is not injured by evidence tending to show that the latter's intestate was at the time of his death the owner of the land.

2. A deed purporting to be that of a business corporation, and to have been executed in the corporate name by the president of the corporation, is, if the corporate seal be attached thereto, prima facie valid. (a) Where such a deed was offered in evidence and admitted over objections that it did not appear that the party signing it as president of the corporation was in fact such president, or that he had authority to execute the paper, it does not affirmatively appear that any error was committed in admitting the paper, when the record is silent as

whether it had or had not the seal of the corporation attached to it.

3. Agency cannot be proved by the declarations of the alleged agent.

4. It does not appear that any error prejudicial to the plaintiffs in error was committed in admitting in evidence the record of a case to which they were not parties, and the action of the court in directing the verdict in favor of the plaintiff in execution was not, for any reason assigned, erroneous.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by the Equitable Mortgage Company against W. W. Braswell. Judgment for plaintiff. On levy of execution, Almand & George interposed a claim. Judgment finding the property subject, and claimants bring error. Affirmed.

W. W. Braswell, for plaintiffs in error. Candler & Thomson and Payne & Tye, for defendant in error.

FISH, J. An execution in favor of the Equitable Mortgage Company and against W. W. Braswell, as administrator of R. M. Brown, deceased, and directed generally against the goods and chattels, lands and tenements, belonging to the estate of the deceased in the hands of the administrator to be administered, and specially against certain described land, was levied on such land, which was claimed by Almand & George. Upon the trial of the issue, the court directed a verdict finding the property subject, whereupon claimants excepted.

1. Plaintiff in *fi. fa.* tendered in evidence a deed from William Bellisle, as administrator *de bonis non* with the will annexed of John McCullough, deceased, to Robert M. Brown, dated January 5, 1864, recorded April 2, 1866, and purporting to convey the land levied upon. "Said deed contained all of the usual recitals, among which was that it was made in pursuance of an order granted by the court of ordinary of Dekalb county. To the admissibility of this deed claimants objected upon the ground that no authority was shown for the person claiming to be such administrator to sell such land or execute such deed." The deed was admitted in evidence over objection, and claimants assigned error upon the ruling. The deed was inadmissible without proof that the grantor, as administrator, had power to sell. *Mining Co. v. Irby*, 40 Ga. 479. The record, however, shows that the claimants based their title to the land in question solely upon a sale thereof to them made by Braswell as the administrator of R. M. Brown, the defendant in *fi. fa.* We cannot see, therefore, how the claimants were injured by evidence tending to show that R. M. Brown was the owner of the land at the time of his death.

2. The court admitted in evidence, over the objection of the claimants, a deed from the Equitable Mortgage Company to W. W. Braswell, as administrator of R. M. Brown, de-

ceased, dated January 13, 1868, and recorded February 2, 1869, conveying the land in question to Braswell, as such administrator, in order that it might be levied on and sold as the property of the estate of his intestate, who had made a security deed to the mortgage company. This deed from the mortgage company to Braswell, administrator, was signed, "Equitable Mortgage Company, by Charles N. Fowler, President, Charles N. Fowler and James M. Gifford, Receivers." "To the admissibility of this deed, claimants objected upon the following grounds: First. It does not appear that the party signing this paper as president was in fact president of the Equitable Mortgage Company; nor does it appear that, if he was president, that he had authority by himself to execute said paper. Second. Because it does not appear that there is or ever has been a receiver for the Equitable Mortgage Company, except the mere declaration of the parties executing this paper; nor does it appear that, if there was such a receiver, he had authority to execute this paper." These objections were overruled by the court. There was no error in this ruling. The deed purported to be that of the Equitable Mortgage Company, a business corporation, and to have been executed in the corporate name by its president. The record is silent as to whether the deed had or had not the seal of the corporation attached to it. If the corporate seal was attached, the presumption is that the person executing the deed as president had authority so to do in behalf of the corporation. *Dodge v. Mortgage Co.*, 109 Ga. 394, 34 S. E. 672. There being nothing in the record to indicate that the seal was not attached, it follows that it does not affirmatively appear that any error was committed in admitting the instrument. If admissible, because executed in the corporate name by the president of the corporation, with its seal attached, then the fact that it was signed by Fowler and Gifford, receivers, would not render it inadmissible, when there is nothing to show that there ever has been a receiver for the corporation, "except the mere declaration of the parties executing this paper."

3. The bill of exceptions recites that: "Counsel for claimants then offered to interrogate the witness [Braswell] as to certain transactions and communications between witness and Alonzo Richardson, stating that he wished to show that said Richardson had possession of all the papers of the Equitable Mortgage Company in Georgia; that several conferences had occurred between the witness and Richardson in which said Richardson had urged witness to sell the land described above, threatening that if witness did not sell the same, he (Richardson) would sell it under the power of sale in the loan deed of Brown to the Equitable Mortgage Company; and that, mainly through the solicitations of said Richardson, he administered on said estate. Counsel for plaintiff in error objected

in the following language: "That we object to any statement about what Alonzo Richardson said. That could have nothing to do with the validity of this sale." The court sustained the objection." The only attempt to assign error upon this ruling is as follows: "The court erred in refusing to allow W. W. Braswell, witness for the claimants, to testify as set out in this bill of exceptions; the error in this ruling being that the evidence was sufficient to go to the jury upon the question whether or not Alonzo Richardson was the agent of the Equitable Mortgage Company." Even if this be a good assignment of error, it was not erroneous to reject declarations of Richardson offered for the purpose of proving that he was the agent of the Equitable Mortgage Company, as it is well settled that agency cannot be proved by the declarations of the alleged agent.

4. The record discloses that the question upon which the case turned was whether or not there was usury in the deed executed by R. M. Brown, the intestate of the defendant in *fi. fa.*, to the Equitable Mortgage Company, on December 23, 1888, as security for a loan made by the mortgage company to the grantor. The bill of exceptions complains that "the court erred in directing a verdict finding the property subject; the error in this ruling being that the evidence did not demand such a verdict, but was sufficient to justify the finding that the deed of Brown to the Equitable Mortgage Company was usurious." We have carefully considered all the evidence submitted by the claimants, and it clearly appears therefrom that the total amount, including principal, interest, and commissions, which Brown agreed to pay the Equitable Mortgage Company, did not exceed the sum which would result from adding to the principal actually received by Brown interest at 8 per cent. per annum for the period of the loan. The evidence on the question of usury in this case is very similar to that in *Green v. Mortgage Co.*, 107 Ga. 536, 33 S. E. 809, where it was held that the contract was not usurious. Claimants objected to the admission in evidence of the record in the case of Braswell, administrator of Brown, against the Equitable Mortgage Company et al., upon the ground that the claimants were not parties thereto, and not bound thereby. The objection was overruled, and the record admitted. This was error, but, as the only object in introducing such record in evidence was to show that there was no usury in the deed from Brown to the Equitable Mortgage Company, claimants were not injured by such error, as all the other evidence in the case, including that for the claimants, wholly failed to show that there was usury in such instrument. We conclude that the action of the court in directing a verdict for the plaintiff in execution was not, for any reason assigned, erroneous. Judgment affirmed. All the justices concurring.

(113 Ga. 1062)

IVEY v. STATE.

(Supreme Court of Georgia. July 23, 1901.)

CRIMINAL LAW—TRIAL—UNFAIR MEANS OF PROSECUTION—ARGUMENTS OF COUNSEL.

1. The state, as accuser in a criminal proceeding, does not seek one of its citizens convicted unless the evidence shows his guilt beyond a reasonable doubt; nor will it permit its prosecuting officer to use any unfair means in the trial, or illegal argument in his address to the jury, to the prejudice of the accused.

2. Where, therefore, a solicitor general, in his address to the jury, uses highly improper language, not authorized by the evidence, or any fair deduction therefrom, and the counsel for the accused objects thereto, and moves the court to declare a mistrial, which the court refuses, and exception is taken to the ruling, this court will reverse the judgment, and grant a new trial, in the interest of justice and of fair and impartial trials.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Elizabeth Ivey was convicted of selling liquor without a license, and brings error. Reversed.

Jesse A. Glenn and Geo. G. Glenn, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

SIMMONS, C. J. The record discloses that Mrs. Elizabeth Ivey was tried and convicted for the offense of selling intoxicating liquor without a license. She made a motion for a new trial, which was overruled by the court, and she excepted. From her motion it appears that the solicitor general, in his address to the jury, used the following language: "Gentlemen of the jury, I want you to stand by me, and help me break up this vile den;" and: "Gentlemen of the jury, if you could go over this town, and see the good mothers whose pillows have been wet with tears over their boys who have been intoxicated by the acts of this woman." Defendant's counsel objected to these remarks as being highly improper, and without evidence to authorize them, and asked the court to declare a mistrial on account of them. This motion the court overruled, simply remarking, "Go on with the case, and confine your argument to the facts in the case." The motion for a new trial complains of the refusal of the court to grant a mistrial as asked. We think that the ruling complained of was erroneous. While the state is the accuser in every criminal case, it does not seek the conviction or punishment of any one of its citizens unless the evidence shows beyond a reasonable doubt that he is guilty. An officer is appointed to represent the state in the courts, and it is his duty, when the evidence shows or tends to show the guilt of one on trial for crime, to argue to the jury that the evidence is sufficient to authorize a conviction, and that the jury should return a verdict of guilty. The state, however, will in no case permit its representative to go outside of the evidence.

to find a basis for appealing to the sentiments, passions, or prejudices of the jury in order to obtain a conviction. *Jesse v. State*, 20 Ga. 169. The solicitor general, appointed to represent the interest of the state in the trial of offenders, does not occupy the position of counsel generally. His duty does not require him to insist upon the conviction of the accused unless the evidence is sufficient to authorize it. His office is quasi judicial, and, while it is his duty, if he honestly believes that the evidence shows the guilt of the accused, to insist upon this view before the jury, and to use in his argument all his ability and skill in presenting the case as made by the pleadings and the evidence, still it is under no circumstances his duty either to go outside of the case, and state facts not in evidence, or to appeal to the passions or prejudices of the jury. The motion for new trial shows that the solicitor general stated as facts things to which no witness had testified,—that good mothers had wet their pillows with their tears over their boys who had been intoxicated by the acts of the accused. These remarks were not warranted by the evidence, and were plainly calculated to prejudice the accused. While, as before remarked, the state is the accuser in criminal cases, it will not permit its representatives to use unfair means against the accused pending the trial, or to comment upon facts not put in evidence, or to make remarks calculated to prejudice the accused in the minds of the jurors. This is not a new question in this court. Similar conduct was condemned by this court in no uncertain terms in the case of *Berry v. State*, 10 Ga. 522. In *Mitchum v. State*, 11 Ga. 615, where the court had refused to restrain the solicitor general from commenting on facts not in evidence, *Nisbet, J.*, said, in reference to the habit of counsel in addressing the jury of going outside of the evidence, and commenting on facts not growing out of the evidence or the pleadings: "We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal, and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments; and in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial." In *Forsyth v. Cothran*, 61 Ga. 278, this court approved the grant of a new trial by the lower court upon this ground. In *Railroad Co. v. Randall*, 85 Ga. 297, 315, 11 S. E. 706, this court granted a new trial in a civil case because counsel for the plaintiff, in his concluding address to the jury, stated facts which were not in evidence, and inferences which could not be deduced from anything properly in the case. In *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 22 Am. St. Rep. 465, a new trial was granted because

the trial judge allowed the solicitor general to argue, over objection, that the accused was of bad character, when there was no evidence of such character. In *Washington v. State*, 87 Ga. 12, 13 S. E. 131, in which the accused was tried on a charge of arson, it was held that it was error to allow the solicitor general, over objection of defendant's counsel, to state that frequent burnings had occurred throughout the country, and to urge the jury, in consequence thereof, to strictly enforce the law in the case then on trial. In that case a new trial was granted. In *Johnson v. State*, 88 Ga. 606, 15 S. E. 667, a new trial was granted because the solicitor general was allowed, over the objections of the counsel for the accused, to argue to the jury that the failure of the counsel for the accused to examine the state's witnesses concerning a fact which the court had ruled to be inadmissible was an admission of such fact; and also that the failure of the accused to introduce these witnesses as his own amounted to such an admission. Mr. Justice Lumpkin, speaking for the court, said: "We feel constrained to grant the accused another hearing. The conclusions drawn * * * from the premises stated were unauthorized, and were highly injurious to the accused." In some of the foregoing cases it does not appear that any objection was made in the lower court to the improper language, or that any motion for a mistrial was made on account of it. The rule which now prevails in this court is that a new trial will not be granted upon such grounds unless objection is made by counsel for the accused, and some ruling invoked thereon in the court below. *Farmer v. State*, 91 Ga. 720, 18 S. E. 987. In the case of *Bowens v. State*, 106 Ga. 760, 764, 32 S. E. 666, 667, Mr. Justice Lumpkin lays down the rule as follows (with numerous citations of the decisions of this court): "Where counsel make unauthorized and improper statements in their arguments before juries, opposing counsel should call attention to the same, and either move for a mistrial or request the court to instruct the jury to disregard such statements." Even in cases where this court has refused to grant a new trial on this ground because of the failure to invoke a ruling in the court below, and make the point properly, it has almost invariably condemned the practice of commenting on facts not in evidence, and making improper remarks to the jury. In the present case the solicitor made statements to the jury which were highly improper, the court failed to rebuke him, or to charge the jury with reference to the matter, and refused to grant a mistrial when asked so to do by the counsel for the accused. Under these circumstances, and the doctrine announced in the above-cited cases, we feel constrained to grant a new trial upon this ground. It may be that the accused was guilty of the offense charged, but certainly she cannot be said to have had

a fair and impartial trial, and, in the interest of impartiality and of justice and of the dignity and decorum of the courts, a new trial should be had. Judgment reversed. All the justices concurring.

(113 Ga. 1012)

BIRD v. BURGSTEINER.

(Supreme Court of Georgia. July 20, 1901.)

DISMISSAL—REINSTATEMENT.

When, in the superior court, a case is dismissed for want of prosecution, its reinstatement is a matter within the sound discretion of the court. There was no abuse of discretion in refusing to reinstate the present case.

(Syllabus by the Court.)

Error from superior court, Effingham county; P. E. Seabrook, Judge.

Action by J. A. Burgsteiner against L. A. Bird. Judgment for defendant, and plaintiff brings error. Affirmed.

A. C. Wright, for plaintiff in error. D. H. Clark, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1023)

HOLTZCLAW et al. v. RILEY, Judge.

RILEY, Judge, v. HOLTZCLAW et al.

(Supreme Court of Georgia. July 20, 1901.)

MANDAMUS TO COUNTY JUDGE.

1. A writ of mandamus will not be issued against a public officer to compel the performance by him of acts which do not come within his official duties.

2. Where a board of county commissioners is invested with the full management and control of certain matters with which the county judge, as such, has nothing to do, but to a part of which he is attending as the agent of the board of commissioners, mandamus will not lie against such county judge to compel him to perform certain acts in connection with such matters, when these acts, if required at all by law, are required of the board of commissioners.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Judge.

Petition by R. N. Holtzclaw and others for a writ of mandamus against A. C. Riley, judge. From the judgment both parties bring error. Judgment on cross bill reversed; on main bill dismissed.

R. N. Holtzclaw, for petitioners. C. E. Brunson, for respondent.

SIMMONS, C. J. The sheriff of Houston county and the solicitor of the county court filed a petition for mandamus against the county judge to compel him to pay to petitioners named amounts as fees out of moneys in his hands, received as compensation for the labor of convicts hired out by him for Houston county to the county of Dooley. There was no dispute as to the facts, and the judge rendered judgment in favor of the petitioners for an amount less than that claimed. To this judgment all parties excepted; the peti-

tioners to the failure to grant all of the relief prayed, and the respondent to the judgment against him which was rendered. Counsel argued before this court several interesting questions as to the amount and payment of the fees of the sheriff and the solicitor of the county court in criminal cases, but, under the view we take of the case, this court cannot now determine them. The money in the hands of the respondent was compensation for the labor of misdemeanor convicts. Under the law the board of county commissioners is invested with full authority to lease and hire out these convicts, and to receive and dispose of the fund arising as compensation for the services of the convicts. Pen. Code, § 1097. With these matters the county judge, as such, has absolutely nothing to do. It appears that the board of commissioners did turn over to him the convicts of the chain gang, and did authorize and empower him to hire them out; that he accordingly made a contract for such convicts with the county of Dooley; and that he received on said contract a certain amount of money. If the county commissioners had the right to thus delegate their authority with reference to hiring out convicts (as to which we express no opinion), we are clear that the county judge held this money as the agent of the board of commissioners, and not in his capacity as county judge. As county judge he had nothing to do with the matter, and, in hiring out the convicts, he, as such agent, performed a duty imposed by law upon the board of commissioners. As county judge he did not receive or hold the money, and as county judge or as an officer he was under no duty to turn any part of it over to the petitioners. Accordingly, it was error to grant a mandamus against him for any amount, to compel him to pay out any money which he held as agent of the board of commissioners. Mandamus will not lie against a public officer to compel him to perform acts which do not come within the sphere of his official duties. The question just dealt with was made by the cross bill of exceptions. As its decision is controlling in the case, the main bill will be dismissed. Judgment on cross bill of exceptions reversed; main bill of exceptions dismissed. All the justices concurring.

(113 Ga. 1060)

CONEY v. STATE.

(Supreme Court of Georgia. July 23, 1901.)

RIOT—WHAT CONSTITUTES.

To constitute the offense of riot, there must be not only a common intent on the part of two or more persons to do an unlawful act of violence, or some other act in a violent and tumultuous manner, but also concert of action in furtherance of such intent.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Green Coney was convicted of riot, and brings error. Reversed.

Griner & Williams, for plaintiff in error.
F. G. Corker, for the State.

LUMPKIN, P. J. The plaintiff in error, Green Coney, was jointly indicted with Robert Jordan for the offense of riot. The sole question here presented is whether or not, under the evidence introduced in behalf of the state, the conviction of Coney can lawfully be sustained. There was testimony to the following effect: Coney and Jordan were seen standing about a hundred yards from a house where a frolic was in progress, and were heard to say, "Let's go and break up the God-damned thing. It ain't no count, no-how." They then went to the house and entered it. Jordan joined in a game that was being played, having for his partner a girl named Ella Nobles. Coney walked across the room and kissed this girl. This she did not resent, but Jordan said: "Look out. That is my girl." Thereupon one Baker said to Jordan: "Mind out. That is my kid;" and they began "fussing" with each other, and drew weapons. In this altercation Coney took no part. The girls began to leave the house, and Coney was heard to say: "God damn it. I am in my liquors." A witness went to him and asked him to stop cursing, telling him "this was no negro frolic." He replied "he was sure that it was no white man's frolic." This witness testified that he saw Coney "do nothing, but did hear him curse." After talking with him as above set forth, the witness "got the girls back in the house, and the frolic went on as before."

Section 354 of the Penal Code declares that: "If two or more persons do an unlawful act of violence, or any other act in a violent and tumultuous manner, they shall be guilty of a riot." There must be concert of action on the part of two or more persons in furtherance of a common intent. *Prince v. State*, 80 Ga. 27; *Stafford v. State*, 93 Ga. 207, 19 S. E. 50; *Dixon v. State*, 105 Ga. 787, 31 S. E. 750; *Tripp v. State*, 109 Ga. 489, 34 S. E. 1021. "The mere making a noise or behaving tumultuously will not alone constitute riot, in the absence of any violence." *Baron v. State*, 74 Ga. 833. It does not appear that Coney actually did more than this, notwithstanding he had expressed a willingness to join in a project to "break up" the frolic on the ground that it was "no count nohow." On entering the house, neither he nor Jordan proceeded to carry this project into execution. On the contrary, the latter immediately entered into the merrymaking, while Coney, left to his own resources, embarked upon a wholly independent plan of diversion, which called forth a protest on the part of Jordan. Baker was the aggressor in the quarrel which ensued between him and Jordan, and neither by word nor act did Coney participate therein. Certain it is that he did not join with Jordan in any overt act of violence, nor did the latter take part with him in the disturbance which he created by his

drunken misbehavior. This being so, the case falls squarely within the ruling announced in *Tripp v. State*, supra, in which it was held that "where, in a given case, it is shown that while two persons were in company one was guilty of an unlawful act of violence, and the evidence falls to disclose any participation by the other in such act, and there were no circumstances from which a common intent to do the act might be inferred, a conviction cannot lawfully stand." Judgment reversed. All the justices concurring.

(113 Ga. 1035)

DICKERSON v. STATE.

(Supreme Court of Georgia. July 22, 1901.)

CHEATING BY FALSE PRETENSES.

False representations, to be the basis of a prosecution for cheating and swindling, must relate either to the past or the present. No promise or statement as to what may occur in the future, however false, will serve as a basis for such a prosecution.

(Syllabus by the Court.)

Error from criminal court of Atlanta; A. E. Calhoun, Judge.

J. H. Dickerson was convicted of cheating by false pretenses, and brings error. Reversed.

Jas. E. Warren, for plaintiff in error. E. R. Black, for the State.

COBB, J. Dickerson was placed on trial upon an accusation charging him with the offense of cheating and swindling, it being alleged that by deceitful means and artful practices he had cheated and defrauded Siller Smith out of the sum of 75 cents. At the trial it appeared from the evidence that he represented to her that he was the agent of an association organized for the purpose of procuring legislation by congress providing pensions for former slaves. The membership fee in this association was 25 cents, which was to be sent to W. R. Vaughn, to be turned over to him to be used in furthering the passage of a bill which had been introduced into the senate of the United States, providing pensions for former slaves. Upon the faith of these representations she paid to Dickerson 75 cents for three certificates, for herself, her father, and her mother, respectively. There was evidence that the accused had admitted that the money had not been forwarded to Vaughn, but had been used for other purposes, and that he denied that he had anything to do with Vaughn, or had ever said that he had. The jury returned a verdict finding the accused guilty. A motion for a new trial upon the general grounds only having been made and overruled, the accused excepted.

False representations, to be the basis of a prosecution for cheating and swindling, must relate either to the past or the present. Any promise or statement as to what may occur in the future, however false, will not serve

as a basis for such a prosecution, for the reason that the promise is not a pretense. *Holton v. State*, 109 Ga. 129, 34 S. E. 358, and cases cited. If there has been a false representation as to a past or existing fact, the offense of cheating and swindling is complete, notwithstanding there may have been, as a part of the inducement to the person defrauded to part with his money, a promise by the swindler to be performed in the future. *Thomas v. State*, 90 Ga. 437, 16 S. E. 94. In the present case there was evidence that there was such an association as is referred to in the accusation, and the constitution and by-laws of the association were produced. It appeared that the representations in reference to the organization, its business and purposes, were true. The only representation proven to have been false was the statement by the accused that the money would be sent to Vaughn, to be used by him in furthering the passage of the bill which had been introduced in the senate of the United States, providing pensions for former slaves. This statement amounted to nothing more or less than a promise by Dickerson to forward the amount paid to him to Vaughn, to be used by him for the purpose indicated. No representation as to any past or existing fact was contained in this statement. It related exclusively to what was to be done in the future. This being true, and all of the other representations made by the accused having been proven to be true, under the rulings made in the cases above cited, his promise to forward the money to Vaughn, though made for the express purpose of defrauding the prosecutrix out of her money, and with no intention of performance, was not sufficient to authorize the jury to find him guilty of the offense of cheating and swindling. The court should have granted a new trial. Judgment reversed. All the justices concurring.

(113 Ga. 1021)

GEORGIA, S. & F. RY. CO. v. MURRAY.

(Supreme Court of Georgia. July 20, 1901.)

CARRIERS—INJURY TO PASSENGER—EVIDENCE.

The evidence demanding the conclusion that whatever injury the plaintiff sustained was not the result of any negligence on the part of the defendant or its employees, but, rather, of her own negligence or mistake, the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by C. E. Murray against the Georgia, Southern & Florida Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hall & Wimberly, J. E. Hall, and R. C. Jordan, for plaintiff in error. Guerry & Hall, for defendant in error.

LEWIS, J. Mrs. C. E. Murray brought suit for damages against the Georgia Southern &

Florida Railway Company. Briefly stated, her petition was as follows: On March 27, 1900, petitioner boarded a train of the defendant at a station on its line of railroad in Houston county, known as "Welston," intending to return to her home in Bibb county, and the conductor collected from her the amount of her fare from Welston to Macon. At the time she notified the conductor that she desired to leave the train at a point near the limits of the city of Macon known as the "Junction," which is the place where the tracks of the defendant connect with those of another railroad, and the conductor agreed to stop the train at that point for petitioner to get off. The defendant was in the habit of receiving and discharging passengers at the Junction. The train stopped when it reached the point where petitioner desired to leave it, and where the conductor agreed that he would give her an opportunity to leave it, and she attempted to get off; but while she was in the act of stepping from the car, holding in her arms her little grandchild, by whom she was accompanied, the train was suddenly, violently, and rapidly started forward, without any notice to petitioner, and she was thrown violently to the ground, receiving injuries as set forth in the petition, and for which she seeks to recover. The answer of the defendant company was a general denial of all the allegations of the petition, and upon this issue the case went to the jury, who found a verdict for the plaintiff for \$750. The defendant made a motion for a new trial, to the overruling of which it excepts. The motion contains many grounds, but a proper determination of the case requires only that we consider the general grounds,—that the verdict was contrary to law and the evidence. There is some conflict in the testimony of the plaintiff herself as to just where she was on the train when it started forward, and her own words raise a strong suspicion that she was negligent in attempting to alight from the train with a child after the train had started forward. But, be that as it may, the uncontradicted evidence on other points completely defeats her right to a recovery under the evidence as contained in the record. It is claimed by the plaintiff that she asked the conductor to let her off of the train "at the Junction," and the conductor agreed to do so. It was proven that the point at which the plaintiff attempted to alight was more than 100 yards from what was known by the defendant and its employees as the "Junction," where she had asked to be let off, and that the stopping of the train was only momentary, to allow time for a switch to be set. It was plainly her duty to wait, before attempting to get off, until the train reached the point where she had asked to be discharged, or at least until it reached one of the regular places for discharging passengers. Failing in this, she must be held to have assumed the risk of whatever accident befell her. The railroad

company certainly cannot be held responsible for the results of her attempt to alight from the train at a point short of her destination, and distant from any station or stopping place; nor can it be justly held that a momentary stopping of the train for switching purposes was an invitation to her to alight, such as would excuse her negligence. No act of negligence on the part of any of the agents or employes of the defendant company is disclosed by the record. The conductor had no notice that the plaintiff would attempt to alight before reaching the Junction, nor was he chargeable with such notice. Taken all together, the evidence demanded the conclusion that whatever injuries the plaintiff sustained were due to her own fault, rather than to any negligence of the defendant, and the overruling of the motion for a new trial was therefore error. Judgment reversed. All the justices concurring.

(113 Ga. 872)

SMITH v. FERRARIO.

(Supreme Court of Georgia. July 19, 1901.)

PARTNERSHIP—EVIDENCE—DECLARATIONS.

1. Since the fact of the existence of a partnership cannot, as against one denying it, be lawfully shown by declarations of another alleged member of the firm, an instruction which warranted the jury in giving to evidence of this character such an effect was erroneous.

2. Although the evidence in the present case may have required a finding that the plaintiff in error held himself out to the payee of the promissory note sued on as the partner of him who signed the alleged firm name thereto, and there was sufficient evidence to warrant, though the same did not demand, a finding that the payee acted thereon in the transaction represented by such note, yet as it cannot be ascertained whether the verdict in favor of the plaintiff was rendered on the proof of a general partnership, or because of such representations, it must, because of the error above pointed out, be set aside.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action between H. H. Smith and G. Ferrario. From the judgment, Smith brings error. Reversed.

Ohas. T. Hopkins and Danl. W. Rountree, for plaintiff in error. Slaton & Phillips, for defendant in error.

LITTLE, J. A material question of fact raised by the pleadings was whether a partnership existed between plaintiff in error and one A. N. Ivancich, and that question was by the jury determined against the former. He complained in his motion for a new trial that the verdict rendered was contrary to the evidence, and that the judge erred in certain rulings of law, and that he was therefore entitled to a new trial. It is contended on the part of the defendant in error that the evidence was sufficient to show that a partnership did exist between Smith and Ivancich, and, in the event this conclusion was not de-

manded by the evidence, that, as to the defendant in error, Smith is estopped from denying its existence, because of representations made by him to Ferrario that the partnership existed, and that the latter acted upon such representations. After a careful investigation of the evidence contained in the record, we are very clear that the jury trying the issue would have been fully authorized to find the fact to be that a partnership existed. The admissions contained in certain letters written by Smith to Ferrario, copies of which are found in the record, are clear and explicit that such a partnership did exist, and these admissions were of themselves amply sufficient to support such a finding; but it cannot be said that the evidence on this subject, as a whole, demanded such a finding, because Smith himself was a witness in the case, and testified in equally as clear and direct terms that Ivancich was not his partner, that no such partnership ever existed, and that Ferrario knew it. Hence, while the jury would have been authorized to find, under the admissions made, that the partnership existed, they were not compelled to do so. It therefore becomes material to determine whether the trial judge committed any error of importance sufficient to require the verdict to be set aside. It is alleged that he erred in giving to the jury the following charge: "Now, you take all the evidence in the case, gentlemen, and admissions that are before you, and any other evidence that will illustrate the question,—any direct evidence, circumstantial or otherwise; any evidence that will illustrate the question,—and weigh it all, and say whether the evidence shows a partnership existed between Mr. Smith and Mr. Ivancich, as alleged." It is pointed out in this connection that there is evidence contained in the record which, under this charge, the jury were authorized to consider in determining the fact, and which it was improper that they should have considered in determining the question at issue. It appears that the plaintiff himself introduced in evidence letters directed to Ferrario, signed "H. H. Smith & Co.," and written by Ivancich. The general tenor of these letters indicated that a partnership existed between Smith and Ivancich, and they were written in reference to business proposed to be transacted between the respective parties. Certain depositions of a witness, Trapani, also appear in the brief of evidence. He was allowed to testify that, after the execution of the notes sued on, he had a conversation with Ivancich, in which the latter admitted that he had signed the notes as a partner of H. H. Smith & Co., that the notes were given in connection with the business of Smith & Co. in the regular course of business, and that he (Ivancich) had full authority as a partner to sign said notes. Another witness, Mr. O'Byrne, testified that the notes sued on were turned over to the law firm of which he is a member for collection; that, failing to see Mr.

Smith, who was not in Savannah, payment was demanded from Ivancich, a member of the firm, and that Ivancich admitted that he had signed the notes for the firm of H. H. Smith & Co., having the power and authority to do so as a member of the firm, and further stated that H. H. Smith, his partner, knew all about the business transactions in connection with which the notes were given, and that Smith was liable for the payment thereof. So, it will be seen that, in addition to the admissions made by Smith of the existence of the partnership, there was evidence from Ivancich, not as a witness, but as to his saying that a partnership existed between Smith and himself. Certainly, Ivancich would have been a competent witness to testify as to the existence or nonexistence of the partnership. Certainly, too, after the fact that the partnership existed had been established, the sayings of Ivancich that the notes were given in the regular course of business, etc., would have been admissible for the purpose of binding the partnership. But we apprehend that there can be no question that proof of the sayings of Ivancich as to the existence of the partnership were inadmissible. Being in evidence, the effect of these sayings was not limited by the charge of the court. On the contrary, the jury were told to take all the evidence in the case, as well as the admissions,—“any direct evidence, circumstantial or otherwise; any evidence that will illustrate the question,—and weigh it all, and say whether the evidence shows that a partnership existed.” Certainly, these instructions were sufficient to embrace the sayings of Ivancich, which were not admissible for that purpose, and which could not legally have been considered in determining the question whether the partnership existed. Therefore, while it is easy of determination that the admissions which Smith made were amply sufficient to support a finding that a partnership existed, we are not able to say that the finding of the jury was based on these admissions. It may have been based upon the sayings of Ivancich. If so, it ought to be set aside. But inasmuch as the jury were allowed to consider these sayings at all for this purpose, and the admissions of Smith, because of his testimony, did not compel a verdict that the partnership existed, it must be ruled that the charge was error, and materially affected the rights of the defendant.

But the legal proposition is insisted on that whether Smith and Ivancich were partners as to the world in general is immaterial; that, as a matter of fact, they were partners as to Ferrario; and it is claimed that this result must follow, because Smith represented to Ferrario that Ivancich was his partner, and Ferrario acted upon such representations, and that the liability was incurred by reason of transactions which had followed the representations. As said before, there can be no question, under the evidence, that

these representations were distinctly and fully made; and from a careful inspection of certain correspondence which was had between Smith and Ferrario, as appears in the record, we are of the opinion that the jury would have been authorized to find, as a matter of fact, that Ferrario acted upon these representations. But how are we to determine whether the jury found the partnership to have existed generally as matter of fact, or that it existed as to Ferrario because of the representations and his actions thereon? We have endeavored to show that, because of the erroneous charge above referred to, the finding that a general partnership existed should be set aside. It is true that one who represents himself to be a partner of another may, though no partnership in fact existed, be held liable as a partner by a person to whom he so held himself out; but, in order to render himself thus liable, it must appear that such person acted upon the representations that there was a partnership, as well as that his demand grew out of a transaction or transactions based upon this fact. We are free to say that the evidence in this case required a finding that the defendant below held himself out to the payee of the promissory notes sued on as the partner of Ivancich, who signed the alleged firm name thereto, but it does not demand a finding that there was in fact a partnership; and, inasmuch as the finding of the jury was general,—that is, for the plaintiff for a given amount,—it must be a matter of doubt, at least, whether that finding was based on the existence, in their opinion, of a general partnership between the parties; or on the fact that, as to the plaintiff, Smith and Ivancich were partners. It must follow, then, that, because of the error in the charge above pointed out, a new trial must be granted. The other grounds of the motion do not disclose any error of sufficient importance to be specially considered. Judgment reversed. All the justices concurring.

(112 Ga. 1008)

BROOKS et al. v. MILLER.

(Supreme Court of Georgia. July 20, 1901.)

SECOND APPEAL—LAW OF THE CASE.

The facts of this case as reported in 30 S. E. 630, 102 Ga. 712, were not materially changed upon the second trial; and the judgment of the lower court, not being in accordance with the decision rendered when the case was here before, must be reversed.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by C. P. Miller against one Mousseau and others. On the death of Mousseau, Jordan F. Brooks, administrator, was substituted as defendant. Judgment for plaintiff. Defendants bring error. Reversed.

Denmark, Adams & Freeman, for plaintiffs in error. Saussey & Saussey, for defendant in error.

LEWIS, J. This case is reported in 103 Ga. 712, 30 S. E. 630. After the decision there reported, there was a trial, on which the evidence introduced was that contained in the brief of evidence which was before this court at the time that decision was rendered, and certain additional evidence contained in the present record. The defendants contended that, under the evidence and the decision above referred to, a judgment in their favor was demanded; that the contract sued on was made conditional on a division between the co-tenants, and that Miller, the prospective purchaser and the agent of the owners, was to see to a division being made, but took no steps to bring about such a division, and did not propose to do so; and, further, that no evidence had been submitted to prove the damages claimed, or furnish a basis therefor. The judge, to whom the case was submitted to be tried without a jury, rendered a judgment awarding to the plaintiff \$7,379.90, with interest from May 4, 1888, and the defendants excepted.

Where a case rests upon a simple issue of fact, and there is a conflict in the testimony upon the trial, this court will not interfere to settle such an issue. But the judge of the court below in the present case did not, in arriving at his conclusion, properly apply the principle of law laid down when the case was here before. We then based our ruling upon the fact that the letters which evidenced the contract between Miller and Mousseau showed upon their face that the contract for the sale of the land in question was conditional upon a division or partition of the land between the co-tenants, the subject-matter of the sale being the interest of one of the co-tenants after such division, and that the purchaser (the defendant in error in the present case), who was also the agent of the owner, was to see to the division being made. No time was specified within which the division should be made, and the enforcement of the contract depended upon the ability of the purchaser to bring it about. That question was not a simple issue of fact upon a conflict of the evidence, for there was no conflict as to what the contract actually was, and the principle announced was a conclusion of this court as to the construction of that contract. It was therefore purely a question of law, and the decision of this court upon the subject was *res adjudicata* and binding upon the parties below. There is nothing in the additional testimony offered on the second trial to show that Miller took any active steps to bring about a partition of the land in controversy. It clearly appears that, while he was ready at any time to act if he had been appointed an arbitrator by the court, he did nothing to bring about the partition, either by arbitration or by proceedings in court. Mousseau, seeing that nothing had been accomplished that direction, and doubtless believing

that nothing would be accomplished, sold the land. This additional testimony could have been of no benefit whatever to the plaintiff on the trial of the case. On the contrary, it furnished still further proof that he had done nothing whatever to bring about the division, and nothing appeared to indicate that he intended at any time in the future to be active in this direction. In any event, the evidence was not sufficient to show any definite amount in which Miller had been damaged, if he was damaged at all, for it is impossible to determine what price he would have had to pay for the land. He was to pay \$100 per lot after the division, but it seems that there was quite a difference in the value of different portions of the property, and in the division Mousseau's portion or number of lots would have had to be determined according to its value. For these reasons, we think that the judgment of the court below finding in favor of the plaintiff and against the defendants was contrary to the law of the case as heretofore decided, and to the evidence introduced at the trial. Judgment reversed. All the justices concurring.

(113 Ga. 894)

BELT et al. v. SIMKINS et al.

(Supreme Court of Georgia. July 19, 1901.)

LIFE TENANT—WASTE—LIABILITY TO REMAINDER-MAN.

A tenant for life, who holds the estate without impeachment for waste, is not liable at law to a remainder-man for waste committed, though he may be restrained by a court of equity, at the instance of a remainder-man, from committing further acts of waste in the future which are destructive of the inheritance, or of a wanton and malicious nature.

(Syllabus by the Court.)

Error from superior court, Emanuel county; H. D. D. Twiggs, Judge pro hac.

Action by L. J. and C. T. Belt against Simkins & Co. Judgment for defendants, and plaintiffs bring error. Affirmed.

R. L. Gamble, A. Herrington, and F. H. Saffold, for plaintiffs in error. Williams & Williams, for defendants in error.

COBB, J. Mr. Bisham, in his work on the Principles of Equity (6th Ed., § 430), says: "The common-law remedy for waste, as extended by the statutes of Marlbridge and Gloucester, was a writ of waste, in which the thing wasted was forfeited, and damages were recovered. The writ of waste has been abolished in England, and the only common-law remedy which the remainder-man now has is a special action on the case for damages. In many of the United States remedies for waste are given by statute; in some of them the place wasted being forfeited, and damages recovered; in others, the remedy being simply an action for damages." In the case of *Parker v. Chambliss*, 12 Ga. 235,—a case decided in 1852,—it was held that: "A tenant in

dower is liable for waste committed on the estate, but she does not thereby forfeit her estate and treble damages, as provided by the statute of Gloucester. The remedy against her is by an action on the case, in the nature of waste, to recover the actual damage done to the estate, or by an injunction to restrain her from committing waste, when necessary, on a proper case made." In *Dickinson v. Jones*, 36 Ga. 97, it was held that equity would enjoin waste by a life tenant at the instance of a remainder-man. In the opinion Judge Harris takes occasion to say that while in the earlier decisions of the court there were to be found dicta in which doubts were stated as to whether the statute of Gloucester was of force in Georgia, yet, speaking for himself, he would have to regard that statute as being of force until it had been repealed by the general assembly. In *Woodward v. Gates*, 38 Ga. 206, it was ruled that the statute of Gloucester, as to a forfeiture of the estate, was not of force in this state prior to the adoption of the Code, but that since the 1st day of January, 1868, when the first Code went into effect, the provisions of the statute of Gloucester, so far as a forfeiture of the estate as a result of waste was concerned, were of force in Georgia. The provisions of the Code of 1868 referred to are those which are now contained in Civ. Code, § 3090, which reads as follows: "The tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled to the remainder or reversion. For the want of such care, and the willful commission of such acts, he forfeits his interest to the remainder-man, if he elects to claim immediate possession." The section just quoted clearly provides for a forfeiture of the estate by the life tenant as a result of waste, if the remainder-man or reversioner elects to claim immediate possession. There is nothing in the section, however, which makes of force in this state the harsh penalty of treble damages, which was provided for in the statute of Gloucester. Whether or not the remainder-man or reversioner has a right to bring an action at law for damages for waste committed by the life tenant, or whether, under the Code, they are remitted entirely to the remedy given to claim a forfeiture of the estate, is a question which is not necessary to be decided in the present case, as will hereafter appear. One who creates a life estate for the benefit of another, either by deed or by will, may, if he sees proper, provide that the tenant for life shall not be held liable for waste. Such a tenant is characterized as a tenant for life who holds without impeachment for waste. No matter what may be the character of the waste committed, no one interested in the property has a right to call such a tenant into a court of law on account of his conduct. If a particular tenant exer-

cises this power in an unconscientious manner, a court of equity may interfere to restrain him, and a waste committed by such a tenant which would be enjoined by a court of equity is called equitable waste; but a life tenant who holds the estate without impeachment for waste is not liable for acts of waste, except those which are destructive of the inheritance, and wanton and malicious in their character. Bisp. Eq. § 434; 28 Am. & Eng. Enc. Law (1st Ed.) p. 864; 12 Enc. Laws Eng. p. 536; *Dickinson v. Jones*, 36 Ga. 105. Under the terms of the will of L. Carlton Belt, Mrs. Belt was a tenant for life, without impeachment for waste, and she, and those claiming under her, during her lifetime, cannot be called to account in a court of law for any act or conduct on their part in relation to the way in which they are managing or dealing with the estate. This was a sufficient reason for rendering judgment in favor of the defendants, without regard to the question as to whether, under the Code, an action for damages would lie against a life tenant in favor of a remainder-man for waste committed by the former. It is not necessary to determine in the present case whether Mrs. Belt, either as executrix of the will of her husband, or as tenant for life in the property, had the power to sell and dispose of the remainder interest. If she did have this power, her deed to the defendants would convey to them the entire interest in the property, and therefore judgment in their favor was right. If she did not have this power, the defendants would during her lifetime, under a deed from her, have the same rights which she would have; and for this reason, also, a judgment in favor of the defendants would be a proper judgment in the case. Judgment affirmed. All the justices concurring.

(113 Ga. 391)

OVERSTREET et al. v. SULLIVAN et al.
(Supreme Court of Georgia. July 19, 1901.)
DEED—CONSTRUCTION—TRUST—EXECUTION—
ESTATE CONVEYED.

1. By a deed executed in 1864, realty was conveyed to a husband "for the use, benefit, and advantage in trust of [his wife] for life, exempt from the marital rights of [himself or any future husband], for her sole and separate use, and on her decease to such child or children as she may have in life." Held: (a) That the trust for the life tenant was executed by the married woman's law of 1863, or became executed as soon after its enactment as she attained her majority. (b) That no trust at all was created for the children of the life tenant, but that they took, as remainder-men, a legal, and not an equitable, estate.

2. This case as presented is controlled by the ruling above announced, from which it results that the judgment excepted to was erroneous. (Syllabus by the Court.)

Error from superior court, Screven county; B. D. Evans, Judge.

Action by Henry Reddick against W. R. Sullivan and others. From the judgment the executors of Causey Overstreet and others brought error. Reversed.

E. K. Overstreet and Wilson & Rogers, for plaintiffs in error. Oliver & Overstreet, White & Boykin, and E. K. Overstreet, for defendant in error.

LUMPKIN, P. J. On the 5th day of March, 1864, John H. Mercer, of Screven county, the father of Mrs. Susan Ann Conner, conveyed to her husband, John R. Conner, certain realty "for the use, benefit, and advantage in trust of said Susan Ann Conner for life, exempt from the marital rights of said John R. Conner or any future husband said Susan Ann Conner may have, for her sole and separate use, and on her decease to such child or children, or representative of child or children, as she may have in life." Mrs. Conner on January 17, 1893, paid for and obtained a policy insuring for a term of three years the dwelling house situated on the realty so conveyed. She died July 30, 1895. The house was destroyed by fire December 12, 1895. John R. Conner, as temporary administrator of her estate, collected a stated amount from the insurance company. Later he was appointed permanent administrator, and subsequently died. After J. P. Conner and A. B. Conner, who were appointed administrators of his estate, had been removed from their trust, Henry Reddick was appointed administrator de bonis non thereof, and W. R. Sullivan was appointed administrator de bonis non of the estate of Mrs. Conner. Reddick filed an equitable petition to marshal the assets of John R. Conner's estate. The same was submitted to the trial judge for decision without a jury, upon an agreed statement of facts, from which may be gathered what appears above, and in which it was recited that Sullivan, as the representative of Mrs. Conner's estate, "claims against the estate of John R. Conner fifteen hundred and ninety-seven dollars, collected as insurance, as above mentioned, and in addition thereto three hundred dollars for rent of the property above mentioned for the years 1896 and 1897." In the agreed statement of facts the claim of the executors of Causey Overstreet against the estate of John R. Conner, evidenced by a promissory note signed by the intestate, and the claim of Woods & Malone against that estate, evidenced by promissory notes and a mortgage executed by the decedent, were fully set forth. The correctness and justice of these claims were not controverted. It is proper to add that the agreed statement of facts does not fully disclose the terms and conditions of the insurance policy, but apparently it was taken out in the name and for the benefit of Mrs. Conner alone.

On the facts above disclosed, the court adjudged: "(a) That the trust created by the deed from John H. Mercer to John R. Conner, trustee, is an executory trust. (b) That whether John R. Conner, as temporary administrator of Susan A. Conner, had the right to the insurance policy or not, he did have

ht to collect the same as trustee of the

remainder-men under said deed; and having collected the money as administrator, and having actual manual possession of the same, he should have accounted for it as trustee." Upon the foregoing as a foundation, the court further, in substance, adjudged that the demand against the estate of John R. Conner growing out of the collection by him of the insurance money was a debt of the intestate due by him in the fiduciary capacity of trustee, and as such entitled to priority of payment over the demands of the executors of Causey Overstreet and of Woods & Malone. These creditors filed a bill of exceptions, and brought the case to this court for review. In the argument here their counsel insisted that no valid demand of any kind existed against John R. Conner's estate in favor of Sullivan or those he represented. In support of this contention it was argued that, as Mrs. Conner was only a life tenant, her interest in the property which was burned ceased at her death; that, as the fire occurred after that event, her representative had no right to collect anything from the insurance company; that its payment to him was purely gratuitous; and that therefore neither he nor the representative of his estate could be held liable to any one for this "donation" from the company. We cannot undertake to pass upon the merits of this contention, for there is no assignment of error which would warrant our so doing. On the contrary, that portion of the judgment which we have quoted affirmatively discloses that the trial judge did not undertake to pass upon the question whether or not John R. Conner was entitled to collect the policy as administrator, and the entire decision was based upon the proposition that the insurance fund should be treated as having passed into the hands of John R. Conner as trustee under the Mercer deed. Indeed, the bill of exceptions very imperfectly presents the point that the judgment complained of is unlawful because of error in the ruling just referred to, and on which that judgment was actually predicated; but as we are able, from a careful and comprehensive view of all the recitals of the bill of exceptions, to perceive that a decision by us of the question involved in this particular ruling is invoked, we will pass upon it.

As the deed of John H. Mercer was executed in 1864, the trust created in behalf of his daughter for her life was a valid one, but it became executed as to her by the married woman's act of 1866, or as soon after its enactment as she attained her majority. We differ with his honor in holding that John R. Conner ever became "trustee of the remainder-men under said deed." It is clear that the estate thereby created was, as to them, a legal, and not an equitable, one, and that the trust did not attach thereto. The decision in *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791, is controlling on this point, and it has several times been followed. See, for instance, *Allen v. Hughes*, 106 Ga. 775, 32 S. E. 927, and

Brantley v. Porter, 111 Ga. 886, 36 S. E. 970. Carswell v. Lovett, 80 Ga. 36, 4 S. E. 866, is closely in point. The distinction between cases like these and those of Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46, and Riggins v. Adair, 105 Ga. 727, 31 S. E. 743, is obvious. In the Cushman Case the deed under construction expressly provided that the trust should, after the death of the life tenant, continue in force for the benefit of the remaindermen; and in the Riggins Case the trustee was "to have and to hold" the property for the purpose of making a division of it after the termination of the life estate. The deed now before us does not, relatively to the remaindermen, clothe the trustee with any title, or impose upon him the performance of any duty. As the trial judge's construction of this deed was erroneous, the judgment based thereon must, for this reason, if for no other, be set aside. Judgment reversed. All the justices concurring.

(113 Ga. 999)

HARDWICK et al. v. BURKE, Treasurer.

(Supreme Court of Georgia. July 20, 1901.)

FINES—LIEN OF COURT OFFICERS.

The officers of the superior court have no lien or claim, on account of insolvent costs due them in cases transferred from the superior to the county court, upon fines in the county treasury arising in the county court upon other cases transferred from the superior court.

(Syllabus by the Court.)

Error from superior court, Screven county; E. L. Brinson, Judge.

Action by T. W. Hardwick and others against Abraham Burke, treasurer. Judgment for defendant, and plaintiffs bring error. Affirmed.

T. W. Hardwick, B. T. Rawlings, and White & Boykin, for plaintiffs in error. E. K. Overstreet, for defendant in error.

COBB, J. In Overstreet v. Rawlings, 106 Ga. 793, 32 S. E. 855, it was held that it was the duty of the judge of the county court to pay over to the county treasurer amounts collected by the county judge as fines imposed in the county court upon persons convicted of offenses against the criminal law, and that, if the officers of either the superior or the county court had any claim upon the funds derived from this source, it should be asserted against the county treasurer. The present case presents the question as to whether the officers of the superior court have any lien or claim upon funds in the hands of the county treasurer, paid to him by the county judge from fines collected and imposed in the county court in cases transferred from the superior court, for the insolvent costs due such officers in other cases transferred from the superior court. The law provides that the officers of the superior court shall be paid their insolvent costs which have accrued in that court out of the fines

and forfeitures in the county treasury received from the superior court. Pen. Code, § 1092. The law also provides that any officer of the county court having a claim for insolvent costs may present to the county judge an itemized bill of the costs claimed, and when the same is approved and entered on the minutes of the county court, or other book kept for that purpose, the order of approval shall be a warrant on the county treasurer, payable out of the fines and forfeitures arising in the county court. Pen. Code, § 1098. We know of no other law than this which authorizes the county judge to grant an order which would have the effect of a warrant upon the county treasurer for costs due public officers. No person can claim any right under this provision who is not an officer of the county court. It is claimed that the officers of the superior court are, within the meaning of this provision of the law, officers of the county court, so far as their right to claim payment for insolvent costs due them in cases transferred from the superior to the county court are concerned. We do not think the general assembly intended the expression "officer of the county court" to include any other person than one who is directly and officially connected with that court, and we have no authority for saying that they meant officers of the superior court when they have expressly said officers of the county court, and used no language to indicate that any other persons are to be included than those described in the law. It may be that it is a very great hardship upon officers of the superior court not to be allowed to participate in the distribution of the fines and forfeitures arising in the county court from cases transferred from the superior court, but to hold that they did have such right, under the law as it now stands, would, in our opinion, be doing violence both to the letter and spirit of the law. Judgment affirmed. All the justices concurring.

(113 Ga. 1000)

LAFFITTE et al. v. BURKE, Treasurer, et al.

(Supreme Court of Georgia. July 20, 1901.)

PLEADING—SUFFICIENCY—CONSTITUTIONALITY OF ACT.

The question whether a local legislative act passed in 1881 is for any reason unconstitutional is not properly raised by a general statement that "said act is in conflict with the general law of 1877."

(Syllabus by the Court.)

Error from superior court, Screven county; E. L. Brinson, Judge.

Action by T. W. Hardwick and others against Abraham Burke, treasurer. C. Laffitte and others intervene. From the judgment, interveners bring error. Affirmed.

J. W. Overstreet and Spencer R. Atkinson, for plaintiffs in error. E. K. Overstreet, White & Boykin, and T. W. Hardwick, for defendants in error.

they had been convicted, the judge did not err in refusing to grant the relief prayed for, without regard to the question whether they were properly or improperly before the court. Judgment affirmed. All the justices concurring.

EQUITABLE SECURITIES CO. v. GREEN
et al.

SECONDARY EVIDENCE—PRIVILEGED COMMUNICATIONS—EJECTMENT—EVIDENCE—PRIOR CONVEYANCE—NOTICE—KNOWLEDGE OF ATTORNEY—PURCHASE PENDENTE LITE.

2. Before the testimony of an attorney at law can be excluded on the ground that such testimony would divulge privileged communications of his client, it must be shown that the relation of attorney and client existed. This was not shown in the present case.

4. Where a husband conveys land to his wife, and she borrows money and makes a deed to the land to secure the payment of the loan, the husband's knowledge that she claimed the land is not admissible in favor of such grantee of the wife, as against one to whom the husband subsequently conveyed the land.

6. Where, in the second deed made by the husband, he recited that the lands conveyed were "free from all liens except those controlled by" a named person, it was admissible to show that this person had in his hands a judgment lien against the wife at the time of the conveyance. If this person, who was the attorney of the second grantee, controlled the lien against the wife, this would be a circumstance which should go to the jury in order to show that the second grantee and his counsel had notice of the prior conveyance to the wife.

8. One who purchases land of the defendant in an ejectment suit while such suit is pending takes subject to whatever judgment may be rendered in the case. The pendency of the suit is notice to the world, and, where such purchaser is made a party to the suit, it is immaterial whether he had actual notice or not, and the deed to him from the defendant is irrelevant and inadmissible in evidence.

Error from superior court, Crawford county: W. H. Felton, Jr., Judge.

Action between the Equitable Securities Company and John M. Green and others.

From the judgment, the company brings error. Reversed.

Hall & Wimberly, for plaintiff in error.
A. H. Cox, M. G. Bayne, and Guerry & Hall,
for defendants in error.

SIMMONS, G. J. At the very beginning of the trial of this case an error was committed which necessarily affected the rest of the proceedings. Of the numerous questions made in the record, the headnotes deal with all which are likely to arise upon another trial. Complaint was also made of a number of minor rulings which are not referred to in the headnotes, and which are not now decided. For the errors which were committed, a new trial must be ordered. Judgment reversed. All the justices concurring.

(113 Ga. 1063)

SIMS v. SIMS.

(Supreme Court of Georgia. July 23, 1901.)

IMPEACHMENT OF VERDICT—APPEAL—NEW TRIAL.

1. After a verdict has been received and the jury have dispersed, a juror will never be heard to say that he did not agree to the verdict.

2. There was evidence authorizing the verdict. The charges complained of were free from error, the newly-discovered evidence was cumulative, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county;
Z. A. Little, Judge.

Action between S. R. Sims and T. B. Sims. From the judgment, S. R. Sims brings error. Affirmed.

Allen Fort, F. A. Hooper, and B. A. Hawkins, for plaintiff in error. J. T. Hill and Guerry & Hall, for defendant in error.

COBB, J. We do not think it necessary to refer in detail to the numerous grounds of the motion for a new trial. None of the assignments of error in the motion relate to questions which it would be profitable to discuss at length. The case at last turned upon the question whether the proposition made in the letter had been accepted. The plaintiff claimed that it had been accepted in his behalf by his attorney, who was duly authorized to act for him. The defendant denied this, and claimed that the offer had been withdrawn before it was accepted by the plaintiff. Upon this issue the parties went to the jury. There was evidence to sustain either view of the transaction, and the jury have seen fit to decide in favor of the plaintiff. After a careful examination of the motion for a new trial, we cannot say that there was any error which required the granting of a new trial. An effort was made to show that two of the jurors had never agreed to the verdict as rendered. The evidence offered to establish this fact was con-

tained in the affidavits of the two jurors, and, of course, the court properly refused to consider this evidence. See Civ. Code, § 5338, and numerous cases cited thereunder. Judgment affirmed. All the justices concurring.

(113 Ga. 1070)

VINCE v. STATE.

(Supreme Court of Georgia. July 23, 1901.)

OBSTRUCTION OF OFFICER—EVIDENCE.

Merely refusing, upon the demand of a levying officer, to unlock a door of a house in order to enable him to enter the same for the purpose of levying a lawful process upon goods therein contained, is not a violation of section 306 of the Penal Code, which makes it a misdemeanor to "knowingly and willfully obstruct, resist or oppose any officer of this state, or other person duly authorized, in serving, or attempting to serve or execute any lawful process, or order."

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Rosa Vince was convicted of obstructing an officer, and brings error. Reversed.

Akerman & Akerman, for plaintiff in error. F. G. Corker, for the State.

LUMPKIN, P. J. Taking the evidence in this case most strongly against the accused, the state showed nothing more than that she refused to comply with the demand of a constable to unlock the door of her house in order to enable him to enter the same for the purpose of levying a distress warrant upon goods in the house. It does not appear that she did anything which even tended to obstruct the movements of the officer, or in any manner resisted or opposed any effort on his part to enter the house. If, when he arrived, the door had been open, and the accused had shut and locked it to prevent an entrance by the officer, the case would have been different. As it was, when he attempted to make the levy he found the door already locked, and the accused simply declined, on his demand, to open it. In *Davis v. State*, 76 Ga. 721, this court held: "In the statute making it criminal to knowingly and willfully obstruct, resist, or oppose any sheriff, coroner, or other officer of this state, or other person duly authorized, in serving or attempting to serve or execute any lawful process, the word 'obstruct' must be construed with reference to the other words, 'resist or oppose,' which imply force. The crime consists in obstructing, resisting, or opposing an officer, not merely in impeding or defeating the execution of the process with which the officer is armed." The case in hand, upon its facts, falls within the principle embraced in the words just quoted. It affirmatively appears that the accused did not obstruct, resist, or oppose the officer, but, at most, simply refused to give him any assistance in executing the process in his hands. Judgment reversed. All the justices concurring.

(113 Ga. 1054)

LUFBURROW v. EVERETT.

(Supreme Court of Georgia. July 22, 1901.)

SALE OF TIMBER—ACTION FOR PRICE—INJUNCTION.

1. The trial below was conducted without error of law, and a verdict for the plaintiff was demanded by the evidence. The court therefore erred in granting a new trial.

2. The verdict authorized the decree that the court below rendered, rescinding the contract between the parties, restoring the land to the plaintiff, and granting the perpetual injunction prayed for by the petitioner.

(Syllabus by the Court.)

Error from superior court, Effingham county; P. E. Seabrook, Judge.

Action by Caroline Lufburrow against Joel Everett. Verdict for plaintiff. From an order granting a new trial, she brings error. Reversed.

D. H. Clark and Lester & Ravenel, for plaintiff in error. H. B. Strange, for defendant in error.

LEWIS, J. On March 13, 1890, a written contract was executed by Mrs. Caroline Lufburrow and Joel Everett, in which she conveyed to him the timber on a tract of land owned by her. Afterwards, in the same year, he moved his sawmill to the land and began cutting the timber. In 1897 she sued him for \$400 and interest alleged to be due under the contract, and prayed that he be enjoined from cutting timber on the land. The contract stipulated for the conveyance of the timber in consideration of \$600, upon the following terms: Two hundred dollars was to be paid cash, and two notes, each for \$200, were to be given by Everett, the first payable 90 days after Everett's tram road should reach the Central Railroad, which was to be during the same year (1890), and the second payable 90 days after the payment of the first. It was agreed that Everett should have sufficient time to cut the timber off of the land, and that his mill might remain on the land "to cut other timber as he might thereafter have." Everett bound himself to locate his tram road on the tract of land, and to complete it within 90 days after it was so located, "should no providential causes hinder him from so doing." The petition alleged that when the contract was made the defendant told the plaintiff that he intended at once and continuously to engage in a sawmill business, and would not want more than a reasonable and sufficient time in which to cut the suitable sawmill timber from the land, and because of this statement no exact time was stipulated when he should cease cutting and remove from the land, but she then understood and believed that, when he should have remained on the land a sufficient length of time, he would have cut all the merchantable sawmill timber on it, and would give her possession of the land; that he still remains in possession of it, and refuses to allow her to go upon it for turpentine or other purposes, though he has been in

exclusive and uninterrupted possession of it ever since the date of the contract, engaged in cutting the timber, and for a sufficient length of time to have cut and sold all the sawmill timber on the land, and, if he has not cut all the timber, it is his own fault; that he paid her \$200 of the contract price March 13, 1890, but he has never given either of the notes provided for in the contract, nor paid the remaining \$400 due, and refuses to do so, assigning as a reason that he has never built the tram road, and that the contingency has not occurred when he should give the notes or pay the money. The defendant in his answer set up that he had fully complied with the contract as to the payment of the purchase money; that he had paid the plaintiff \$478.30 as purchase money, and had cut only about an eighth of the sawmill timber on the land. He alleged that he put his mill on the land in September, 1890, but, in consequence of heavy rains, could not run his mill or build the tram road contemplated by the contract of March, 1890, and he went to the plaintiff and told her it was impossible for him to comply with the terms of the contract as to the building of the tram road, and she told him it was "all rights;" "to just go ahead and cut the timber, and pay for it as you cut it;" that he acted on this statement, and considered that the contract to build the tram road was at an end; that no time was fixed by the contract in which he was to finish cutting the timber, but he was to have his own time for that purpose, and that from time to time he had been delayed because the land was covered with water; and that he had paid all of the \$600 but \$121.70, which he was willing to pay at the proper time. After the first trial of the case the court granted a new trial. The next trial resulted in a verdict against the defendant, and he made a motion for a new trial, which was granted, and the plaintiff excepted. The verdict consisted of special findings in response to questions submitted, as follows: "Did Mrs. Lufburrow and the defendant, after the execution of the written contract sued upon, enter into an oral agreement with reference to the timber in dispute? No. If they did, did they change the terms of the written contract with reference to the time of paying for and cutting the timber? No. Did Mrs. Lufburrow consent that Everett should cut the timber, and pay for it as he cut it? No. Did she accept payments made by Everett in pursuance of such change? She did accept payments made by Everett, but not in pursuance of any change. What amount of timber has Everett cut from the land in dispute? Between one-eighth and one-fourth. What amount, if any, is Everett due the plaintiff? None. Has Everett had sufficient time, under the facts of the case, to cut the timber? Yes." Where timber is sold in the manner above set out, and no time is specified as to how long the purchaser shall have to cut it, the law allows him a reasonable time for such purpose. This contract

was made in March, 1890, and the defendant took possession of the land, moved his saw-mill upon it, and began cutting timber during the same year. This suit was not brought until 1897. The evidence is overwhelming that he had ample opportunity to finish cutting the timber before that time, and, indeed, he says in his testimony: "I believe I could have cut all the timber easily, with the seasons we have had, and the reason I have not done so was that I had no demand for the lumber." It appears that no attempt was ever made to build the tram road as required by the contract. According to the contention of the defendant, he might hold the land forever, and prevent the owner from obtaining possession of it, although he purchased only the right to cut the timber, and was to have only a reasonable time in which to accomplish that object. It is to be noted that, although the plaintiff sought to recover a money balance alleged and admitted to be due her under the contract, the special verdict of the jury did not allow that claim. She is apparently satisfied with the verdict, however, and only seeks to regain possession of her land, which we think, under the evidence, she has a clear right to do. A verdict in her favor for the land was demanded. No errors requiring the grant of a new trial were committed on the trial.

2. The trial judge entered a decree on the verdict, and it was fully authorized by what the jury had found. He decreed the defendant, his tenants, agents, and assigns, should not have the right to enter upon the land again or get any more of the timber. The temporary injunction he granted before, he made perpetual, and forever enjoined the defendant, his agents and assigns, from trespassing upon the land. The decree further gave the plaintiff permission to enter upon the land at pleasure, and to have the full, quiet, and peaceful possession of the same and the timber thereon. Of course, the effect of the judgment of this court is to set aside the order of the court granting a new trial, and to leave the last verdict of the jury, and the decree of the court rendered thereon, in full force; thus bringing to a final termination all of the issues between the parties. Judgment reversed. All the justices concurring.

(118 Ga. 1074)

CLARKE et al. v. WHEATLEY.

(Supreme Court of Georgia. July 23, 1901.)

INTERVENTION—ACCOUNTING—TENDER BY DEFENDANT.

1. It is not the right of a stranger to a pending cause to intervene therein, unless it is necessary to his protection that he be allowed to become a party to the litigation, and thus afforded an opportunity to resist the rendition of a judgment which would operate to his prejudice.

2. One who, though acting in entire good faith, illegally disposes of property belonging to another, is liable to account therefor; and

if, under any circumstances, he has an equitable right to demand that his unauthorized disposition of such property be ratified, he must at least make a proper tender of the proceeds arising therefrom, and assume the burden of showing that the value of the property was not greater than the amount realized therefor. (a) The decree entered by the court in the present case being more favorable to the losing party than he had any right to expect, it affords him no just cause for complaint.

(Syllabus by the Court.)

Error from superior court, Sumter county; E. J. Reagan, Judge.

Equitable petition by T. Wheatley, receiver, against W. F. Clarke and others. Certain banks filed a petition for intervention. Order refusing to allow them to intervene, and they bring error. Affirmed.

W. F. Clarke, W. M. Hawkes, and Bacon, Miller & Brunson, for plaintiffs in error. Allen Fort and W. P. Wallis, for defendant in error.

LUMPKIN, P. J. This court at its March term, 1890, in the case of Clarke v. Ingram, rendered a decision declaring that a conveyance which had been made by the Bank of Americus to W. W. Flannagan, a nonresident of this state, as trustee for three other banks in that conveyance named, was void. See 107 Ga. 565, 33 S. E. 802. For convenience, we will hereinafter refer to this conveyance as the "deed of trust," and to the three banks for whose benefit it was executed as the "foreign banks." The opinion filed in that case sets forth in full the nature of the litigation upon which the decision mentioned arose. Before it was announced, Flannagan, while assuming to act as trustee, and W. F. Clarke, who, upon Flannagan's resignation as such, had been appointed trustee in his stead, made divers collections of money upon choses in action belonging to the Americus bank, which had come into their hands under the deed of trust, and also sold to various persons much of the property which that deed purported to convey to Flannagan, as trustee. Shortly after the remittitur from this court had been entered in the court below, Thornton Wheatley, the receiver of the Americus bank, filed in that court an equitable petition in which Clarke was named as the sole defendant. This petition set forth a history of the litigation which had been had in the original case, stated the result thereof as above indicated, and contained prayers for direction, and for an accounting and settlement by Clarke for and in respect of all the assets which had come into his hands as the successor of Flannagan in the alleged trust. The receiver subsequently filed an amendment to his petition wherein he prayed "the court to grant an order authorizing him to institute suits to recover the property specified in the" deed of trust "which had not come into his hands as receiver, and to give him such instructions as directions in the premises" as might

proper. Clarke filed an answer in which he undertook to set forth a full report of all his actings and doings while assuming to act as trustee. This report disclosed what assets of the Americus bank had been turned over to him by Flannagan, what sums of money had been realized therefrom, and the disbursements which had been made out of the fund thus arising, etc. By way of defense, Clarke alleged that he had in good faith made collections upon divers choses in action coming into his hands as trustee, and had sold certain property, both real and personal, described in the deed of trust, and therefore was not in a position to turn over to the receiver all of the assets of the Americus bank which had come into his possession as trustee. He undertook to assert in this connection that as the sales of property made by himself and Flannagan were fairly conducted, and the sums of money thereby realized represented the highest price for which the property could have been sold, it was "to the interest of all parties that the acts of said trustees in making sales and collections under said trust deed should be solemnly decreed by the court to be ratified and confirmed, so as to quiet the titles of the various purchasers, and promptly set at rest all question of litigation concerning the same." By way of conclusion, Clarke further alleged that he was "ready to account for all property and moneys that have come into his hands, and has been ready and willing to come to a prompt settlement with said receiver from the time he was advised of the decision of the supreme court in this cause; but the said receiver has never called upon him for such settlement, unless this petition, which is a wholly unnecessary proceeding, is to be so regarded." The only specific prayer contained in Clarke's answer was in the following words: "And, having fully answered, respondent prays that he be hence discharged." To this answer Wheatley, the receiver, demurred upon the following grounds: "First. There is no tender into court of any of the proceeds realized from the sale of the real estate or the collections of the choses in action, * * * and the trustee has no right to ask that the collections of money from the sale of real and personal property and choses in action be withheld, and the disposition thereof be confirmed by the court. Second. The answer and response are wholly insufficient in law and equity," in that "the respondent does not propose to do equity in order to have his acts and conduct ratified in the premises; equity requiring immediate surrender of any and all assets, or the proceeds thereof, which have passed through his hands or his predecessor's hands, before confirmation of his actings and doings in the premises. Third. His report shows that the larger part of the assets realized out of the assets derived from the Bank of Americus are in the hands of the beneficiaries mentioned in the deed of trust,

who are nonresidents, and that the said assets are not proposed to be subject to the jurisdiction of the court." Before the case came on for trial, the foreign banks presented to the court a petition, in the nature of an intervention, praying that they be made parties, and that they be granted certain relief, to which, for reasons assigned, they alleged they were entitled. After characterizing their petition as an "intervention in the nature of an answer to the above-mentioned petition of said receiver," they proceeded to state that: "Your respondents hereby adopt the answer of their co-respondent, W. F. Clarke, so far as the same is pertinent to this, their answer." The averments therein set forth were, in substance, as follows: The receiver has no right to proceed against Clarke for an accounting and settlement, since, as is fully shown by his report, "there has been no sale made and no collection made under the terms of said trust deed that is attacked * * * or is sought to be set aside and canceled on any grounds whatever." On the contrary, "all the acts of said Clarke and his predecessor, Flannagan, as disclosed by the report attached to said Clarke's answer, have been in an economical and orderly administration of said trust, and have been a prudent and skillful realization of funds from" the assets of the Americus bank; and accordingly "the acts of said Clarke and Flannagan should, in the interest of all parties in this litigation, be ratified" and confirmed by the court. "The said Thornton Wheatley, receiver, has in his possession money and other assets which were never covered by the said trust deed, and which should be fully reported to the court, with an accurate estimate of the value thereof, before any order or judgment is passed under the receiver's petition"; and he "should be required, before such judgment is rendered, to come to a settlement with the said W. F. Clarke, receiving from him all the money and the assets now in his hands which have not been paid over to these respondents as the beneficiaries under the said trust deed, which unadministered assets are fully shown by his report, and said receiver should then report such assets to the court, with an accurate estimate of the value thereof. Or these defendants submit that even a better course to be pursued would be for the said receiver, under the order of the court, to convert all such assets into cash, and then report the same to the court, before any order or decree is rendered upon the said receiver's petition." The court should then "finally determine and fix the various allowances to be made to the receiver and the counsel in this case, and ascertain the court costs and all other expenses of administration, so as to know the aggregate amount thereof to be paid out of the said funds." The court should also undertake to "ascertain the various amounts that have been received by these respondents upon their respective claims

arising from the properties covered by said trust deed, so as to definitely ascertain the percentage or proportion of the credits that the respondents have heretofore received from said source." They "have received, approximately, seventeen thousand dollars through the hands of Flannagan and Clarke, trustees, which amounts have been entered as credits upon their respective claims; and they now and here propose to submit to the court, for the most careful scrutiny and examination, the entire transactions of the said Flannagan, former trustee, and of said Clarke, showing the sales and collections made, the disbursements of necessary expenses, and the actual amount paid over to these respondents as a credit upon their respective claims. Respondents submit that this examination should be had and the respective amounts determined before the prayers of the receiver's petition should be allowed by the court. Respondents further aver that the funds which will be in the said receiver's hands after all the unadministered assets described above have been converted into money will be sufficient, even after allowing reasonable compensation to the various officers and counsel, to pay to the general creditors, other than these respondents, an amount sufficient to make that class of creditors equal, in the pro rata amounts received upon their respective debts, to these respondents," and therefore no "decree should be rendered upon said receiver's petition, either authorizing him to repudiate the sales and collections made by the said trustees and bring suit to recover the said assets, or * * * requiring these respondents to pay back into the said receiver's hands the said sum of seventeen thousand dollars received by them as above stated, until the said receiver shall make it affirmatively appear to the court by competent evidence that the funds in his hands after a full settlement with W. F. Clarke, trustee, will not be sufficient to equalize with these respondents those creditors who have not yet received any payments upon their demands." In the event the receiver should, "upon the hearing of his said petition, show to the court that the funds in his hands are not sufficient for the purpose above recited, then he should" be required to further show "the extent of said deficiency, and what amount it was necessary for these respondents to refund or repay to him as receiver in order to equalize the class of creditors above described; and the court should then, in its decree upon his said petition, require these respondents to pay over to the said receiver only such amount as would be required for the purpose just named." The estimates of value placed upon "the properties covered by said trust deed" at the time it was executed "were in many instances fictitious," these properties not being, in point of fact, "at any time worth the large sum which they were originally rated at." On the contrary, "the said Clarke's report is the highest and

best proof of the actual values of said properties, as appears from the amounts realized therefrom." Following the foregoing allegations was a prayer on the part of the foreign banks "that all of the steps above outlined by them in regard to ascertaining the true funds in the receiver's hands from all of the assets of" the Americus bank "be all had and taken before any decree" was entered by the court, and that "the relief claimed by them above be granted." The trial judge, after hearing argument from them as to their right to become parties to the litigation with a view to securing the relief sought, refused to allow them to intervene; and to this ruling they excepted. He thereupon sustained the demurrer to the answer filed by Clarke, and entered a decree in favor of the receiver. Being dissatisfied with the disposition thus made of the case, Clarke also excepted. We shall first direct our attention to the complaint made by the foreign banks that the court erred in not allowing them to intervene, and then dispose of the questions presented by the assignments of error upon which Clarke relies.

1. At the time Wheatley, as receiver, commenced proceedings against Clarke, it had already been finally adjudicated, not only as against him, but also as against the three foreign banks, that the deed of trust above referred to was an absolute nullity. As a result of this adjudication, Clarke became liable to account for all the assets of the Americus bank which had come into his hands while assuming to act as trustee for the foreign banks. The receiver, as the representative of the creditors at whose instance this instrument was set aside, was under as positive duty to recover, if possible, the illegally scattered assets of the Americus bank, including those which passed into the possession of Clarke, and for which he had failed to account. It was unquestionably proper for the receiver to endeavor to compel Clarke, as well as all others who had unlawfully acquired property belonging to that bank, to make prompt and full restitution. This the receiver was seeking to do when the foreign banks undertook to interpose and tie his hands. They were, it is true, creditors of the Americus bank, and as such had a right to object to the receiver's taking steps which would operate to the prejudice of its unsecured creditors. But, as has been seen, the receiver was simply endeavoring to discharge his positive duty in the premises; and the proceeding instituted by him was, beyond all question, not only proper, but essential to the protection of such creditors. Certain it is that the foreign banks failed signally to disclose any reason for apprehending that they, in their capacity of creditors, would be prejudiced in the event Clarke was made to account for property which had been illegally disposed of by him. Any suggestion that it might be would seem to be wholly with

foundation. As matter of fact, they did not make any such claim. On the contrary, it was solely in their capacity as beneficiaries under the deed of trust that they asserted a right to intervene in the pending cause and arrest the action of the court upon the receiver's petition. They were nonresidents. He was not seeking to recover the money which had been turned over to them by Clarke, and no judgment against him could possibly affect their rights. This being so, it was not necessary to their protection that they should be allowed to become parties to the litigation; and, of course, it was not their privilege, as mere volunteers, to champion the cause of Clarke, and lend him aid and comfort in his contest with the receiver. There is no force whatever in the argument that if judgment were rendered against Clarke, and he should be compelled to make restitution, he would have a right of action against the foreign banks to recover the money he had, while acting as their trustee, improperly paid over to them. If Clarke failed to interpose a proper defense, and suffered judgment to be rendered against him upon a demand which he might have successfully resisted, these foreign banks would be in a position to assert that they could not justly be called upon to reimburse him for any loss thus sustained. On the other hand, if he should rightly be held to account for the assets coming into his hands, the proceeds of which he had in good faith, though improperly, delivered to them, they should, without forcing him to litigate further, restore to him the funds thus received by them. Our conclusion therefore is that the proposed intervention presented in behalf of the foreign banks amounted to neither more nor less than an effort on their part to force the receiver, against his will, to sue them for \$17,000, to no other end than that they might thus be afforded an opportunity to interpose the wholly untenable defense that he had no right to recover any portion of that sum without showing that, as debtors, they were liable for an amount in excess of that which they, as unsecured creditors, would, on a final distribution among all creditors of the funds realized by the receiver from the assets of the insolvent Americus bank, ultimately be entitled to receive upon the claims which they held against it. Under the circumstances disclosed, the receiver certainly had the privilege of declining to bring a suit against the foreign banks, however much the latter may have desired the institution thereof.

2. The defense relied on by Clarke was nothing short of remarkable. It was apparently based upon the theory that as he had, while assuming to act in behalf of the foreign banks, been faithful to the trust imposed upon him by the deed executed in their favor, he could not be legally called upon to account to the receiver for the misapplied assets of the Americus bank, notwithstanding

ing that deed had been by the court declared wholly inoperative and void as against the creditors who prevailed in their effort to have it set aside. In framing his answer, Clarke seems to have totally ignored the fact that, by reason of his alleged faithfulness as trustee, the major portion of the assets of that bank were illegally disposed of, and the proceeds arising therefrom carried beyond the jurisdiction of the court, and placed in the hands of parties not entitled to receive the same. That the creditors in whose behalf the receiver sought to recover these assets, or the proceeds thereof, were dissatisfied with the disposition made by Clarke of property belonging to the insolvent bank which had been unlawfully delivered to him, does not afford cause for surprise. Whether or not he had been faithful to the foreign banks was a matter as to which these creditors had no concern. He was not called upon by the receiver to answer in what manner he had performed his duty as a trustee. On the contrary, he was called upon, as a person whom the court had characterized as one who had without any shadow of authority intermeddled with the affairs of the Americus bank, to account for assets belonging to it, of which he had wrongfully acquired possession. He was, beyond the possibility of doubt, liable for all the assets of the bank thus coming under his control. While it was proper for him to state in his answer that it was not within his power to restore all of these assets, he clearly had no right to ask that the court ratify and confirm his unauthorized disposition thereof, without at least offering to pay into the registry of the court the proceeds arising from the same, and assuming the burden of showing that the property disposed of by him did not exceed in value the amount realized thereon. When, by way of demurrer to his answer, his attention was called to the fact that he had omitted to come up to this reasonable requirement, he displayed no disposition to do equity, and thereby forced the court to hold that there was no merit in the defense which he sought to interpose. It appears that when the case came on to be heard the receiver elected to take the assets of the Americus bank which still remained in the hands of Clarke, but "not to confirm the sale of the real and personal property or the collection of the choses in action" made by him or by Flannagan. Accordingly the court, in framing its decree, merely imposed upon Clarke the duty of surrendering possession of such only of the assets of that bank which he in his answer admitted were still in his hands, and expressly provided that he should not be called upon to account for "any proceeds derived from the sale of any of the real estate made by" him or by Flannagan. It will thus be seen that, relatively to the receiver, Clarke practically escaped all liability growing out of his unauthorized disposition of property

which was the subject-matter of controversy. Nevertheless he complains that the court further provided in its decree that the receiver should proceed against all other persons who held adversely to him assets of the Americus bank which were subject to the claims of its creditors. This direction to the receiver was, Clarke contends, "erroneous, in that it makes him personally liable to all persons from whom he has made collections of money under the trust deed, whether in making sales or in collecting the choses in action." The reply to this contention is that one who, with however much good faith, undertakes to sell or otherwise deal with property which does not belong to him, cannot reasonably hope to escape liability if, because of his unauthorized acts in relation thereto, innocent parties are made to suffer loss. Judgment affirmed. All the justices concurring.

(113 Ga. 1027)

BANK OF LAWRENCEVILLE v. JONES.

(Supreme Court of Georgia. July 20, 1901.)

MONEY PAID FOR DEFENDANT—EVIDENCE.

An action for money alleged to have been paid by the plaintiff upon the defendant's order, and for the latter's use, is not sustained by evidence showing that no such order was ever given or paid.

(Syllabus by the Court.)

Error from city court of Gwinnett county; Sam J. Winn, Judge.

Action by D. C. Jones against the Bank of Lawrenceville. Judgment for plaintiff. Defendant brings error. Reversed.

T. M. Peeples and C. H. Brand, for plaintiff in error. N. L. Hutchins, Jr., for defendant in error.

LUMPKIN, P. J. An ordinary action upon an open account was brought by D. C. Jones against the Bank of Lawrenceville. The copy of the account attached to the plaintiff's petition was as follows:

Bank of Lawrenceville, Dr., to D. C. Jones.	
1899. Aug. 17. To balance due on Int.	
Rev. Stamps paid by D. C. Jones, as	
per order of bank, June 27, 1898....	\$20 00
Interest to date.....	1 44
	<hr/> \$21 44

The defendant answered, denying indebtedness to the plaintiff. It appeared at the trial that the bank addressed to H. A. Rucker, United States collector of internal revenue at Atlanta, Ga., a written order for revenue stamps of certain denominations therein designated. Accompanying this order was cash to the amount of \$101.08. The evidence in behalf of the plaintiff showed that he was a clerk in the collector's office, and that in pursuance of his duties as such clerk he undertook to fill the order, and transmit the stamps to the bank. The testimony introduced by him also tended to show that the order really covered stamps to the value of \$121.08, that

he by mistake forwarded to the bank stamps amounting in value to the sum last mentioned, and that he was subsequently required by the government to pay the shortage of \$20. The evidence in behalf of the defendant tended to show that it actually received only \$101.08 worth of stamps. There was a verdict for the plaintiff. A motion for a new trial was made by the bank, which was overruled, and it excepted.

The sole question presented for our decision is whether or not the evidence, taken most favorably for the plaintiff, warranted the verdict. We are clearly of the opinion that it did not. The action was predicated upon the theory that the bank, being indebted to the government a balance of \$20 for stamps sold and delivered to it, ordered or requested Jones to pay this balance; that he accordingly did so; and that the bank thus became indebted to him for money laid out and expended for its use and by its direction. His proof affirmatively showed that no such order was ever given or payment made, but that he improvidently sent to the bank stamps belonging to the United States government, which had not been paid for, and that it held him, in his capacity as a mere servant of its internal revenue collector, accountable for the consequences of his mistake. It is obvious, therefore, that there was a fatal variance between the allegata and the probata, and it follows that the trial judge erred in not setting the verdict aside. Judgment reversed. All the justices concurring.

(113 Ga. 1045)

CENTRAL OF GEORGIA RY. CO. v. GRADY.

(Supreme Court of Georgia. July 22, 1901.)

INSTRUCTIONS—ABSTRACT PROPOSITIONS—INJURY TO EMPLOYE—ACT OF GOD.

1. Requests to charge, which assume the truth of one side or the other of a controverted question of fact, are properly refused.

2. When a charge sufficiently covers all of the material issues involved, failure to give specific instructions on a particular point is not cause for a new trial; nor is an unimportant inaccuracy in stating to the jury the contentions of the losing party.

3. A charge embracing an abstractly correct and pertinent principle of law is not rendered erroneous by a failure to charge some other legal principle applicable to the case.

4. There was in the present case sufficient evidence to support the verdict, both as to liability and amount.

(Syllabus by the Court.)

Error from superior court, Washington county; B. D. Evans, Judge.

Action by Hugh Grady against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. O'Connor, O'Byrne & Hartridge and Twigg & Oliver, for defendant in error.

LUMPKIN, P. J. On March 31, 1897, a washout occurred on the line of the Central

LEWIS, J. This case is reported in 103 Ga. 712, 30 S. E. 630. After the decision there reported, there was a trial, on which the evidence introduced was that contained in the brief of evidence which was before this court at the time that decision was rendered, and certain additional evidence contained in the present record. The defendants contended that, under the evidence and the decision above referred to, a judgment in their favor was demanded; that the contract sued on was made conditional on a division between the co-tenants, and that Miller, the prospective purchaser and the agent of the owners, was to see to a division being made, but took no steps to bring about such a division, and did not propose to do so; and, further, that no evidence had been submitted to prove the damages claimed, or furnish a basis therefor. The judge, to whom the case was submitted to be tried without a jury, rendered a judgment awarding to the plaintiff \$7,879.90, with interest from May 4, 1888, and the defendants accepted.

Where a case rests upon a simple issue of fact, and there is a conflict in the testimony upon the trial, this court will not interfere to settle such an issue. But the judge of the court below in the present case did not, in arriving at his conclusion, properly apply the principle of law laid down when the case was here before. We then based our ruling upon the fact that the letters which evidenced the contract between Miller and Mousseau showed upon their face that the contract for the sale of the land in question was conditional upon a division or partition of the land between the co-tenants, the subject-matter of the sale being the interest of one of the co-tenants after such division, and that the purchaser (the defendant in error in the present case), who was also the agent of the owner, was to see to the division being made. No time was specified within which the division should be made, and the enforcement of the contract depended upon the ability of the purchaser to bring it about. That question was not a simple issue of fact upon a conflict of the evidence, for there was no conflict as to what the contract actually was, and the principle announced was a conclusion of this court as to the construction of that contract. It was therefore purely a question of law, and the decision of this court upon the subject was *res adjudicata* and binding upon the parties below. There is nothing in the additional testimony offered on the second trial to show that Miller took any active steps to bring about a partition of the land in controversy. It clearly appears that, while he was ready at any time to act if he had been appointed an arbitrator by the court, he did nothing to bring about the partition, either by arbitration or by proceedings in court. Mousseau, seeing that nothing had been accomplished in that direction, and doubtless believing

that nothing would be accomplished, sold the land. This additional testimony could have been of no benefit whatever to the plaintiff on the trial of the case. On the contrary, it furnished still further proof that he had done nothing whatever to bring about the division, and nothing appeared to indicate that he intended at any time in the future to be active in this direction. In any event, the evidence was not sufficient to show any definite amount in which Miller had been damaged, if he was damaged at all, for it is impossible to determine what price he would have had to pay for the land. He was to pay \$100 per lot after the division, but it seems that there was quite a difference in the value of different portions of the property, and in the division Mousseau's portion or number of lots would have had to be determined according to its value. For these reasons, we think that the judgment of the court below finding in favor of the plaintiff and against the defendants was contrary to the law of the case as heretofore decided, and to the evidence introduced at the trial. Judgment reversed. All the justices concurring.

(113 Ga. 894)

BELT et al. v. SIMKINS et al.
(Supreme Court of Georgia. July 19, 1901.)
LIFE TENANT—WASTE—LIABILITY TO REMAINDER-MAN.

A tenant for life, who holds the estate without impeachment for waste, is not liable at law to a remainder-man for waste committed, though he may be restrained by a court of equity, at the instance of a remainder-man, from committing further acts of waste in the future which are destructive of the inheritance, or of a wanton and malicious nature.

(Syllabus by the Court.)

Error from superior court, Emanuel county; H. D. D. Twiggs, Judge pro hac.

Action by L. J. and C. T. Belt against Simkins & Co. Judgment for defendants, and plaintiffs bring error. Affirmed.

R. L. Gamble, A. Herrington, and F. H. Saffold, for plaintiffs in error. Williams & Williams, for defendants in error.

COBB, J. Mr. Bispham, in his work on the Principles of Equity (6th Ed., § 430), says: "The common-law remedy for waste, as extended by the statutes of Marlbridge and Gloucester, was a writ of waste, in which the thing wasted was forfeited, and damages were recovered. The writ of waste has been abolished in England, and the only common-law remedy which the remainder-man now has is a special action on the case for damages. In many of the United States remedies for waste are given by statute; in some of them the place wasted being forfeited, and damages recovered; in others, the remedy being simply an action for damages." In the case of *Parker v. Chambliss*, 12 Ga. 235,—a case decided in 1852,—it was held that: "A tenant in

dower is liable for waste committed on the estate, but she does not thereby forfeit her estate and treble damages, as provided by the statute of Gloucester. The remedy against her is by an action on the case, in the nature of waste, to recover the actual damage done to the estate, or by an injunction to restrain her from committing waste, when necessary, on a proper case made." In *Dickinson v. Jones*, 36 Ga. 97, it was held that equity would enjoin waste by a life tenant at the instance of a remainder-man. In the opinion Judge Harris takes occasion to say that while in the earlier decisions of the court there were to be found dicta in which doubts were stated as to whether the statute of Gloucester was of force in Georgia, yet, speaking for himself, he would have to regard that statute as being of force until it had been repealed by the general assembly. In *Woodward v. Gates*, 38 Ga. 205, it was ruled that the statute of Gloucester, as to a forfeiture of the estate, was not of force in this state prior to the adoption of the Code, but that since the 1st day of January, 1868, when the first Code went into effect, the provisions of the statute of Gloucester, so far as a forfeiture of the estate as a result of waste was concerned, were of force in Georgia. The provisions of the Code of 1868 referred to are those which are now contained in Civ. Code, § 3090, which reads as follows: "The tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled to the remainder or reversion. For the want of such care, and the willful commission of such acts, he forfeits his interest to the remainder-man, if he elects to claim immediate possession." The section just quoted clearly provides for a forfeiture of the estate by the life tenant as a result of waste, if the remainder-man or reversioner elects to claim immediate possession. There is nothing in the section, however, which makes of force in this state the harsh penalty of treble damages, which was provided for in the statute of Gloucester. Whether or not the remainder-man or reversioner has a right to bring an action at law for damages for waste committed by the life tenant, or whether, under the Code, they are remitted entirely to the remedy given to claim a forfeiture of the estate, is a question which is not necessary to be decided in the present case, as will hereafter appear. One who creates a life estate for the benefit of another, either by deed or by will, may, if he sees proper, provide that the tenant for life shall not be held liable for waste. Such a tenant is characterized as a tenant for life who holds without impeachment for waste. No matter what may be the character of the waste committed, no one interested in the property has a right to call such a tenant into a court of law on account of his conduct. If a particular tenant exer-

cises this power in an unconscientious manner, a court of equity may interfere to restrain him, and a waste committed by such a tenant which would be enjoined by a court of equity is called equitable waste; but a life tenant who holds the estate without impeachment for waste is not liable for acts of waste, except those which are destructive of the inheritance, and wanton and malicious in their character. Bisp. Eq. § 434; 28 Am. & Eng. Enc. Law (1st Ed.) p. 864; 12 Enc. Laws Eng. p. 536; *Dickinson v. Jones*, 36 Ga. 105. Under the terms of the will of L. Carlton Belt, Mrs. Belt was a tenant for life, without impeachment for waste, and she, and those claiming under her, during her lifetime, cannot be called to account in a court of law for any act or conduct on their part in relation to the way in which they are managing or dealing with the estate. This was a sufficient reason for rendering judgment in favor of the defendants, without regard to the question as to whether, under the Code, an action for damages would lie against a life tenant in favor of a remainder-man for waste committed by the former. It is not necessary to determine in the present case whether Mrs. Belt, either as executrix of the will of her husband, or as tenant for life in the property, had the power to sell and dispose of the remainder interest. If she did have this power, her deed to the defendants would convey to them the entire interest in the property, and therefore judgment in their favor was right. If she did not have this power, the defendants would during her lifetime, under a deed from her, have the same rights which she would have; and for this reason, also, a judgment in favor of the defendants would be a proper judgment in the case. Judgment affirmed. All the justices concurring.

(113 Ga. 891)

OVERSTREET et al. v. SULLIVAN et al.
(Supreme Court of Georgia. July 19, 1901.)

DEED—CONSTRUCTION—TRUST—EXECUTION—ESTATE CONVEYED.

1. By a deed executed in 1864, realty was conveyed to a husband "for the use, benefit, and advantage in trust of [his wife] for life, exempt from the marital rights of [himself or any future husband], for her sole and separate use, and on her decease to such child or children as she may have in life." Held: (a) That the trust for the life tenant was executed by the married woman's law of 1866, or became executed as soon after its enactment as she attained her majority. (b) That no trust at all was created for the children of the life tenant, but that they took, as remainder-men, a legal, and not an equitable, estate.

2. This case as presented is controlled by the ruling above announced, from which it results that the judgment excepted to was erroneous. (Syllabus by the Court.)

Error from superior court, Screven county; B. D. Evans, Judge.

Action by Henry Reddick against W. R. Sullivan and others. From the judgment the executors of Causey Overstreet and others brought error. Reversed.

E. K. Overstreet and Wilson & Rogers, for plaintiffs in error. Oliver & Overstreet, White & Boykin, and E. K. Overstreet, for defendant in error.

LUMPKIN, P. J. On the 5th day of March, 1864, John H. Mercer, of Screven county, the father of Mrs. Susan Ann Conner, conveyed to her husband, John R. Conner, certain realty "for the use, benefit, and advantage in trust of said Susan Ann Conner for life, exempt from the marital rights of said John R. Conner or any future husband said Susan Ann Conner may have, for her sole and separate use, and on her decease to such child or children, or representative of child or children, as she may have in life." Mrs. Conner on January 17, 1893, paid for and obtained a policy insuring for a term of three years the dwelling house situated on the realty so conveyed. She died July 30, 1895. The house was destroyed by fire December 12, 1895. John R. Conner, as temporary administrator of her estate, collected a stated amount from the insurance company. Later he was appointed permanent administrator, and subsequently died. After J. P. Conner and A. B. Conner, who were appointed administrators of his estate, had been removed from their trust, Henry Reddick was appointed administrator de bonis non thereof, and W. R. Sullivan was appointed administrator de bonis non of the estate of Mrs. Conner. Reddick filed an equitable petition to marshal the assets of John R. Conner's estate. The same was submitted to the trial judge for decision without a jury, upon an agreed statement of facts, from which may be gathered what appears above, and in which it was recited that Sullivan, as the representative of Mrs. Conner's estate, "claims against the estate of John R. Conner fifteen hundred and ninety-seven dollars, collected as insurance, as above mentioned, and in addition thereto three hundred dollars for rent of the property above mentioned for the years 1896 and 1897." In the agreed statement of facts the claim of the executors of Causey Overstreet against the estate of John R. Conner, evidenced by a promissory note signed by the intestate, and the claim of Woods & Malone against that estate, evidenced by promissory notes and a mortgage executed by the decedent, were fully set forth. The correctness and justice of these claims were not controverted. It is proper to add that the agreed statement of facts does not fully disclose the terms and conditions of the insurance policy, but apparently it was taken out in the name and for the benefit of Mrs. Conner alone.

On the facts above disclosed, the court adjudged: "(a) That the trust created by the deed from John H. Mercer to John R. Conner, trustee, is an executory trust. (b) That whether John R. Conner, as temporary administrator of Susan A. Conner, had the right to collect the insurance policy or not, he did have the right to collect the same as trustee of the

remainder-men under said deed; and having collected the money as administrator, and having actual manual possession of the same, he should have accounted for it as trustee." Upon the foregoing as a foundation, the court further, in substance, adjudged that the demand against the estate of John R. Conner growing out of the collection by him of the insurance money was a debt of the intestate due by him in the fiduciary capacity of trustee, and as such entitled to priority of payment over the demands of the executors of Causey Overstreet and of Woods & Malone. These creditors filed a bill of exceptions, and brought the case to this court for review. In the argument here their counsel insisted that no valid demand of any kind existed against John R. Conner's estate in favor of Sullivan or those he represented. In support of this contention it was argued that, as Mrs. Conner was only a life tenant, her interest in the property which was burned ceased at her death; that, as the fire occurred after that event, her representative had no right to collect anything from the insurance company; that its payment to him was purely gratuitous; and that therefore neither he nor the representative of his estate could be held liable to any one for this "donation" from the company. We cannot undertake to pass upon the merits of this contention, for there is no assignment of error which would warrant our so doing. On the contrary, that portion of the judgment which we have quoted affirmatively discloses that the trial judge did not undertake to pass upon the question whether or not John R. Conner was entitled to collect the policy as administrator, and the entire decision was based upon the proposition that the insurance fund should be treated as having passed into the hands of John R. Conner as trustee under the Mercer deed. Indeed, the bill of exceptions very imperfectly presents the point that the judgment complained of is unlawful because of error in the ruling just referred to, and on which that judgment was actually predicated; but as we are able, from a careful and comprehensive view of all the recitals of the bill of exceptions, to perceive that a decision by us of the question involved in this particular ruling is invoked, we will pass upon it.

As the deed of John H. Mercer was executed in 1864, the trust created in behalf of his daughter for her life was a valid one, but it became executed as to her by the married woman's act of 1866, or as soon after its enactment as she attained her majority. We differ with his honor in holding that John R. Conner ever became "trustee of the remainder-men under said deed." It is clear that the estate thereby created was, as to them, a legal, and not an equitable, one, and that the trust did not attach thereto. The decision in *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791, is controlling on this point, and it has several times been followed. See, for instance, *Allen v. Hughes*, 106 Ga. 775, 32 S. E. 927, and

Brantley v. Porter, 111 Ga. 886, 36 S. E. 970. Carswell v. Lovett, 80 Ga. 36, 4 S. E. 866, is closely in point. The distinction between cases like these and those of Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46, and Riggins v. Adair, 105 Ga. 727, 31 S. E. 743, is obvious. In the Cushman Case the deed under construction expressly provided that the trust should, after the death of the life tenant, continue in force for the benefit of the remaindermen; and in the Riggins Case the trustee was "to have and to hold" the property for the purpose of making a division of it after the termination of the life estate. The deed now before us does not, relatively to the remaindermen, clothe the trustee with any title, or impose upon him the performance of any duty. As the trial judge's construction of this deed was erroneous, the judgment based thereon must, for this reason, if for no other, be set aside. Judgment reversed. All the justices concurring.

(113 Ga. 999)

HARDWICK et al. v. BURKE, Treasurer.

(Supreme Court of Georgia. July 20, 1901.)

FINES—LIEN OF COURT OFFICERS.

The officers of the superior court have no lien or claim, on account of insolvent costs due them in cases transferred from the superior to the county court, upon fines in the county treasury arising in the county court upon other cases transferred from the superior court.

(Syllabus by the Court.)

Error from superior court, Screven county; E. L. Brinson, Judge.

Action by T. W. Hardwick and others against Abraham Burke, treasurer. Judgment for defendant, and plaintiffs bring error. Affirmed.

T. W. Hardwick, B. T. Rawlings, and White & Boykin, for plaintiffs in error. E. K. Overstreet, for defendant in error.

COBB, J. In Overstreet v. Rawlings, 106 Ga. 798, 32 S. E. 855, it was held that it was the duty of the judge of the county court to pay over to the county treasurer amounts collected by the county judge as fines imposed in the county court upon persons convicted of offenses against the criminal law, and that, if the officers of either the superior or the county court had any claim upon the funds derived from this source, it should be asserted against the county treasurer. The present case presents the question as to whether the officers of the superior court have any lien or claim upon funds in the hands of the county treasurer, paid to him by the county judge from fines collected and imposed in the county court in cases transferred from the superior court, for the insolvent costs due such officers in other cases transferred from the superior court. The law provides that the officers of the superior court shall be paid their insolvent costs which have accrued in that court out of the fines

and forfeitures in the county treasury received from the superior court. Pen. Code, § 1092. The law also provides that any officer of the county court having a claim for insolvent costs may present to the county judge an itemized bill of the costs claimed, and when the same is approved and entered on the minutes of the county court, or other book kept for that purpose, the order of approval shall be a warrant on the county treasurer, payable out of the fines and forfeitures arising in the county court. Pen. Code, § 1098. We know of no other law than this which authorizes the county judge to grant an order which would have the effect of a warrant upon the county treasurer for costs due public officers. No person can claim any right under this provision who is not an officer of the county court. It is claimed that the officers of the superior court are, within the meaning of this provision of the law, officers of the county court, so far as their right to claim payment for insolvent costs due them in cases transferred from the superior to the county court are concerned. We do not think the general assembly intended the expression "officer of the county court" to include any other person than one who is directly and officially connected with that court, and we have no authority for saying that they meant officers of the superior court when they have expressly said officers of the county court, and used no language to indicate that any other persons are to be included than those described in the law. It may be that it is a very great hardship upon officers of the superior court not to be allowed to participate in the distribution of the fines and forfeitures arising in the county court from cases transferred from the superior court, but to hold that they did have such right, under the law as it now stands, would, in our opinion, be doing violence both to the letter and spirit of the law. Judgment affirmed. All the justices concurring.

(113 Ga. 1000)

LAFFITTE et al. v. BURKE, Treasurer, et al.

(Supreme Court of Georgia. July 20, 1901.)

PLEADING—SUFFICIENCY—CONSTITUTIONALITY OF ACT.

The question whether a local legislative act passed in 1881 is for any reason unconstitutional is not properly raised by a general statement that "said act is in conflict with the general law of 1877."

(Syllabus by the Court.)

Error from superior court, Screven county; E. L. Brinson, Judge.

Action by T. W. Hardwick and others against Abraham Burke, treasurer. C. Laffitte and others intervene. From the judgment, interveners bring error. Affirmed.

J. W. Overstreet and Spencer R. Atkinson, for plaintiffs in error. E. K. Overstreet, White & Boykin, and T. W. Hardwick, for defendants in error.

COBB, J. In the case of *Hardwick v. Burke* (Ga.) 39 S. E. 433, in which the officers of the superior court of Screven county were attempting to assert a lien upon certain fines which had been paid into the county treasury by the county judge of that county, interventions were filed by Laffitte and Burns, each setting up that he had been convicted in the county court of a violation of a special act for Screven county regulating the sale of liquor, and that such special act was "unconstitutional, null, and void, for the reason that said act is in conflict with the general law of 1877." The interveners prayed that the amounts which had been paid by them to the county judge, and which were in the hands of the county treasurer, being embraced in the sum in controversy in the case of *Hardwick v. Burke*, be repaid to them. It does not appear that any objection was made to these persons filing interventions in the case, nor was any question raised as to whether they were entitled to the relief prayed, in the manner in which they asked it. The prayer of the interveners was denied, and to this ruling they excepted. It appears from the record that the interveners were regularly tried and convicted in the county court, and the sole ground upon which the judgment of conviction is attacked is that the law for a violation of which the interveners were convicted is an invalid law, and therefore no lawful judgments of conviction could have been entered against them. The only attack made upon the law in the pleadings of the interveners was in the language quoted above. We do not think this was sufficient to authorize either the trial judge or this court to pass upon the question as to whether the special act for Screven county was a valid and constitutional law. One who calls in question the constitutionality of a law passed by the general assembly must in his pleadings clearly and distinctly point out in what respect the law is violative of the constitution. No reason is assigned in the language quoted why the act is unconstitutional, save that it is "in conflict with the general law of 1877." What general law of 1877? There were several general laws enacted in 1877, and there was more than one general law enacted in that year relating to the subject of the sale of liquor. The allegation not only does not identify any particular law passed in 1877, but it also fails as a sufficient attack upon the constitutionality of the special act, for the reason that it does not in any way call attention to the specific provision of the constitution with which the act is claimed to be in conflict. No court should ever pass upon the constitutionality of a legislative act unless the record in the case clearly and specifically points out the reason why the act is claimed to be unconstitutional. See *Railway Co. v. Hardin*, 110 Ga. 433, 35 S. E. 681, and case cited. The pleadings of the interveners not being sufficient to bring in question the constitutionality of the law under which

they had been convicted, the judge did not err in refusing to grant the relief prayed for, without regard to the question whether they were properly or improperly before the court. Judgment affirmed. All the justices concurring.

(113 Ga. 1012)

EQUITABLE SECURITIES CO. v. GREEN et al.

(Supreme Court of Georgia. July 20, 1901.)

SECONDARY EVIDENCE—PRIVILEGED COMMUNICATIONS—EJECTMENT—EVIDENCE—PRIOR CONVEYANCE—NOTICE—KNOWLEDGE OF ATTORNEY—PURCHASE PENDENTE LITE.

1. The record discloses that there was sufficient proof of the execution and loss of the deed, the contents of which it was sought to show by parol evidence, to authorize the admission of such evidence.

2. Before the testimony of an attorney at law can be excluded on the ground that such testimony would divulge privileged communications of his client, it must be shown that the relation of attorney and client existed. This was not shown in the present case.

3. Where A. conveys land to B., and B. conveys it to C. as security for a debt, and a judgment is obtained by C. and levied upon the land as the property of B., and A. files a claim there to, in the trial of a suit in ejectment between C. and D., to whom A. had conveyed the same land, the claim affidavit of A. is not admissible as evidence in favor of D. against C. (a) This evidence does not appear to have been offered for the purpose of impeaching any testimony of A.

4. Where a husband conveys land to his wife, and she borrows money and makes a deed to the land to secure the payment of the loan, the husband's knowledge that she claimed the land is not admissible in favor of such grantee of the wife, as against one to whom the husband subsequently conveyed the land.

5. Evidence as to whether the husband, after the conveyance to his wife, held the land in his own right or in the right of his wife, was not admissible as against his second grantee.

6. Where, in the second deed made by the husband, he recited that the lands conveyed were "free from all liens except those controlled by" a named person, it was admissible to show that this person had in his hands a judgment lien against the wife at the time of the conveyance. If this person, who was the attorney of the second grantee, controlled the lien against the wife, this would be a circumstance which should go to the jury in order to show that the second grantee and his counsel had notice of the prior conveyance to the wife.

7. A letter written by the attorney of the plaintiff to such plaintiff, explaining the delay in collecting the claim against the wife, was not admissible to show notice of this matter to the defendant, although the writer of the letter was at that time the attorney of the present defendant as well as of the present plaintiff.

8. One who purchases land of the defendant in an ejectment suit while such suit is pending takes subject to whatever judgment may be rendered in the case. The pendency of the suit is notice to the world, and, where such purchaser is made a party to the suit, it is immaterial whether he had actual notice or not, and the deed to him from the defendant is irrelevant and inadmissible in evidence.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Jr., Judge.

Action between the Equitable Securities Company and John M. Green and others.

From the judgment, the company brings error. Reversed.

Hall & Wimberly, for plaintiff in error.
A. H. Cox, M. G. Bayne, and Guerry & Hall,
for defendants in error.

SIMMONS, G. J. At the very beginning of the trial of this case an error was committed which necessarily affected the rest of the proceedings. Of the numerous questions made in the record, the headnotes deal with all which are likely to arise upon another trial. Complaint was also made of a number of minor rulings which are not referred to in the headnotes, and which are not now decided. For the errors which were committed, a new trial must be ordered. Judgment reversed. All the justices concurring.

(113 Ga. 1088)

SIMS v. SIMS.

(Supreme Court of Georgia. July 23, 1901.)

IMPEACHMENT OF VERDICT—APPEAL—NEW TRIAL.

1. After a verdict has been received and the jury have dispersed, a juror will never be heard to say that he did not agree to the verdict.

2. There was evidence authorizing the verdict. The charges complained of were free from error, the newly-discovered evidence was cumulative, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county;
Z. A. Little, Judge.

Action between S. R. Sims and T. B. Sims. From the judgment, S. R. Sims brings error. Affirmed.

Allen Fort, F. A. Hooper, and E. A. Hawkins, for plaintiff in error. J. T. Hill and Guerry & Hall, for defendant in error.

COBB, J. We do not think it necessary to refer in detail to the numerous grounds of the motion for a new trial. None of the assignments of error in the motion relate to questions which it would be profitable to discuss at length. The case at last turned upon the question whether the proposition made in the letter had been accepted. The plaintiff claimed that it had been accepted in his behalf by his attorney, who was duly authorized to act for him. The defendant denied this, and claimed that the offer had been withdrawn before it was accepted by the plaintiff. Upon this issue the parties went to the jury. There was evidence to sustain either view of the transaction, and the jury have seen fit to decide in favor of the plaintiff. After a careful examination of the motion for a new trial, we cannot say that there was any error which required the granting of a new trial. An effort was made to show that two of the jurors had never agreed to the verdict as rendered. The evidence offered to establish this fact was con-

tained in the affidavits of the two jurors, and, of course, the court properly refused to consider this evidence. See Civ. Code, § 5338, and numerous cases cited thereunder. Judgment affirmed. All the justices concurring.

(113 Ga. 1070)

VINCE v. STATE.

(Supreme Court of Georgia. July 23, 1901.)

OBSTRUCTION OF OFFICER—EVIDENCE.

Merely refusing, upon the demand of a levying officer, to unlock a door of a house in order to enable him to enter the same for the purpose of levying a lawful process upon goods therein contained, is not a violation of section 306 of the Penal Code, which makes it a misdemeanor to "knowingly and willfully obstruct, resist or oppose any officer of this state, or other person duly authorized, in serving, or attempting to serve or execute any lawful process, or order."

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Rosa Vince was convicted of obstructing an officer, and brings error. Reversed.

Akerman & Akerman, for plaintiff in error. F. G. Corker, for the State.

LUMPKIN, P. J. Taking the evidence in this case most strongly against the accused, the state showed nothing more than that she refused to comply with the demand of a constable to unlock the door of her house in order to enable him to enter the same for the purpose of levying a distress warrant upon goods in the house. It does not appear that she did anything which even tended to obstruct the movements of the officer, or in any manner resisted or opposed any effort on his part to enter the house. If, when he arrived, the door had been open, and the accused had shut and locked it to prevent an entrance by the officer, the case would have been different. As it was, when he attempted to make the levy he found the door already locked, and the accused simply declined, on his demand, to open it. In *Davis v. State*, 76 Ga. 721, this court held: "In the statute making it criminal to knowingly and willfully obstruct, resist, or oppose any sheriff, coroner, or other officer of this state, or other person duly authorized, in serving or attempting to serve or execute any lawful process, the word 'obstruct' must be construed with reference to the other words, 'resist or oppose,' which imply force. The crime consists in obstructing, resisting, or opposing an officer, not merely in impeding or defeating the execution of the process with which the officer is armed." The case in hand, upon its facts, falls within the principle embraced in the words just quoted. It affirmatively appears that the accused did not obstruct, resist, or oppose the officer, but, at most, simply refused to give him any assistance in executing the process in his hands. Judgment reversed. All the justices concurring.

(112 Ga. 1054)

LUFBURROW v. EVERETT.(Supreme Court of Georgia. July 22, 1901.)
SALE OF TIMBER—ACTION FOR PRICE—INJUNCTION.

1. The trial below was conducted without error of law, and a verdict for the plaintiff was demanded by the evidence. The court therefore erred in granting a new trial.

2. The verdict authorized the decree that the court below rendered, rescinding the contract between the parties, restoring the land to the plaintiff, and granting the perpetual injunction prayed for by the petitioner.

(Syllabus by the Court.)

Error from superior court, Effingham county; P. E. Seabrook, Judge.

Action by Caroline Lufburrow against Joel Everett. Verdict for plaintiff. From an order granting a new trial, she brings error. Reversed.

D. H. Clark and Lester & Ravenel, for plaintiff in error. H. B. Strange, for defendant in error.

LEWIS, J. On March 13, 1890, a written contract was executed by Mrs. Caroline Lufburrow and Joel Everett, in which she conveyed to him the timber on a tract of land owned by her. Afterwards, in the same year, he moved his sawmill to the land and began cutting the timber. In 1897 she sued him for \$400 and interest alleged to be due under the contract, and prayed that he be enjoined from cutting timber on the land. The contract stipulated for the conveyance of the timber in consideration of \$600, upon the following terms: Two hundred dollars was to be paid cash, and two notes, each for \$200, were to be given by Everett, the first payable 90 days after Everett's tram road should reach the Central Railroad, which was to be during the same year (1890), and the second payable 90 days after the payment of the first. It was agreed that Everett should have sufficient time to cut the timber off of the land, and that his mill might remain on the land "to cut other timber as he might thereafter have." Everett bound himself to locate his tram road on the tract of land, and to complete it within 90 days after it was so located, "should no providential causes hinder him from so doing." The petition alleged that when the contract was made the defendant told the plaintiff that he intended at once and continuously to engage in a sawmill business, and would not want more than a reasonable and sufficient time in which to cut the suitable sawmill timber from the land, and because of this statement no exact time was stipulated when he should cease cutting and remove from the land, but she then understood and believed that, when he should have remained on the land a sufficient length of time, he would have cut all the merchantable sawmill timber on it, and would give her possession of the land; that he still remains in possession of it, and refuses to allow her to go upon it for turpentine or other purposes, though he has been in

exclusive and uninterrupted possession of it ever since the date of the contract, engaged in cutting the timber, and for a sufficient length of time to have cut and sold all the sawmill timber on the land, and, if he has not cut all the timber, it is his own fault; that he paid her \$200 of the contract price March 13, 1890, but he has never given either of the notes provided for in the contract, nor paid the remaining \$400 due, and refuses to do so, assigning as a reason that he has never built the tram road, and that the contingency has not occurred when he should give the notes or pay the money. The defendant in his answer set up that he had fully complied with the contract as to the payment of the purchase money; that he had paid the plaintiff \$478.30 as purchase money, and had cut only about an eighth of the sawmill timber on the land. He alleged that he put his mill on the land in September, 1890, but, in consequence of heavy rains, could not run his mill or build the tram road contemplated by the contract of March, 1890, and he went to the plaintiff and told her it was impossible for him to comply with the terms of the contract as to the building of the tram road, and she told him it was "all rights;" "to just go ahead and cut the timber, and pay for it as you cut it;" that he acted on this statement, and considered that the contract to build the tram road was at an end; that no time was fixed by the contract in which he was to finish cutting the timber, but he was to have his own time for that purpose, and that from time to time he had been delayed because the land was covered with water; and that he had paid all of the \$600 but \$121.70, which he was willing to pay at the proper time. After the first trial of the case the court granted a new trial. The next trial resulted in a verdict against the defendant, and he made a motion for a new trial, which was granted, and the plaintiff excepted. The verdict consisted of special findings in response to questions submitted, as follows: "Did Mrs. Lufburrow and the defendant, after the execution of the written contract sued upon, enter into an oral agreement with reference to the timber in dispute? No. If they did, did they change the terms of the written contract with reference to the time of paying for and cutting the timber? No. Did Mrs. Lufburrow consent that Everett should cut the timber, and pay for it as he cut it? No. Did she accept payments made by Everett in pursuance of such change? She did accept payments made by Everett, but not in pursuance of any change. What amount of timber has Everett cut from the land in dispute? Between one-eighth and one-fourth. What amount, if any, is Everett due the plaintiff? None. Has Everett had sufficient time, under the facts of the case, to cut the timber? Yes." Where timber is sold in the manner above set out, and no time is specified as to how long the purchaser shall have to cut it, the law allows him a reasonable time for such purpose. This contract

was made in March, 1890, and the defendant took possession of the land, moved his saw-mill upon it, and began cutting timber during the same year. This suit was not brought until 1897. The evidence is overwhelming that he had ample opportunity to finish cutting the timber before that time, and, indeed, he says in his testimony: "I believe I could have cut all the timber easily, with the seasons we have had, and the reason I have not done so was that I had no demand for the lumber." It appears that no attempt was ever made to build the tram road as required by the contract. According to the contention of the defendant, he might hold the land forever, and prevent the owner from obtaining possession of it, although he purchased only the right to cut the timber, and was to have only a reasonable time in which to accomplish that object. It is to be noted that, although the plaintiff sought to recover a money balance alleged and admitted to be due her under the contract, the special verdict of the jury did not allow that claim. She is apparently satisfied with the verdict, however, and only seeks to regain possession of her land, which we think, under the evidence, she has a clear right to do. A verdict in her favor for the land was demanded. No errors requiring the grant of a new trial were committed on the trial.

2. The trial judge entered a decree on the verdict, and it was fully authorized by what the jury had found. He decreed the defendant, his tenants, agents, and assigns, should not have the right to enter upon the land again or get any more of the timber. The temporary injunction he granted before, he made perpetual, and forever enjoined the defendant, his agents and assigns, from trespassing upon the land. The decree further gave the plaintiff permission to enter upon the land at pleasure, and to have the full, quiet, and peaceful possession of the same and the timber thereon. Of course, the effect of the judgment of this court is to set aside the order of the court granting a new trial, and to leave the last verdict of the jury, and the decree of the court rendered thereon, in full force; thus bringing to a final termination all of the issues between the parties. Judgment reversed. All the justices concurring.

(118 Ga. 1074)

CLARKE et al. v. WHEATLEY.

(Supreme Court of Georgia. July 23, 1901.)

INTERVENTION—ACCOUNTING—TENDER BY DEFENDANT.

1. It is not the right of a stranger to a pending cause to intervene therein, unless it is necessary to his protection that he be allowed to become a party to the litigation, and thus afforded an opportunity to resist the rendition of a judgment which would operate to his prejudice.

2. One who, though acting in entire good faith, illegally disposes of property belonging to another, is liable to account therefor; and

if, under any circumstances, he has an equitable right to demand that his unauthorized disposition of such property be ratified, he must at least make a proper tender of the proceeds arising therefrom, and assume the burden of showing that the value of the property was not greater than the amount realized therefor. (a) The decree entered by the court in the present case being more favorable to the losing party than he had any right to expect, it affords him no just cause for complaint.

(Syllabus by the Court.)

Error from superior court, Sumter county; E. J. Reagan, Judge.

Equitable petition by T. Wheatley, receiver, against W. F. Clarke and others. Certain banks filed a petition for intervention. Order refusing to allow them to intervene, and they bring error. Affirmed.

W. F. Clarke, W. M. Hawkes, and Bacon, Miller & Brunson, for plaintiffs in error. Allen Fort and W. P. Wallis, for defendant in error.

LUMPKIN, P. J. This court at its March term, 1899, in the case of Clarke v. Ingram, rendered a decision declaring that a conveyance which had been made by the Bank of Americus to W. W. Flannagan, a nonresident of this state, as trustee for three other banks in that conveyance named, was void. See 107 Ga. 565, 33 S. E. 802. For convenience, we will hereinafter refer to this conveyance as the "deed of trust," and to the three banks for whose benefit it was executed as the "foreign banks." The opinion filed in that case sets forth in full the nature of the litigation upon which the decision mentioned arose. Before it was announced, Flannagan, while assuming to act as trustee, and W. F. Clarke, who, upon Flannagan's resignation as such, had been appointed trustee in his stead, made divers collections of money upon choses in action belonging to the Americus bank, which had come into their hands under the deed of trust, and also sold to various persons much of the property which that deed purported to convey to Flannagan, as trustee. Shortly after the remittitur from this court had been entered in the court below, Thornton Wheatley, the receiver of the Americus bank, filed in that court an equitable petition in which Clarke was named as the sole defendant. This petition set forth a history of the litigation which had been had in the original case, stated the result thereof as above indicated, and contained prayers for direction, and for an accounting and settlement by Clarke for and in respect of all the assets which had come into his hands as the successor of Flannagan in the alleged trust. The receiver subsequently filed an amendment to his petition wherein he prayed "the court to grant an order authorizing him to institute suits to recover the property specified in the" deed of trust "which had not come into his hands as receiver, and to give him such instructions and directions in the premises" as might be

proper. Clarke filed an answer in which he undertook to set forth a full report of all his actings and doings while assuming to act as trustee. This report disclosed what assets of the Americus bank had been turned over to him by Flannagan, what sums of money had been realized therefrom, and the disbursements which had been made out of the fund thus arising, etc. By way of defense, Clarke alleged that he had in good faith made collections upon divers choses in action coming into his hands as trustee, and had sold certain property, both real and personal, described in the deed of trust, and therefore was not in a position to turn over to the receiver all of the assets of the Americus bank which had come into his possession as trustee. He undertook to assert in this connection that as the sales of property made by himself and Flannagan were fairly conducted, and the sums of money thereby realized represented the highest price for which the property could have been sold, it was "to the interest of all parties that the acts of said trustees in making sales and collections under said trust deed should be solemnly decreed by the court to be ratified and confirmed, so as to quiet the titles of the various purchasers, and promptly set at rest all question of litigation concerning the same." By way of conclusion, Clarke further alleged that he was "ready to account for all property and moneys that have come into his hands, and has been ready and willing to come to a prompt settlement with said receiver from the time he was advised of the decision of the supreme court in this cause; but the said receiver has never called upon him for such settlement, unless this petition, which is a wholly unnecessary proceeding, is to be so regarded." The only specific prayer contained in Clarke's answer was in the following words: "And, having fully answered, respondent prays that he be hence discharged." To this answer Wheatley, the receiver, demurred upon the following grounds: "First. There is no tender into court of any of the proceeds realized from the sale of the real estate or the collections of the choses in action, * * * and the trustee has no right to ask that the collections of money from the sale of real and personal property and choses in action be withheld, and the disposition thereof be confirmed by the court. Second. The answer and response are wholly insufficient in law and equity," in that "the respondent does not propose to do equity in order to have his acts and conduct ratified in the premises; equity requiring immediate surrender of any and all assets, or the proceeds thereof, which have passed through his hands or his predecessor's hands, before confirmation of his actings and doings in the premises. Third. His report shows that the larger part of the assets realized out of the assets derived from the Bank of Americus are in the hands of the beneficiaries mentioned in the deed of trust,

who are nonresidents, and that the said assets are not proposed to be subject to the jurisdiction of the court." Before the case came on for trial, the foreign banks presented to the court a petition, in the nature of an intervention, praying that they be made parties, and that they be granted certain relief, to which, for reasons assigned, they alleged they were entitled. After characterizing their petition as an "intervention in the nature of an answer to the above-mentioned petition of said receiver," they proceeded to state that: "Your respondents hereby adopt the answer of their co-respondent, W. F. Clarke, so far as the same is pertinent to this, their answer." The averments therein set forth were, in substance, as follows: The receiver has no right to proceed against Clarke for an accounting and settlement, since, as is fully shown by his report, "there has been no sale made and no collection made under the terms of said trust deed that is attacked * * * or is sought to be set aside and canceled on any grounds whatever." On the contrary, "all the acts of said Clarke and his predecessor, Flannagan, as disclosed by the report attached to said Clarke's answer, have been in an economical and orderly administration of said trust, and have been a prudent and skillful realization of funds from" the assets of the Americus bank; and accordingly "the acts of said Clarke and Flannagan should, in the interest of all parties in this litigation, be ratified" and confirmed by the court. "The said Thornton Wheatley, receiver, has in his possession money and other assets which were never covered by the said trust deed, and which should be fully reported to the court, with an accurate estimate of the value thereof, before any order or judgment is passed under the receiver's petition"; and he "should be required, before such judgment is rendered, to come to a settlement with the said W. F. Clarke, receiving from him all the money and the assets now in his hands which have not been paid over to these respondents as the beneficiaries under the said trust deed, which unadministered assets are fully shown by his report, and said receiver should then report such assets to the court, with an accurate estimate of the value thereof. Or these defendants submit that even a better course to be pursued would be for the said receiver, under the order of the court, to convert all such assets into cash, and then report the same to the court, before any order or decree is rendered upon the said receiver's petition." The court should then "finally determine and fix the various allowances to be made to the receiver and the counsel in this case, and ascertain the court costs and all other expenses of administration, so as to know the aggregate amount thereof to be paid out of the said funds." The court should also undertake to "ascertain the various amounts that have been received by these respondents upon their respective claims

arising from the properties covered by said trust deed, so as to definitely ascertain the percentage or proportion of the credits that the respondents have heretofore received from said source." They "have received, approximately, seventeen thousand dollars through the hands of Flannagan and Clarke, trustees, which amounts have been entered as credits upon their respective claims; and they now and here propose to submit to the court, for the most careful scrutiny and examination, the entire transactions of the said Flannagan, former trustee, and of said Clarke, showing the sales and collections made, the disbursements of necessary expenses, and the actual amount paid over to these respondents as a credit upon their respective claims. Respondents submit that this examination should be had and the respective amounts determined before the prayers of the receiver's petition should be allowed by the court. Respondents further aver that the funds which will be in the said receiver's hands after all the unadministered assets described above have been converted into money will be sufficient, even after allowing reasonable compensation to the various officers and counsel, to pay to the general creditors, other than these respondents, an amount sufficient to make that class of creditors equal, in the pro rata amounts received upon their respective debts, to these respondents," and therefore no "decree should be rendered upon said receiver's petition, either authorizing him to repudiate the sales and collections made by the said trustees and bring suit to recover the said assets, or * * * requiring these respondents to pay back into the said receiver's hands the said sum of seventeen thousand dollars received by them as above stated, until the said receiver shall make it affirmatively appear to the court by competent evidence that the funds in his hands after a full settlement with W. F. Clarke, trustee, will not be sufficient to equalize with these respondents those creditors who have not yet received any payments upon their demands." In the event the receiver should, "upon the hearing of his said petition, show to the court that the funds in his hands are not sufficient for the purpose above recited, then he should" be required to further show "the extent of said deficiency, and what amount it was necessary for these respondents to refund or repay to him as receiver in order to equalize the class of creditors above described; and the court should then, in its decree upon his said petition, require these respondents to pay over to the said receiver only such amount as would be required for the purpose just named." The estimates of value placed upon "the properties covered by said trust deed" at the time it was executed "were in many instances fictitious," these properties not being, in point of fact, "at any time worth the large sum which they were originally rated at." On the contrary, "the said Clarke's report is the highest and

best proof of the actual values of said properties, as appears from the amounts realized therefrom." Following the foregoing allegations was a prayer on the part of the foreign banks "that all of the steps above outlined by them in regard to ascertaining the true funds in the receiver's hands from all of the assets of" the Americus bank "be all had and taken before any decree" was entered by the court, and that "the relief claimed by them above be granted." The trial judge, after hearing argument from them as to their right to become parties to the litigation with a view to securing the relief sought, refused to allow them to intervene; and to this ruling they excepted. He thereupon sustained the demurrer to the answer filed by Clarke, and entered a decree in favor of the receiver. Being dissatisfied with the disposition thus made of the case, Clarke also excepted. We shall first direct our attention to the complaint made by the foreign banks that the court erred in not allowing them to intervene, and then dispose of the questions presented by the assignments of error upon which Clarke relies.

1. At the time Wheatley, as receiver, commenced proceedings against Clarke, it had already been finally adjudicated, not only as against him, but also as against the three foreign banks, that the deed of trust above referred to was an absolute nullity. As a result of this adjudication, Clarke became liable to account for all the assets of the Americus bank which had come into his hands while assuming to act as trustee for the foreign banks. The receiver, as the representative of the creditors at whose instance this instrument was set aside, was under as positive duty to recover, if possible, the illegally scattered assets of the Americus bank, including those which passed into the possession of Clarke, and for which he had failed to account. It was unquestionably proper for the receiver to endeavor to compel Clarke, as well as all others who had unlawfully acquired property belonging to that bank, to make prompt and full restitution. This the receiver was seeking to do when the foreign banks undertook to interpose and tie his hands. They were, it is true, creditors of the Americus bank, and as such had a right to object to the receiver's taking steps which would operate to the prejudice of its unsecured creditors. But, as has been seen, the receiver was simply endeavoring to discharge his positive duty in the premises; and the proceeding instituted by him was, beyond all question, not only proper, but essential to the protection of such creditors. Certain it is that the foreign banks failed signally to disclose any reason for apprehending that they, in their capacity of creditors, would be prejudiced in the event Clarke was made to account for property which had been illegally disposed of by him. Any suggestion that they might be would seem to be wholly without

foundation. As matter of fact, they did not make any such claim. On the contrary, it was solely in their capacity as beneficiaries under the deed of trust that they asserted a right to intervene in the pending cause and arrest the action of the court upon the receiver's petition. They were nonresidents. He was not seeking to recover the money which had been turned over to them by Clarke, and no judgment against him could possibly affect their rights. This being so, it was not necessary to their protection that they should be allowed to become parties to the litigation; and, of course, it was not their privilege, as mere volunteers, to champion the cause of Clarke, and lend him aid and comfort in his contest with the receiver. There is no force whatever in the argument that if judgment were rendered against Clarke, and he should be compelled to make restitution, he would have a right of action against the foreign banks to recover the money he had, while acting as their trustee, improperly paid over to them. If Clarke failed to interpose a proper defense, and suffered judgment to be rendered against him upon a demand which he might have successfully resisted, these foreign banks would be in a position to assert that they could not justly be called upon to reimburse him for any loss thus sustained. On the other hand, if he should rightly be held to account for the assets coming into his hands, the proceeds of which he had in good faith, though improperly, delivered to them, they should, without forcing him to litigate further, restore to him the funds thus received by them. Our conclusion therefore is that the proposed intervention presented in behalf of the foreign banks amounted to neither more nor less than an effort on their part to force the receiver, against his will, to sue them for \$17,000, to no other end than that they might thus be afforded an opportunity to interpose the wholly untenable defense that he had no right to recover any portion of that sum without showing that, as debtors, they were liable for an amount in excess of that which they, as unsecured creditors, would, on a final distribution among all creditors of the funds realized by the receiver from the assets of the insolvent Americus bank, ultimately be entitled to receive upon the claims which they held against it. Under the circumstances disclosed, the receiver certainly had the privilege of declining to bring a suit against the foreign banks, however much the latter may have desired the institution thereof.

2. The defense relied on by Clarke was nothing short of remarkable. It was apparently based upon the theory that as he had, while assuming to act in behalf of the foreign banks, been faithful to the trust imposed upon him by the deed executed in their favor, he could not be legally called upon to account to the receiver for the misapplied assets of the Americus bank, notwithstand-

ing that deed had been by the court declared wholly inoperative and void as against the creditors who prevailed in their effort to have it set aside. In framing his answer, Clarke seems to have totally ignored the fact that, by reason of his alleged faithfulness as trustee, the major portion of the assets of that bank were illegally disposed of, and the proceeds arising therefrom carried beyond the jurisdiction of the court, and placed in the hands of parties not entitled to receive the same. That the creditors in whose behalf the receiver sought to recover these assets, or the proceeds thereof, were dissatisfied with the disposition made by Clarke of property belonging to the insolvent bank which had been unlawfully delivered to him, does not afford cause for surprise. Whether or not he had been faithful to the foreign banks was a matter as to which these creditors had no concern. He was not called upon by the receiver to answer in what manner he had performed his duty as a trustee. On the contrary, he was called upon, as a person whom the court had characterized as one who had without any shadow of authority intermeddled with the affairs of the Americus bank, to account for assets belonging to it, of which he had wrongfully acquired possession. He was, beyond the possibility of doubt, liable for all the assets of the bank thus coming under his control. While it was proper for him to state in his answer that it was not within his power to restore all of these assets, he clearly had no right to ask that the court ratify and confirm his unauthorized disposition thereof, without at least offering to pay into the registry of the court the proceeds arising from the same, and assuming the burden of showing that the property disposed of by him did not exceed in value the amount realized thereon. When, by way of demurrer to his answer, his attention was called to the fact that he had omitted to come up to this reasonable requirement, he displayed no disposition to do equity, and thereby forced the court to hold that there was no merit in the defense which he sought to interpose. It appears that when the case came on to be heard the receiver elected to take the assets of the Americus bank which still remained in the hands of Clarke, but "not to confirm the sale of the real and personal property or the collection of the choses in action" made by him or by Flannagan. Accordingly the court, in framing its decree, merely imposed upon Clarke the duty of surrendering possession of such only of the assets of that bank which he in his answer admitted were still in his hands, and expressly provided that he should not be called upon to account for "any proceeds derived from the sale of any of the real estate made by" him or by Flannagan. It will thus be seen that, relatively to the receiver, Clarke practically escaped all liability growing out of his unauthorized disposition of property

which was the subject-matter of controversy. Nevertheless he complains that the court further provided in its decree that the receiver should proceed against all other persons who held adversely to him assets of the Americus bank which were subject to the claims of its creditors. This direction to the receiver was, Clarke contends, "erroneous, in that it makes him personally liable to all persons from whom he has made collections of money under the trust deed, whether in making sales or in collecting the choses in action." The reply to this contention is that one who, with however much good faith, undertakes to sell or otherwise deal with property which does not belong to him, cannot reasonably hope to escape liability if, because of his unauthorized acts in relation thereto, innocent parties are made to suffer loss. Judgment affirmed. All the justices concurring.

(113 Ga. 1027)

BANK OF LAWRENCEVILLE v. JONES.

(Supreme Court of Georgia. July 20, 1901.)

MONEY PAID FOR DEFENDANT—EVIDENCE.

An action for money alleged to have been paid by the plaintiff upon the defendant's order, and for the latter's use, is not sustained by evidence showing that no such order was ever given or paid.

(Syllabus by the Court.)

Error from city court of Gwinnett county; Sam J. Winn, Judge.

Action by D. C. Jones against the Bank of Lawrenceville. Judgment for plaintiff. Defendant brings error. Reversed.

T. M. Peeples and O. H. Brand, for plaintiff in error. N. L. Hutchins, Jr., for defendant in error.

LUMPKIN, P. J. An ordinary action upon an open account was brought by D. C. Jones against the Bank of Lawrenceville. The copy of the account attached to the plaintiff's petition was as follows:

Bank of Lawrenceville, Dr., to D. C. Jones.	
1899. Aug. 17. To balance due on Int.	
Rev. Stamps paid by D. C. Jones, as	
per order of bank, June 27, 1898....	\$20 00
Interest to date.....	1 44
	<hr/> \$21 44

The defendant answered, denying indebtedness to the plaintiff. It appeared at the trial that the bank addressed to H. A. Rucker, United States collector of internal revenue at Atlanta, Ga., a written order for revenue stamps of certain denominations therein designated. Accompanying this order was cash to the amount of \$101.08. The evidence in behalf of the plaintiff showed that he was a clerk in the collector's office, and that in pursuance of his duties as such clerk he undertook to fill the order, and transmit the stamps to the bank. The testimony introduced by him also tended to show that the order really covered stamps to the value of \$121.08, that

he by mistake forwarded to the bank stamps amounting in value to the sum last mentioned, and that he was subsequently required by the government to pay the shortage of \$20. The evidence in behalf of the defendant tended to show that it actually received only \$101.08 worth of stamps. There was a verdict for the plaintiff. A motion for a new trial was made by the bank, which was overruled, and it excepted.

The sole question presented for our decision is whether or not the evidence, taken most favorably for the plaintiff, warranted the verdict. We are clearly of the opinion that it did not. The action was predicated upon the theory that the bank, being indebted to the government a balance of \$20 for stamps sold and delivered to it, ordered or requested Jones to pay this balance; that he accordingly did so; and that the bank thus became indebted to him for money laid out and expended for its use and by its direction. His proof affirmatively showed that no such order was ever given or payment made, but that he improvidently sent to the bank stamps belonging to the United States government, which had not been paid for, and that it held him, in his capacity as a mere servant of its internal revenue collector, accountable for the consequences of his mistake. It is obvious, therefore, that there was a fatal variance between the allegata and the probata, and it follows that the trial judge erred in not setting the verdict aside. Judgment reversed. All the justices concurring.

(113 Ga. 1045)

CENTRAL OF GEORGIA RY. CO. v. GRADY.

(Supreme Court of Georgia. July 22, 1901.)

INSTRUCTIONS—ABSTRACT PROPOSITIONS—INJURY TO EMPLOYE—ACT OF GOD.

1. Requests to charge, which assume the truth of one side or the other of a controverted question of fact, are properly refused.

2. When a charge sufficiently covers all of the material issues involved, failure to give specific instructions on a particular point is not cause for a new trial; nor is an unimportant inaccuracy in stating to the jury the contentions of the losing party.

3. A charge embracing an abstractly correct and pertinent principle of law is not rendered erroneous by a failure to charge some other legal principle applicable to the case.

4. There was in the present case sufficient evidence to support the verdict, both as to liability and amount.

(Syllabus by the Court.)

Error from superior court, Washington county; B. D. Evans, Judge.

Action by Hugh Grady against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. O'Connor, O'Byrne & Hartridge and Twiggs & Oliver, for defendant in error.

LUMPKIN, P. J. On March 31, 1897, a washout occurred on the line of the Central

of Georgia Railway Company. One of its trains ran into the chasm thus occasioned, and Hugh Grady, the fireman on the locomotive, was seriously injured. He brought his action, and obtained a verdict against the company for \$7,000. It is now before this court upon exceptions to a judgment overruling its motion for a new trial.

1. Two grounds of this motion assign error upon the court's refusal to give in charge to the jury certain written requests of the defendant's counsel. In each of them the occurrence under investigation was referred to as "the accident." Whether it was or was not an accident was the most seriously contested issue in the case. Obviously, then, it was not erroneous to decline to give instructions which, by their very terms, assumed the truth of the affirmative of this issue.

2. In other grounds complaint is made of alleged omissions and inaccuracies in charging with respect to the contentions of the defendant, and in failing to instruct the jury that the plaintiff assumed the risks incident to his employment. The charge contained a statement of the respective contentions of the parties and of the law of the case, apparently full enough to cover all the material issues involved. If more detailed instructions as to the points relied on by the defendant were desired, they should have been specially requested; and, if there was any inaccuracy at all in informing the jury what the defendant's contentions were, it was of minor importance.

3. While instructing the jury as to the amount of damages to which the plaintiff would, in the event of a recovery by him, be entitled on account of impaired capacity to labor, the court charged: "In ascertaining what his impaired condition is, you must look to the testimony, and see what his earning capacity was, and what are his disabilities, if his injuries are temporary, if his capacity for labor is total or partial. All of these things should be taken into consideration in determining what amount, provided you find that he is entitled to recover." The exceptions to this charge embrace no complaint of its abstract correctness, but it is alleged to be erroneous because the court failed to charge various other principles which would have been appropriate. "A portion of a charge wherein a complete, accurate, and pertinent proposition is stated is not, in and of itself, erroneous, simply because it fails to embrace an instruction which would be appropriate in connection with that proposition." *Lucas v. State*, 110 Ga. 756, 36 S. E. 87. See, also, *McIver v. Railway Co.*, 108 Ga. 306, 309, 33 S. E. 901; *Wood v. Collins*, 111 Ga. 32, 36 S. E. 423; *Keys v. State*, 112 Ga. 392, 37 S. E. 762; *Power Co. v. Walker*, *Id.* 725, 38 S. E. 107; *Railroad Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

4. The foregoing disposes of all the grounds of the motion for a new trial except those which attack the verdict as being con-

trary to evidence, etc., and excessive. We have studied the brief of evidence closely and carefully, and have reached the conclusion that there was sufficient testimony to support the verdict, both as to liability and amount. The evidence did not, as the able, zealous, and eloquent counsel for the company so earnestly insisted, demand a finding that the catastrophe was attributable to a rain so sudden, violent, and unprecedented as to be necessarily characterized as the "act of God." There was testimony to show that the rains had been heavy, and almost continuous, for weeks before the washout. In view of this fact, we are of the opinion that the evidence, taken as a whole, while it did not demand, at least warranted, a finding that the company did not exercise ordinary care in the matter of inspecting and looking after the saturated embankment in which the washout occurred, and also that the exercise of such diligence would have led to a discovery of its existence in time to give due warning thereof to those in charge of the train upon which Grady was at work. We cannot hold, as matter of law, that the verdict was for an amount too large. There were facts and figures to sustain it. On the whole, we discover no legal or valid reason for ordering a new trial. Judgment affirmed. All the justices concurring.

(113 Ga. 1165)

HOLMES et al. v. HOLMES et al.

(Supreme Court of Georgia. July 24, 1901.)

DIRECTING VERDICT—CONFLICTING EVIDENCE.

This court having, at the March term, 1899 (33 S. E. 216, 106 Ga. 858), decided that the petition of the plaintiffs in this case set forth a cause of action entitling them to a recovery, and the evidence on the second trial having substantially sustained the allegations of that petition, the court erred in directing a verdict for the defendants. There was a conflict in the evidence, and the case should consequently have been submitted to a jury.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; S. Reese, Judge.

Action by Carter Holmes and others against Joseph Holmes and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Saml. H. Sibley, for plaintiffs in error. Strickland & Green, for defendants in error.

LEWIS, J. This case was formerly before this court upon a demurrer to the plaintiffs' petition, which was sustained by the court below, and the judgment was reversed on the ground that the petition as amended set forth a good cause of action. See *Holmes v. Holmes*, 106 Ga. 858, 33 S. E. 216. An examination of the record now before us discloses that the evidence for the plaintiffs sustained the material allegations of their petition. In fact, the judge of the court below seems to

have so considered, for he overruled a motion by defendants' counsel to nonsuit the case. It is true that the defendants introduced evidence tending to contradict that introduced by the plaintiffs. When the defendants closed, the court directed a verdict in their favor. This was error. The evidence was conflicting in many particulars, and the jury should have been allowed to determine its relative weight and credibility. See, on this point, *Colson v. Meyers*, 80 Ga. 499, 5 S. E. 504; *Bond v. Brewer*, 96 Ga. 443, 26 S. E. 421 (3); *Hall v. Worley*, 99 Ga. 310, 25 S. E. 698; *Thompson v. Cody*, 100 Ga. 771, 28 S. E. 669. There are other grounds in the motion for a new trial, but none of sufficient importance to require discussion here. We reverse the judgment solely on the ground that the court erred in directing a verdict for the defendants. Judgment reversed. All the justices concurring.

(113 Ga. 1017)

WESTERN UNION TEL. CO. v. WAXELBAUM et al.

(Supreme Court of Georgia. July 20, 1901.)

TELEGRAM—NEGLIGENCE IN TRANSMISSION—CONDITIONS—REASONABLENESS.

1. While the sendee of a telegraphic message has a right of action against the company for any damages he may sustain in consequence of its negligence in the transmission of a message to him, he is bound by the reasonable terms of the contract made between the company and the sender of the message.

2. Where one delivers for transmission to a telegraph company a message written on the blank of another company, the blank containing printed instructions that the message shall be sent subject to the terms and conditions printed on the back thereof, the reasonable conditions therein set out are binding, notwithstanding they are in the form of a contract with a company other than the one to which the message is delivered. The delivery and acceptance of such a message is, in effect, an adoption by the parties of the blank contract made in the name of the other company.

3. A provision in such a contract that the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is filed for transmission is reasonable and binding.

4. The evidence failing to disclose in what amount, if any, the plaintiffs were damaged, the court erred in directing a verdict in their favor for the definite amount for which suit was brought.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by J. J. Waxelbaum & Co. against the Western Union Telegraph Company. Judgment for plaintiffs. Defendant brings error. Reversed.

Guerry & Hall and Wm. F. Blue, for plaintiff in error. Hardeman, Davis, Turner & Jones, for defendants in error.

LEWIS, J. In November, 1898, Waxelbaum & Co., a firm doing business in Macon,

Ga., telegraphed to Kennard & Co., of Chicago, to ascertain the price of eggs. In reply they received the following telegram: "Telegram received market higher advancing fifteen and half lowest today quick telegram." It seems to be conceded that the original message as delivered for transmission to the Western Union Telegraph Company (the plaintiff in error) by Kennard & Co., in Chicago, read "sixteen and half" instead of "fifteen and half," and that an error was made by some employé of the telegraph company in the transmission of the message. On the faith of the telegram as received by them, Waxelbaum & Co. ordered a large shipment of eggs from Kennard & Co., and when they came discovered for the first time that the price was 16½ cents per dozen. They took the eggs, however, at the advanced price, and, it seems, disposed of them in Macon. Later they sued the telegraph company in a justice's court of Bibb county for breach of contract for \$75, the amount alleged to have been lost by them on account of the negligent failure to properly transmit the telegram. The defendant filed an answer denying indebtedness, and setting up that the plaintiffs had failed to comply with a clause in the written contract between the company and the sender of the message, stipulating that the company would not be liable for damages or statutory penalties in any case where the claim was not presented in writing within 60 days after the message was filed with the company for transmission. Judgment was rendered for the plaintiffs in the justice's court, and the defendant appealed to a jury in the superior court. After hearing the evidence, the judge of the superior court directed a verdict for the plaintiffs for the full amount sued for, and the defendant excepted. The original message sent by Kennard & Co., which, by consent, was sent to this court with the bill of exceptions, was written on a blank of the Postal Telegraph Cable Company, and delivered by the sender to an agent of the Western Union Telegraph Company in Chicago. At the top of the blank, just preceding the written message, are the following words: "Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to." Among the conditions referred to is one as follows: "This company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

1, 2. It is hardly necessary to argue the very evident legal proposition that where, as in the present case, the sendee of a telegraphic message sued the telegraph company for a breach of a contract entered into between the company and the sender of the message, he is bound by all the reasonable conditions embodied in that contract. See *Stamey v.*

Telegraph Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95. And it can make no difference, as was contended by counsel for the defendants in error, that the original message was written on a blank of a different company from the one which received and transmitted the telegram. It is true that the printed contract on the back of the blank was in the name of the Postal Telegraph Cable Company, and recited that that company was to transmit and deliver the message subject to the terms and conditions therein set out; but Kennard & Co. took the message to the Western Union Telegraph Company, and explicitly directed it to "send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to." The Western Union Telegraph Company accepted and undertook to transmit the message on those terms. The parties, then, adopted the Postal Telegraph Cable Company's form of contract, and it necessarily follows that they, together with the sendee, are bound by its reasonable terms and conditions.

3. It is not denied that the plaintiffs below failed to file in writing a claim against the telegraph company within 60 days after the message was filed with it for transmission by Kennard & Co., nor is any attempt made to explain their noncompliance with the clause in the contract making such a requirement one of the terms of the acceptance of the message by the company. That this clause of the contract was reasonable, and therefore obligatory, is not open to question. See *Hill v. Telegraph Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166, citing *Brown v. Insurance Co.*, 24 Ga. 97, and *Underwriters' Agency v. Sutherland*, 55 Ga. 266. See, also, *Melson v. Insurance Co.*, 97 Ga. 722, 25 S. E. 189; *Association v. Robinson*, 104 Ga. 272, 30 S. E. 918, 42 L. R. A. 261.

4. The record discloses an entire failure on the part of the plaintiffs to prove in what sum, if any, they were damaged. While the document attached to the justice's court summons sets out the indebtedness of the defendant to the plaintiffs as \$75, there is no evidence to sustain this allegation. It does not appear how many of the eggs shipped to them by Kennard & Co. were sold by the plaintiffs, or at what prices they were sold. On the contrary, one of the plaintiffs testified to his inability to state at what price the eggs were sold. It is not satisfactorily shown that, if the telegram had been properly transmitted, the plaintiffs would have received any more for the eggs than they did receive. It is to be presumed that they exacted the highest market prices on the eggs which they did sell. Having failed completely to prove any definite amount in which they had suffered through the alleged negligence of the defendant, they were not entitled to have a verdict directed in their favor for the entire sum for which they sued. Judgment reversed. All the justices concurring.

(118 Ga. 1002)

HIERS v. MILL HAVEN CO.

(Supreme Court of Georgia. July 20, 1901.)

EXECUTORY LICENSE—REVOCATION.

After a person has made improvements or invested capital which must have necessarily preceded the enjoyment of a license granted to him, it becomes an agreement for a valuable consideration, and the licensee a purchaser for value. While such a license is executory, as a general rule it is revocable, but not after it is executed. Especially are the principles above stated applicable in a case where the license was originally granted in writing, and upon a valuable consideration moving to the licensor.

(Syllabus by the Court.)

Error from superior court, Screven county; Evans, Judge.

Action between J. M. Hiers and Mill Haven Company. From the judgment, both parties bring error. Reversed.

White & Boykin and Charlton & Charlton, for plaintiff. E. K. Overstreet and Mackall & Anderson, for defendant.

COBB, J. Without regard to the question as to whether the instrument under which Hiers claims created an estate for years, an easement, or a license in Deaton and his assignee, the tram road which has been constructed upon the land of Wade is, for the term specified in the contract, the property of Hiers, and he is entitled to the free enjoyment thereof without molestation or hindrance from Wade or any one claiming under him. The conclusion just stated can be properly reached, even though the rights of Hiers upon the land of Wade be those of a licensee only. In *Cook v. Pridgen*, 45 Ga. 339, 340, Judge McCay, after stating that a license, even in writing, is revocable, says: "But it does not always follow that a license is revocable at the will of the party giving the license. Even a temporary license must be considered as intended to continue until the objects of the parties are attained, as where, even in courts of law, it has been held that a mere license to overflow land with water, by a dam for a sawmill, cannot be revoked during the continuance of the dam, since it may fairly be presumed that the parties intended the license to last that long at least." In *Sheffield v. Collier*, 3 Ga. 87, Judge Lumpkin says: "Where acts have been done by one party, upon the faith of a license given by another, the latter will be estopped from revoking it to the injury of the former, and this even if the exercise of the right given by the license is of a nature to amount to the enjoyment of an easement or other incorporeal hereditament." In *Mayor, etc., v. Franklin*, 12 Ga. 243, Judge Nisbet says that even a parol license is not revocable in every case, and that "if the enjoyment of it must be preceded necessarily by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it becomes an agreement for a valuable

consideration, and he a purchaser for value. In such cases the books say that it would be against all conscience to permit the grantor to recall the license as soon as the benefit expected from the expenditure is beginning to be derived. While executory, as a general rule, it is revocable, but not after it is executed." See, also, *Rawson v. Bell*, 46 Ga. 19; *City Council v. Burum*, 93 Ga. 74, 19 S. E. 520, and cases cited. If the right to revoke a license is taken away by the fact that the licensee has acted on it and expended money and made improvements upon the faith of the license, much more would the right to revoke be taken away where the license was originally granted upon a valuable consideration moving from the licensee to the licensor. In the present case, under the contract creating the license, if it be treated merely as a license, the licensor is given what may properly be considered as very valuable rights during the continuance of the license, such as free wharfage, and transportation of merchandise and farm products over the tram road, as well as warehouse privileges, and at the expiration of the license the tram road and warehouse or houses become the property of the licensor. In such a case the licensor is not only not permitted to do that which would be a complete revocation of the license, but he is also prohibited from doing anything which would materially interfere with the licensee in the enjoyment of the license; that is, anything which would amount to a partial revocation of the license. Hiers, as the assignee of Deaton under the contract between him and Wade, is entitled to the free and unrestricted use of the tram road constructed in accordance with the contract, and anything which interferes with this free and unrestricted use cannot be imposed upon him, without his consent, by Wade or any one claiming under him. It needs no argument to demonstrate that the crossing of Hiers' tramway by another tramway at any point is an obstruction of his right to the free use and enjoyment of his tramway and an invasion of his property interest in the tramway, notwithstanding he may have no interest in the land upon which it is situated. There may be a difference of opinion as to how much he may be damaged by such a crossing, but there can be no two opinions about the fact that damage results to the owner of the tramway by having another constructed across it. Wade should in the contract have reserved the right to permit others to cross the tramway which Deaton was authorized to construct, if he desired to grant such a privilege to others. Hiers was the owner of the tramway, and had a right to the possession and use of it during the time fixed in the contract under which he claimed, and the attempt of Wade to confer the right upon some one else to cross this tramway was futile, and the court should have enjoined the construction of the crossing which was attempted to be made by the Mill Haven Company. As the judge erred in refusing to en-

join the construction of the crossing, the assignments of error, in both the main and cross bills of exceptions, were well taken. Judgment on each bill of exceptions reversed. All the justices concurring.

(113 Ga. 1188)

REED v. HOLBROOK.

(Supreme Court of Georgia. July 24, 1901.)
EXEMPTIONS—LIMITATIONS—PROCEEDS OF PROPERTY.

1. An exemption of personalty, which was applied for December 7, 1877, and granted January 2, 1878, and which embraced property amounting to less in value than is allowed under the constitution of 1877, is valid as against debts subsequently contracted, and the court below erred in holding to the contrary.

2. The court also erred in holding that the property claimed as exempt in this case was subject to a *fi. fa.* issued from a judgment obtained upon a debt contracted subsequently to the allowance of the original exemption, it appearing that the property sought to be subjected constituted the proceeds of the exempted property, in connection with the labor of the applicant and his family.

(Syllabus by the Court.)

Error from superior court, Hart county; S. Reese, Judge.

Action by J. W. Holbrook against Aaron Reed, trustee. Judgment for plaintiff on levy of execution. Defendant filed claim in behalf of wife. Judgment holding property subject, and defendant brings error. Reversed.

W. L. Hodges, J. H. Skelton, and O. C. Brown, for plaintiff in error. A. G. McCurry, for defendant in error.

LEWIS, J. Land levied on under an execution against Reed was claimed as homestead property in a claim filed by him in behalf of his wife. On the trial of the claim case he admitted that he was in possession of the property, and assumed the burden of proof. He testified: "I am the head of a family, now consisting of myself and my wife, Amanda Reed. At the time the homestead was set apart, she was my wife. * * * I did not then own any land, but the land now levied on is the proceeds of my homestead, purchased and paid for out of the annual crops and accumulations made by the use of the property set apart in the homestead, in connection with my labor and the labor of my wife and children." It appears that the exemption in question was applied for December 7, 1877, and was granted in January, 1878. The application stated that the exemption was applied for "under article 7, § 1, of the constitution of the state of Georgia of 1868." Counsel for the plaintiff objected to its introduction, basing their objection on the ground that it was void as to judgment creditors for the reason that the homestead was set apart under the constitution of 1868, after the adoption of the constitution of 1877. The court sustained the objection. No further evidence was in-

troduced. The court directed a verdict that the property was subject, and the claimant made a motion for a new trial on the grounds that the verdict was contrary to law and the evidence, and that the court erred in excluding from evidence the exemption papers, and in directing a verdict. The motion was overruled, and the movant excepted.

If the exemption of personalty involved in this case had been greater in amount than that allowed under the constitution of 1877, the question might well be raised as to its validity. Such, however, is not the case. While the application stated that it was made under the constitution of 1868, the fact is that the exemption was applied for after the adoption at the polls of the constitution of 1877, and was granted after the governor had officially proclaimed the result of the election. The value of the personalty set apart was well within the limit allowed by the constitution of 1877, being far below \$1,600; and the mere fact that the application stated that the exemption was applied for under the constitution of 1868 cannot affect the validity of the homestead granted under the constitution of 1877. It is quite true that one cannot have a homestead or exemption set apart to him which shall be governed by a law which has gone out of existence before the homestead or exemption was applied for or set apart; but the original exemption in the present case is governed as much by the constitution of 1877 as by that of 1868, and will not be declared worthless simply because the application prayed that it be set apart under the constitution of 1868. We conclude, therefore, that the court below erred in excluding evidence as to the existence of the homestead, and in directing the jury to return a verdict finding the property claimed subject to the plaintiff's *fi. fa.*, and we accordingly send the case back for a new trial. Judgment reversed. All the justices concurring.

(113 Ga. 1111)

MAYOR, ETC., OF CITY OF MACON v. DANNENBERG.

(Supreme Court of Georgia. July 23, 1901.)

OBSTRUCTION OF DRAIN—INJURY TO LOT OWNER—DAMAGES—EVIDENCE.

1. Assuming that the city was liable to respond in damages to the plaintiff because of negligence in permitting a drain or culvert placed across the street for the purpose of allowing the surface water to flow from his lot to become obstructed, the damages which may be recovered are only those which were occasioned by reason of the fact that the escape of the water was thus prevented.

2. In such a case, where damages are claimed for depreciation in the value of the lot, as well as injuries to houses situated thereon, evidence of the cost of repairing and rendering the houses habitable is not relevant or admissible only, as such evidence is confined to the items of cost necessary to repair or supply defects occasioned by the collection of the water upon the lot. (a) In such a case the city can-

not properly be held liable for injuries to the houses and the removal of parts thereof by persons trespassing on the property. (b) Even if the city be negligent in permitting the mouth of a drain or culvert to be so obstructed as not to carry away the water from the lot, the owner is nevertheless charged with the duty of caring for and protecting his property as far as he may be able, and the consequences of his failure to do so will not be chargeable to the city.

3. In a case of the character indicated, the reasonable rental value of the houses on the lot becomes a pertinent and legal subject of inquiry, but evidence by the owner or his agent that he "should" have received a named sum for a given time as rent if the houses had been occupied is not competent proof of such value.

4. Where, in such a case, damages to houses on the lot is shown as an element of recovery, and it appears that this damage was occasioned, not only by the action of water confined on the lot, but also by natural decay not incident thereto, and by trespassers as well, and the amount of damage sustained by the action of the water alone is not clearly indicated by the evidence, such proof of damage, without more, does not afford a legal basis for recovery.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by Joseph Dannenberg against the mayor and council of city of Macon. Judgment for plaintiff, and defendant brings error. Reversed.

Minter Wimberly, for plaintiff in error.
Hardeman, Davis & Turner, for defendant in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1148)

HENDERSON v. STATE.

(Supreme Court of Georgia. July 24, 1901.)

STABBING—INDICTMENT.

An alternative charge in an accusation that the accused cut and stabbed a named person with a knife, "or some other like instrument," renders the accusation bad on special demurrer.

Lewis, J., dissenting.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Stewart Henderson was indicted for stabbing. A demurrer to the indictment was overruled, and he brings error. Reversed.

Marion W. Harris and R. D. Feagin, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

COBB, J. The accused was arraigned upon an accusation charging him with the offense of stabbing, it being therein alleged that he did "unlawfully, with a knife, or some other like instrument, cut and stab" a named person. To this accusation the accused demurred upon the ground "that the charge is in the alternative," and for this reason the accusation is fatally defective. The demurrer was overruled, and he excepted.

Pleadings which are in the alternative are

defective in form, and this defect may be taken advantage of by special demurrer. Shipman, Com. Law Pl. § 405, p. 266; Steph. Pl. (Heard) *387, 388; Whart. Cr. Pl. (9th Ed.) § 161; 10 Enc. Pl. & Prac. p. 538. This ancient and well-settled rule of pleading is still of force in this state. *Sanders v. State*, 86 Ga. 717, 12 S. E. 1058 (2); *Grantham v. State*, 89 Ga. 121, 14 S. E. 892 (2). Every alternative statement in an indictment, however, will not vitiate it. If the disjunctive can be properly construed to be synonymous with "to wit," the alternative allegation will not render the indictment bad. So it was held that an indictment for horse stealing, which charged that the horse stolen was of a "bay or brown" color, would not, on account of this alternative statement, be held bad, because "bay" and "brown" meant the same thing. *State v. Gilbert*, 13 Vt. 647. See, also, *State v. Ellis*, 4 Mo. 474; *Cobb v. State*, 45 Ga. 11. If that which follows the disjunctive in the indictment can be properly construed to be merely descriptive of that which precedes it, and not an independent allegation, the alternative statement will not make the indictment fatally defective. See *State v. Hester*, 48 Ark. 40, 2 S. W. 339. Finally, if the disjunctive and all that follows it can be rejected as surplusage, then the alternative averment will not be ground for quashing the indictment. *State v. Corrigan*, 24 Conn. 286; *State v. Newsom*, 13 W. Va. 859. The rule seems to be that, if the disjunctive averment need not be supported by proof, or if the proof which is to be admitted thereunder is the same as that which would be admitted under the immediately preceding averment, or something which would be purely explanatory thereof, the insertion of the disjunctive allegation will not render the pleading defective. When this rule is applied to the indictment involved in the present case, it can be readily seen that the disjunctive is not used in the sense of "to wit," because that which follows refers to a different instrument from a knife, although it is true it refers to an instrument of a like nature. Neither can that which follows the disjunctive be treated as explanatory of the word "knife," because it distinctly appears that the language was not intended to refer to a knife, but to some other instrument of a like character. Can it be properly rejected as surplusage? As we understand the rule, no averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it was committed. All such averments must be proven as laid, or the failure to prove the same as laid will amount to a variance. If evidence can be offered in support of the allegation, the allegation cannot be rejected as surplusage. If the state failed to prove in this case that the stabbing was done with a knife, why would not evidence be admissible under the other allegation that it was done with a razor, or dirk, or any other sharp instrument? The charge as to the weapon might have been

cumulative, naming various weapons, and the proof of any one would have supported the allegation; but this does not prevent the alternative allegation from being the subject of exception by the accused, if he takes advantage of it at the proper time, and in the proper way. In *Langston v. State*, 109 Ga. 153, 35 S. E. 166, 779, the accused was charged with having seduced a virtuous unmarried female "by persuasion and promise of marriage, and by other false and fraudulent means." It was ruled that the words, "and by other false and fraudulent means," could not be treated as surplusage, and that a special demurrer calling for more specific information as to the false and fraudulent means used was well taken. In that case the accused was charged with seduction, and the words last quoted merely described in general terms the manner in which the offense was committed. In the present case the accusation charges the offense of stabbing, and the general words, "some other like instrument," likewise describe in general terms the means used. If the general words quoted in the case cited cannot be treated as surplusage, we do not see how, on principle, the descriptive words used in the present accusation can be so treated. As these words can be treated neither as surplusage nor as synonymous with what precedes the disjunctive, the charge in the alternative cannot be held to be good as against a special demurrer. The case of *Hornsby v. State*, 94 Ala. 66, 10 S. E. 522 (4), will be found to be exactly in point on the question made in the present case. Very great changes have been wrought in the rules of criminal pleading, but it is still the law of this state that a person accused of crime is entitled to an indictment which is good in matter of form as well as in substance, if he is fortunate enough, as in the present case, to have an attorney sufficiently well skilled in the rules of pleading to point out by special demurrer the defect in the indictment. The accusation was defective. This defect was one which could be properly taken advantage of by special demurrer, and the judge erred in not quashing the accusation. Judgment reversed. All the justices concurring, except LEWIS, J., dissenting.

(113 Ga. 776)

WESTERN & A. R. CO. v. HYER.

(Supreme Court of Georgia. July 18, 1901.)

APPEAL—RECORD—JUDICIAL COGNIZANCE—DEATH OF EMPLOYE—DAMAGES.

1. A mere statement in a brief of evidence that the plaintiff "introduced in evidence the mortality and annuity tables in the seventieth Georgia Report" does not authorize this court to take judicial cognizance of the contents of the tables published by the official reporter as an appendix to that volume.

2. The right of the plaintiff in the present case to recover of the defendant was clearly established, and it does not appear that the verdict was excessive.

Simmons, C. J., and Lewis, J., dissenting.
(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action by Fannie Hyer against the Western & Atlantic Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Payne & Tye and J. M. Neel, for plaintiff in error. Burton Smith and Albert S. Johnson, for defendant in error.

LUMPKIN, P. J. Mrs. Fannie Hyer brought against the railroad company an action for damages for the homicide of her husband, who, while in the defendant's service as a locomotive engineer, was killed in a collision. There was at the trial ample evidence to show that with respect to this collision the defendant was negligent. Its main contention was that the deceased was also guilty of negligence contributing to his death. The jury returned a verdict for \$5,500 against the company. It made a motion for a new trial, which was overruled, and it excepted. The grounds of this motion were that the verdict was contrary to law and to the evidence, that it was excessive, and that the court erred in giving certain instructions to the jury as to the manner of using the mortality tables appearing in 70 Ga. 844-848, Append., and in failing to give certain other instructions in relation thereto.

1. The first question presented for our consideration is whether or not, in view of the brief of evidence, we can properly undertake to pass upon those grounds of the motion which allege error in charging or omitting to charge with reference to the tables above mentioned. An examination of the brief of evidence discloses that it contains but a single reference to these tables, the same being expressed as follows: "Plaintiff here introduced in evidence the mortality and annuity tables in the seventieth Georgia Report." It is manifest that, in the absence of certain and definite information as to the contents of the tables thus referred to, no reviewing court could intelligently determine what should or should not have been charged with respect thereto. The truth of this self-evident proposition was conceded by the learned counsel for the plaintiff in error, but their insistence was that the meager reference in the brief of evidence to the seventieth volume of our Reports was all that was necessary to bring before this court the matter appearing on the designated pages of that report. In other words, they contended that, as the brief of evidence showed that certain tables appearing on those pages were introduced in evidence, this court should take judicial cognizance of what was there shown. To this we cannot agree. The mere fact that certain tables were published by the official reporter of this court in the form of an appendix to the seventieth Georgia does not authorize us to take judicial notice of the contents of the tables there to be found. On

the contrary, we have no authority to look outside of the record of any given case for the purpose of discovering something which that record should, but does not, itself disclose. So far as we have been able to ascertain, the furthest this court has ever gone in treating as evidence a document not set forth either in a brief of evidence or bill of exceptions was in the case of Ragland v. Barringer, 41 Ga. 114, in which a majority of the court held that it would take judicial notice of the contents of a proclamation issued by the governor of this state in compliance with the terms of a statute giving him direction in the premises. Even if the doctrine announced in that case can be said to have any application to one like the present, the decision rendered therein is not binding as authority, for the reason that Chief Justice Brown dissented therefrom. The foregoing makes it sufficiently apparent that we cannot properly or intelligently pass upon such of the grounds of the motion for a new trial as relate to charges or omissions to charge concerning the use which the jury might make of the tables above referred to.

2. As already intimated, the jury were fully warranted in finding against the company, and the only remaining question is whether or not their verdict was excessive. We cannot, as matter of law, hold that it was. Though the plaintiff's husband at the time of his death was about 64 years of age, there was evidence to warrant the jury in concluding that he was an unusually strong, robust, and vigorous man, who in all probability would have been able to perform his duties as a railroad engineer for many years longer. There was, it is true, testimony tending to show that he was beginning to manifest physical infirmities incident to advancing years, and could hardly be expected to be able to do active service as an engineer for more than 2 or 3 years. As a reviewing court we cannot, however, undertake to say what the jury should have found as to the expectancy of the deceased, or the probable continuance of his ability to perform active work. Giving to the evidence as a whole the view most favorable to the plaintiff, it can be fairly said that it was reasonable to conclude the deceased might have efficiently performed his duties as a locomotive engineer for 8 or 10 years longer, had he not been killed. Several of the witnesses described him as a vigorous man, apparently not over 55 years of age; while there was evidence to the effect that a locomotive engineer not infrequently successfully continued his calling until he reached the age of 70, or even 75 years of age. The deceased was at the time of his death earning an income in excess of \$1,200 per annum. From these figures it will readily be seen that the recovery of \$5,500 was sustainable, and that it would be going too far to hold, as matter of law, that a verdict for that amount was unwarranted. Judgment affirmed.

SIMMONS, C. J., and LEWIS, J. (dissenting). Courts take judicial notice of the standard mortality and annuity tables, without proof. 1 Greenl. Ev. (16th Ed.) § 6e; 17 Am. & Eng. Enc. Law (2d Ed.) 900, and cases cited; Bradner, Ev. 190; 1 Tayl. Ev. § 19, and American notes; Thayer, Oas. Ev. 306 et seq. Where, therefore, the record discloses that certain standard mortality and annuity tables, found in 70 Ga. 844, Append., were introduced in evidence, and the motion for new trial complains of a manifest error committed by the trial judge against the plaintiff in error in his charge to the jury in reference to the use of the tables, but the brief of evidence does not contain a copy of the tables used on the trial, this court should not, merely because the tables are not copied in the brief of evidence, refuse to consider the error, and, as a result of so doing, affirm the judgment, but should take judicial notice of the tables, and reverse the judgment denying a new trial, according to the decision in Railroad Co. v. Smith, 94 Ga. 107, 20 S. E. 763. Under the ruling of the majority, the plaintiff in error loses its case because it failed to bring up in the record a copy of a set of tables whose contents the law presumes the court to know, and as to which, if it has forgotten them, it can refresh its memory by reference to them as published in its own Reports.

(112 Ga. 979)

POWELL v. ALFORD.

(Supreme Court of Georgia. July 20, 1901.)

ACTION BEFORE JUSTICE—PLEADING.

Under section 4116 of the Civil Code, which prescribes how suits in a justice's court shall be brought, "such justice or notary public shall attach a copy of the note, account or cause of action sued on to [the] summons at the time the same is issued." The above-quoted language was taken from the act of September 21, 1881 (Acts 1880-81, p. 66). Since the passage of that act, the plaintiff in an action in a justice's court must set forth, with some degree of certainty, his cause of action; and, having done so, must recover, if at all, upon the cause as laid, and cannot recover upon a different and distinct ground of liability.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by G. W. Powell against G. W. Alford. Judgment for plaintiff before a justice, and defendant brought certiorari. From an order setting the judgment aside, plaintiff brings error. Affirmed.

Ben J. Conyers, for plaintiff in error. Albert & Hughes, for defendant in error.

FISH, J. Powell brought suit in a justice's court against Wood as principal, and Alford as guarantor, on an open account. The summons issued by the justice and the copy of the account thereto attached both showed that Alford was sued as guarantor. Upon the trial, after the introduction of the evidence,

the magistrate dismissed the case as to Alford, and rendered judgment in favor of the plaintiff against Wood. The plaintiff appealed the case to a jury, who rendered a verdict in favor of the plaintiff against Alford alone, and the magistrate entered judgment accordingly. Alford took the case by certiorari to the superior court, alleging, in his petition, among other things, that the verdict was contrary to law and the evidence. The court sustained the certiorari, set the verdict and judgment against Alford aside, and dismissed the case as to him, stating that the case was controlled by a question of law. In an opinion accompanying this judgment, our learned brother of the trial bench says: "The suit was against J. F. Wood and G. W. Alford, guarantor. No amendment was made either to the summons or the account sued on, both of which stated Alford to be guarantor. I cannot surmise a possible amendment or send the case back on such a surmise. The plaintiff, having so sued Alford, must so recover against him, if at all. He could not, in such a suit, recover against him as sole principal debtor. He clearly cannot recover against him as guarantor under the evidence, because, if there was any guaranty, it was in parol." "Plaintiff in error, however, insists that the evidence made out a case of original undertaking, not guaranty, against Alford, and that a verdict against him as principal debtor can stand, even if the summons and account be construed as alleging a cause of action against him in the character of 'guarantor,' because there is practically no pleading in a justice court, and there should, of course, be none." We agree with his honor that no recovery could be had against Alford as guarantor, because the evidence did not show any guaranty in writing, and that the plaintiff, having sued him as guarantor, could not recover against him as principal debtor. To support the contention that, under the evidence, a verdict against Alford, as principal debtor, can stand, although he was sued as guarantor, the two cases upon which the plaintiff in error mainly relies are Howell v. Field, 70 Ga. 582, and Baldwin v. Hiers, 73 Ga. 739. In the first of these cases it was held that, though the defendant was sued "on promise to pay the debt of" two other named persons, a judgment could be lawfully rendered against him upon proof showing that, by agreement between all parties concerned, he had become, by substitution, the real debtor of the plaintiff, the original debtors being released, without amending the summons to conform to this proof. In the other case it was held that one sued in a justice's court as guarantor could be held liable upon proof showing that his promise to pay the debt was an original undertaking on his part. Either of these cases, especially the latter, might afford authority for sustaining the contention of the plaintiff in error, were it not for the fact that they were each brought in a justice's court before the passage of the act

of September 21, 1881 (Acts 1880-81, p. 66). This fact in reference to the Howell Case we have ascertained from the record in that case on file in this court, and in the Baldwin Case it is shown by the reporter's statement of the case, which precedes the opinion of the court. The act of 1881 amended the previous law, in reference to suits in a justice's court, by requiring that "the justice or notary public shall attach a copy of the note, account, or cause of action sued on to [the] summons at the time the same is issued." This requirement is now a part of section 4116 of the Civil Code, which provides how suits in justices' courts shall be brought. In the case of *Vaughan v. McDaniel*, 73 Ga. 97, which was decided at the term preceding the one at which the decision in the Baldwin Case was rendered, it was held that "the object of the act of 1880 (Code, § 4139), which required the summons in justices' courts to have the cause of action sued on attached thereto, was to give the defendant notice what he was required to meet, and since its passage such cause cannot be changed to a totally different cause of action." The act here referred to is really the act of September 21, 1881. See Acts 1880-81, p. 66. This decision is directly in point, and is conclusive upon the question under consideration. If the cause of action set forth in the exhibit attached to the summons cannot be changed to a totally different one, certainly a suit upon one cause of action cannot be supported by proof establishing an entirely different and distinct ground of liability against the defendant. Since the passage of the act of 1881 the plaintiff in an action in a justice's court must set forth his cause of action with some degree of certainty, and, having done so, cannot recover on a different and distinct ground of liability. Judgment affirmed. All the justices concurring.

(113 Ga. 1114)

TINDALL v. WESTCOTT, Sheriff.
SAME v. NISBET, Clerk.

(Supreme Court of Georgia. July 23, 1901.)

MONEY IN CUSTODIA LEGIS—RECEIVER—MISAPPROPRIATION OF FUNDS—CONTEMPT OF COURT—PUNISHMENT—HABEAS CORPUS—POVERTY.

1. A person who has, by the order of a court of competent jurisdiction, been appointed receiver of the property of an insolvent debtor, becomes an executive officer of the court which appointed him, and the property received by him, or the money arising from its sale, is in custodia legis.

2. If a receiver has been directed by the court to deposit a fund arising from the sale of the property of the debtor, in banks, subject to be withdrawn only on his check when the same has been countersigned by the judge presiding in the court which appointed him, and in violation of his duty, and in disregard of the order of the court, the receiver obtains such fund from the banks on checks not countersigned, and appropriates the same to his own use, then, regardless of the question whether or not the bank is liable for such wrongful payment, such receiver is in direct contempt of the court, whose officer he is; and he may be attached

and punished for contempt in disregarding the orders of the court, and also for a failure or refusal, when so ordered, to pay into court the fund so misappropriated. (a) A creditor prima facie entitled to participate in the fund so withheld is a proper party to move an attachment against the defaulting receiver, and, in the absence of any such motion, the judge presiding, on information derived from any source, should cause proper inquiry to be made as to the facts, and, if found to be true, take proper steps to compel the return of the money.

3. The high degree of care proper to be exercised in the preservation of funds arising from the seizure of the property of a citizen requires that a receiver intrusted with such a fund should be held to a rigid accountability, and if, on proper order, he fails or refuses to deliver the same, it is the duty of the court to compel him to do so by the use of all lawful means; and, to that end, it is not illegal to adjudge him to be in contempt for such failure, and imprison him, nor to continue such imprisonment, for the continuing contempt in refusing to deliver the money, for such a time as may be necessary to compel its production. (a) After he has been adjudged in contempt and imprisoned for a refusal to deliver the fund, he will not be discharged under a writ of habeas corpus sued out before another judge on the ground that he is unable, by reason of his poverty, to comply with the order; but it rests in the sound legal discretion of the judge who committed him, or who is presiding in the court which committed him, to determine whether it is or is not in the power of the receiver to restore the fund. (b) Whether a receiver is or is not unable, by proper effort, to restore a fund intrusted to his keeping as an officer of the court, and which he has willfully misappropriated, is, both at common law and under our statute, a question which may be determined by the presiding judge, and is not one which is required to be submitted to a jury.

4. The receiver, in effect having admitted a misappropriation of the fund committed to his safe-keeping, was, in any event, in contempt, and, without regard to the fact of the disqualification of the presiding judge who passed the order requiring him to pay the fund into court, was subject to be held therefor by the judge who heard the case. Under the facts of this case, as shown by the record, the receiver will not be heard to urge such disqualification.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. S. Candler, Judge in *Nisbet Case*; J. H. Lumpkin, Judge in *Westcott Case*.

Action by Robert A. Nisbet against H. C. Tindall. Judgment holding defendant guilty of contempt. Action by H. C. Tindall against G. S. Westcott, sheriff, seeking discharge of plaintiff by habeas corpus. Judgment for respondent, and in both cases Tindall brings error. Cases consolidated, and judgments affirmed.

John P. Ross, for plaintiff in error. N. E. Harris, C. P. Steed, John I. Hall, O. J. Wimberly, and Anderson & Grace, for defendants in error.

LITTLE, J. There are two cases pending in this court in each of which practically the same principles of law, resting upon the same facts, are involved, and the same person is the plaintiff in error. The first is that of *Tindall v. Nisbet, Clerk*, in which a judgment rendered by Judge Candler, of the Stone Mountain circuit, holding the plaintiff

in error to be in contempt of the superior court of Bibb county, is sought to be reversed. In the second case, which is entitled "Tindall v. Westcott, Sheriff," the same plaintiff in error seeks to reverse a judgment rendered by Judge J. H. Lumpkin, of the Atlanta circuit, which refuses to discharge the plaintiff in error from the custody of the sheriff of Bibb county under the commitment made by Judge Candler. These two cases were by consent presented together in this court, and the adjudication now made determines each.

After a careful examination of the record, and a consideration of the alleged errors which the faithful and able counsel representing the plaintiff in error insists were committed on the hearing of the cases in the superior court, we are forced to the conclusion that no error was committed by Judge Candler in the rulings made in the contempt case, nor by Judge Lumpkin in the hearing of the writ of habeas corpus, and we affirm the judgment rendered in each of said cases. Many of the rulings made directly by Judge Candler were necessarily passed on by Judge Lumpkin on the hearing had before him. Without passing in detail on the several rulings made by Judge Candler which were not involved in the petition seeking a discharge from the custody of the sheriff, if, indeed, there be any, it is sufficient to say that, in our judgment, no error which entitles plaintiff to another hearing on the proceedings to attach him for contempt, or to set aside the judgment finding him to be in contempt of court, and ordering his imprisonment, was committed. In passing on the several questions raised on the hearing before him, his honor Judge Candler, in rendering his judgment, did not, in detail, elaborate the principles of law upon which his decision was made to rest. But, in formulating the judgment by which he refused to discharge the plaintiff in error from the custody of the sheriff, his honor Judge Lumpkin deals at length and in detail with the legal questions involved in the consideration of the case on its merits. And the opinion rendered by this able judge, which we find incorporated in the record, seems to be so decisive of every material question raised, and so clearly and forcibly expresses the view which we entertain of the law relating to these questions, that we incorporate it herein, and adopt it, as satisfactorily establishing the correctness of the conclusions which we have reached, and which are announced in the headnotes to these two cases. The opinion so rendered is as follows:

"In passing upon a proceeding seeking to obtain a discharge from the custody by writ of habeas corpus, it is my general custom simply to order a discharge, or to refuse it and remand the prisoner. But the present case is one of such importance and interest that I feel it to be the duty of the presiding judge to do more than this, and to give some

expression of his views on some of the principal points involved. This is indeed an important case. It is important to the prisoner, because it involves his liberty. It is important to the court, because it involves the question whether they can have the assets which they take into their custody preserved, and see that their receivers honestly and faithfully discharge their duties, and properly dispose of property and funds intrusted to their keeping, or whether they cannot; in a word, whether they can control their receivers, or whether their receivers shall control them. It is also of interest to the judges to know whether, after one of them has carefully and patiently considered the conduct of a receiver, and has adjudged him in contempt, another judge of like court will promptly upset his judgment and turn the prisoner loose on a writ of habeas corpus. Of course, if the detention is illegal, the prisoner will be promptly discharged; but if it is a matter of discretion, or of reviewing what the judge who rendered the judgment has done, the second judge should not be overready to interfere. Such appeals should be more naturally addressed to the judge whose judgment is sought to be modified or revoked, or to some other judge with proper jurisdiction, by petition, rather than to another judge by petition for habeas corpus. This case is also of great interest to the public. When creditors or others institute proceedings under which a receiver is appointed, they and the defendants should like to know whether such appointment is a means of preserving and safely keeping the property and funds involved, or whether it is simply a proceeding to take the property of others and turn it over to a receiver for his own use; and whether at the end of the litigation they will get what the court placed in the safe-keeping of its officer, or whether they must be satisfied with the information that the receiver has misappropriated their funds, but that, inasmuch as he says that he has spent them, the court who appointed him is helpless and powerless to compel the restoration or faithfulness and honesty on the part of its appointee. It must present to the mind of the litigant a rather cheerless idea of law and courts if he were told that the court could take his property or money out of his hands and place it in the hands of a receiver for safe-keeping, but could not see that it was safely kept, and that he must be quite content at the end of the case to get nothing, if the receiver should step up and admit that he had misappropriated the funds, but defy the court to make him perform his duty, merely saying in effect that he had taken the money, but he had also spent it, and really did not see how he was to deliver it to those to whom it rightfully belonged, or as the court should direct. The truth is that in these days, when there is so much of speculation and dishonesty in positions of trust, for a court to accept any such excuse,

and allow any such precedent to be set for trustees and receivers, would seem to me little short of judicial outrage upon litigants and the public. See *Wimpy v. Phinlzy*, 68 Ga. 188. That a thing may be a crime does not also prevent it from being a contempt. Justice should ever be tempered with mercy, but to temper justice is not to destroy it, or to weaken it to the point where sentimentality for a faithless trustee or a criminal shall encourage crime in others, or work a positive wrong to the innocent and injured. Receivers might as well learn first that misappropriation can have but one end,—the jail. In what I say, it would seem needless to remark that I am actuated by no sort of feeling against this prisoner. Personally he was wholly unknown to me. If I had a feeling towards him, it would be one of pity and sorrow. To hear of a fond wife and innocent children who must suffer on account of his wrong is touching, but it is quite possible that some of the creditors in the equity cause also have wives and children; and it is one of the saddest things in life that a man can never do wrong and suffer alone. The web of human lives is so interwoven that no individual thread can be drawn out to itself without straining and tearing those intertwined with it.

"Many of the points made by the petitioner have been passed upon and concluded by the judgment of the Hon. John S. Candler, before whom the rule against the receiver was tried, and who adjudged him in contempt and sentenced him to jail. To have so adjudged must necessarily have covered and concluded every fact necessary to such adjudication. A writ of habeas corpus is not a means of reviewing a judgment, nor of considering whether there were any errors or irregularities in it; but the judgment must be so far void that the detention under it is illegal, in order to authorize a discharge under this writ. A motion to modify or a writ of error may reach errors or irregularities, if any exist. To a large part, if not all, of the decision, I might have sustained the demurrer of respondent; but, in the interest of a full and thorough hearing wherever a question of liberty is at stake, I preferred to reserve the ruling on the law questions so raised, and decide the case after having before me all that might be lawfully offered. To illustrate, in Judge Candler's judgment it is stated that it is adjudged that the receiver 'has been and is now in contempt of court,' and it is ordered and adjudged that he 'be required to at once pay to the clerk of this court the sum of \$6,021.17, the same being the amount which is hereby adjudged to be in his hands, with which he is properly chargeable under the evidence, and for which he has failed and refused to account.' That such a judgment is conclusive unless reversed or set aside, see *Thweatt v. Kiddoo*, 58 Ga. 300.

"It is suggested that the decree directing the receiver to pay over the funds to the clerk

was not based on pleadings or the record. I do not understand that a judge can give no direction to a receiver except upon pleadings of parties and findings. The receiver is his officer, and subject to his directions and findings. Suppose he deemed that a certain action of the receiver was necessary for the preservation of the fund; is he powerless to order it unless somebody presents pleadings about it? Must he induce some one to plead and get a judgment, before he can order the receiver to do some necessary thing? A verdict or auditor's report rarely, if ever, undertakes to direct the receiver what to do. It finds debts, amounts, and priorities, and leaves the judge to decree how and when the receiver shall pay out or deal with the funds in his hands, having in view such finding.

"It is said that the order requiring the deposit by the receiver in banks was a special order, and provided how the funds should be drawn out, and that the banks were liable if they let it be taken out otherwise. It may be said that this was before Judge Candler, and must have been passed on by him. But, if it were an open question, is it possible that a receiver can say to the court, in effect: 'You told me to deposit, and instructed me not to draw out, the fund, save only to pay expenses, except in a certain way. I violated the instruction, and got the fund and used it; but possibly the banks are liable for having joined or aided me in this malfeasance, or for having allowed it wrongfully, and therefore the court is powerless to deal with its officer'?

"It is urged with great earnestness and ability that Judge Felton was disqualified from presiding in the equity case in which the receiver was appointed, and was disqualified from making the decree which contained a direction to the receiver to deliver the fund to the clerk; that the decree, as to the receiver, was a nullity; that the rule was dependent on it, and, being dependent on a nullity, must itself be void. It is quite true, if a proceeding is dependent for its own validity upon a nullity, it must fall. It may be doubted whether the proceedings before the judgment of Judge Candler were wholly dependent upon Judge Felton's decree. But suppose they were; is that any ground of defense to the receiver? In the first place, this same man was a member of a firm who were plaintiffs in the petition under which the receiver was appointed. They saw the case steadily proceed, without objection. This petitioner himself heard Judge Felton discuss his disqualification, and decline to preside in the case unless by consent or agreement; heard the judge, when urged to preside, inquire if there were any objection; sat silently by and saw him preside and make the decree. Can he be heard to say that Judge Felton was disqualified? It is said that he was only a party to the decree as a creditor, and not as a receiver, and hence was only bound or estopped in the former character. But he is the same man, and he saw and heard and

said not a word in any character. Even if a judge who was disqualified by reason of relationship to try a case should provide and render a decree, his disqualification could not be set up as a ground for a writ of habeas corpus. *Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120; *Shope v. State*, 106 Ga. 228, 32 S. E. 140. Again this very receiver, as receiver, made a report to the court on February 21, 1901, in which, among other things, he set out that he had made certain expenditures in paying premiums on his bond as receiver, and praying that they be allowed as part of his expenses; and they were allowed on February 22, 1901, in the very decree which the said receiver now seeks to attack as void. Can he apply to the judge for action, obtain the thing he asks, and then attack the decree which he thus in part obtained, as void on the ground that the judge was disqualified to act? If he was not estopped when he heard the judge ask if there were any objections to his presiding, and said nothing,—if he was then listening only with his individual ear, and was deaf in his official auricle,—surely the proceeding just above stated estops him. Is it possible that a receiver can act under the orders of a judge, make a report to him, invoke and obtain action by him, and treat him as qualified to do everything in the case, and yet raise the question of qualification when it suits him? Is the judge qualified to do what suits the receiver, but disqualified to do what displeases him?

"It is also urged that the receiver was entitled to a trial by jury under the rule against him, and this is claimed both under the constitution and the acts of the legislature. This very question was before Judge Candler, and was tried by him, and a writ of habeas corpus is not the mode of reviewing his decision. 15 Am. & Eng. Enc. Law (2d Ed.) 176; *People v. District Court of Second Judicial Dist. (Colo.)* 58 Pac. 608, 46 L. R. A. 855. But, aside from this, the constitution of 1877 (Code, § 5876) provides that 'the right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate.' This provision confers no new right of trial by jury, but merely guarantees that 'the right of trial by jury [that is, the pre-existing or established right] shall remain inviolate.' Has there ever existed any right on the part of a receiver who disobeys the orders of the court of his appointment, and violates his duty, to demand a jury trial? He has never had any such right to be violated, and the constitution has no reference to any such matter. Through all the English practice, and under all the practice under the various constitutions of this state, if any such right was ever allowed or established, I am not aware of it. *Brimson's Case*, 154 U. S. 447 (6), 14 Sup. Ct. 1125, 38 L. Ed. 1047; *Ellenbecker's Case*, 134 U. S. 31-40 (4), (5), 10 Sup. Ct. 424, 33 L. Ed. 801. In *Akers v. Veal*, 66 Ga. 302, it is held that 'a receiver, when called upon by a court to account for funds in his hands, cannot com-

mand a jury to pass upon such accounts.' Similar rulings have been made as to equity cases. *Lamar v. Allen*, 106 Ga. 159-162, 33 S. E. 958; *Hearn v. Laird*, 106 Ga. 271, 276, 29 S. E. 973. An attachment proceeding arising in the course of or incident to an equity case is itself very closely allied to an equity cause. *Hayden v. Phinizy*, 67 Ga. 758. Thus there is no constitutional right of trial by jury in this case. Is there any statutory right? Prior to the act of 1892, section 4046 of the present Code had long stood on the statute books, yet no court ever supposed that under it a defaulting receiver was entitled to a jury trial. Indeed, before the act of 1892 it was held that, even as to the others refusing to deliver money to a receiver, there was no such right. *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 596 (3); *Kingsbery v. Ryan*, 92 Ga. 109, 117, 17 S. E. 689 (3); *Cobb v. Black*, 84 Ga. 162. Besides, the supreme court has, in effect, held that the limitations apparently sought to be placed upon the superior courts by that section, as to defining contempt, were unconstitutional. *Looney v. State*, 111 Ga. 168, 36 S. E. 630. In 1892 the legislature passed an act which is relied on as conferring on this receiver a jury trial. Acts 1892, p. 65; Code 1895, § 4046. Whether this is an amendment by adding a proviso to an unconstitutional section, so far as the superior court is concerned, and, if so, what effect it had, need not be discussed. Suffice it to say that, in my opinion, it was never the intention of the legislature by the act of 1892 to deal with cases of this character, nor to apply that law to them. That act was passed to deal with cases where money was alleged to be in possession of a person who refused to turn it over to a receiver, and similar cases, but not to cases like this, in reference to failing or refusing to 'pay over' money. Now, money which the court has in its possession or custody by its receiver has already been paid over. The terms employed show that the legislature did not contemplate a case where the fund was already delivered into the hands of the court's officer, and where the court gives direction to him. In *Akers v. Veal*, 66 Ga. 302-304, it is said: 'Receivers are but the officers of the court appointed by them, and they are required to account to the court for all receipts and disbursements of the fund received by them. They are not governed by the same rules that regulate the proceedings between parties litigant. Ordinarily they will not be allowed to make expenditures which will materially reduce the fund in their hands without the sanction of the court, and they should get permission as to such expenditures before they are made, as they are always to be held to a strict accountability therefor. A court, in passing upon the accounts of its receiver, should never ratify any expenditure which has not been necessarily incurred for the benefit of the estate intrusted to his care. High, Rec. §§ 798, 799.' 'The fund confided to a receiver is considered as being in custodia le

for the true owner; the court itself having the care of it by its own creature or receiver, and who is often spoken of as the officer of the court. High, Rec. § 2.' Hence, when this 'hand of the court' is called upon to deliver and account for the fund, it shall not be permitted to reply that 'I demand a jury to pass upon my stewardship before I surrender it.' It seems clear that when money has already been 'paid over' to the receiver, and is in custodia legis,—in the keeping of this hand of the court,—the legislature never dreamed that the court could not deal with its own legal hand without having a jury trial. The jury is an important factor in court procedure, but it would indeed be a remarkable and humiliating spectacle if a court having the fund in its custody through this creature or officer of the court could do nothing save after a jury trial, with ensuing motion for a new trial and bill of exceptions. To so decide would be to block efficient court proceedings, and to hold that the head cannot control its own hand without the aid of a jury. No such act has been passed, and, if any such should be proposed, it should have the caption, 'A bill to be entitled an act to authorize and encourage misappropriation on the part of receivers.' That the general words used in the act of 1892 are to be construed in the light of the purpose of the act, see *Lee v. Lee*, 97 Ga. 736, 737, 25 S. E. 174. Let it be noted that this receiver made no real denial of having committed a breach of duty.

"It is suggested that the limit of twenty days' imprisonment provided for an act of contempt applies. Not so. A failure or refusal to comply with the order of the court to deliver or pay money, or the like, or to purge the contempt, is a continuing contempt, and the court may pass judgment that its officer be imprisoned until he shall comply. *Cobb v. Black*, 34 Ga. 162, 166. It is a civil proceeding. *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833.

"It is suggested that there are two things set out in the proceedings,—one disobedience in drawing the checks, and the other for refusing to pay the funds as ordered. It is probable that both were closely allied and became in a measure consolidated, but, if the sentence for disobedience as to drawing checks were limited, the judgment of imprisonment for failing or refusing to pay funds is not so limited, and may be till payment or proper purgation and further order, or the like. The same thing may be said of the complaint that the sentence is indefinite. In civil or remedial proceedings for contempt the judgment need not fix a definite time limit for its termination. *Cobb v. Black*, 34 Ga. 162-166; *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833; 7 Am. & Eng. Enc. Law (2d Ed.) 68, 69. Even if this sentence were more than Judge Candler could have lawfully imposed (which I by no means wish to be understood as holding), and if it could be conceded that he could only have sentenced the

present petitioner for twenty days (which is not the law, and is not conceded), still this prisoner has not been incarcerated for twenty days, even under his own theory, and he would have no right to discharge under writ of habeas corpus until his detention is illegal. In no event is it now illegal. Is it possible that any one familiar with the law really supposes that the legislature intended to say that, if a receiver should take and hold or misappropriate all the funds intrusted to his care,—perhaps many thousand dollars,—the court could not coerce him to perform his duty, but could only put him in jail for twenty days? If the judgment of Judge Candler is in any respect irregular, it may be corrected by a writ of error or motion to modify, but not by writ of habeas corpus. Not even if the sentence is excessive, which it is not, would it be ground for discharge on writ of habeas corpus. 15 Am. & Eng. Enc. Law (2d Ed.) 171.

"Finally, it is said that there could be a discharge of this prisoner because he testified that he cannot pay the sum required of him, or comply with the order of the court. There is no explanation of what he has done with the money, but only the bald statement that he is unable to pay it. Shall receivers, sheriffs, and attorneys who have funds intrusted to their care be discharged by merely saying that they have spent the money which did not belong to them, and cannot pay? Surely not. To wrongfully place one's self in such a position gives no right of discharge. It is true that perpetual punishment is not contemplated, but a showing of inability does not give any actual right to terminate imprisonment, but addresses itself to the discretion of the judge. In *Kingsbery v. Ryan*, 92 Ga. 114, 17 S. E. 689, it is said that: 'If, as a result of the investigation above referred to, it should unequivocally appear that Ryan in fact had no money when the demand was made upon him by the receiver (a possibility suggested by Judge Clarke in his opinion already alluded to), it would by no means follow that the judgment of contempt would be ipso facto set aside or made void.' See, also, *Wimpy v. Phinlzy*, supra; *Harris v. Bridges*, 57 Ga. 407; *Smith v. McLendon*, 59 Ga. 527; 15 Am. & Eng. Enc. Law (2d Ed.) 173. This and the next position really have no place in habeas corpus proceedings, and are not properly incorporated in them, but should be by petition to the court. But counsel on both sides stated that they were willing to have them considered as if no petition [were] addressed to the judge's discretion.

"The last ground urged is an appeal to the judge on the ground that the petitioner has been sufficiently punished and should be discharged. That any such position should be urged can only be attributed to the zeal of able counsel and sympathy for the prisoner's family. Of course, it cannot be seriously expected that any conscientious judge will hold that less than two weeks in jail is a

sufficient punishment for a receiver who, under Judge Candler's judgment, is wrongfully withholding some six thousand dollars. I would that I could, with due regard to the law and my duty, restore this man to his sorrowing family. The tears of his wife and the shame and suffering of his children appeal to deep-seated feelings of the human heart. But a judge has resting upon his shoulders a high duty, and he must act under the solemn sanction of his oath of office. He cannot give way to sentiments of pity or of sympathy for those whom petitioner has brought to suffering, and do that which would set an evil precedent, and perhaps work untold wrong to many people. When in fact this petitioner shall comply with the judgment of Judge Candler, or when, on proper proceedings, it may appear fully and in fact that he cannot do so, and the judge who may hear the case shall deem that he has been sufficiently punished, he may discharge the applicant, if he so decides. But, with a just appreciation of my duty, I cannot do so now."

Judgment in each case affirmed. All the justices concurring.

(113 Ga. 691)

TUELLS v. TORRAS

(Supreme Court of Georgia. May 23, 1901.)

WRIT OF ERROR—DISMISSAL—RIGHT OF ACTION—MASTER OF SHIP—TERMINATION OF EMPLOYMENT—ATTACHMENT AGAINST NON-RESIDENT—LEVY.

1. A writ of error in an injunction case will not be dismissed upon the ground that the act sought to be enjoined has been completed, when the evidence offered by the defendant in error in support of his motion to dismiss is controverted in any way by the opposite party.

2. The master of a ship has such a special property in the vessel and cargo that he may bring an action in his own name, either at law or in equity, against one who wrongfully interferes with his possession of either.

3. When the master of a ship causes the same to be seized under an attachment in his own favor against the owner, such conduct will authorize the owner to terminate the employment; but until the employment is terminated by the owner the master continues to represent him with reference to the vessel and its cargo, and may assert the rights of the owner against any one wrongfully interfering with either.

4. It is essential to the validity of the levy of an attachment issued against a nonresident that the entry of levy should show that the property was levied on as that of the defendant in attachment, and this is so whether the property be realty or personalty. In the absence of such a return, the court has no jurisdiction to order a sale of the property under the attachment.

(Syllabus by the Court.)

Error from superior court, Glynn county; Jos. W. Bennet, Judge.

Action by Aurelio Tuells against Rosendo Torras. Judgment for defendant, and plaintiff brings error. Reversed.

Spencer R. Atkinson and Atkinson & Dunwoody, for plaintiff in error. Crovatt & Whitefield, for defendant in error.

COBB, J. Aurelio Tuells filed a petition to enjoin Rosendo Torras from unloading from the Cuban brig Pablo, lying at Brunswick, Ga., a cargo of lumber which the plaintiff had received at that port for shipment to Santa Cruz, Tenerife, and from otherwise interfering with the plaintiff's possession of the vessel or the cargo. Plaintiff alleged that he was the master of the ship, and as such was entitled to the possession of the vessel and the cargo. The court refused an injunction, and the plaintiff excepted. From the evidence introduced at the hearing it appeared that the defendant had purchased the vessel from Padrosa, who bought the same at a sale had under an order of court passed pending the hearing of an attachment which had been sued out by Padrosa against Gonzalez, the former owner of the vessel, on the ground that he was a nonresident of the state. The defendant offered in evidence the officer's entry of the levy of this attachment. This entry did not state that the vessel was levied on as the property of the defendant in attachment, and did not state anything as to his interest in it. The plaintiff objected to the admission of the return in evidence on the ground that levy was void in consequence of these omissions from the return. The objection was overruled, and the plaintiff excepted. There was no offer on the part of the defendant to amend the return, though the levying officer was sworn as a witness, and testified that he levied on the vessel as the property of the defendant in attachment.

1. A motion was made to dismiss the writ of error on the ground that the act sought to be enjoined, namely, the removal of the cargo from the vessel, had been completed, no supersedeas having been granted by the trial judge. The prayer of the petitioner was that the defendant be enjoined not only from removing the cargo, but from otherwise interfering with petitioner's possession of either the vessel or the cargo. In support of the motion to dismiss, the affidavits of the defendant in error and of two others, each of which affidavits contained a statement that the removal of the cargo had been completed, were filed. In response to the motion, counsel for plaintiff in error denied in open court the statements of fact contained in the affidavits. Upon this statement by the counsel, the motion to dismiss the writ of error was overruled. Even conceding that the statements made in the affidavits showed prima facie that all of the acts which the plaintiff sought to have restrained had been completed, these statements were denied, and this court will not determine the issue of fact thus raised. If the judge refuses to grant an injunction to prevent the commission of a given act, and the refusal to grant the injunction is brought to this court, no supersedeas of the judgment having been obtained, and it appears to the satisfaction of this court, by uncontroverted evidence, that the act sought to be enjoined has been com-

pleted, the writ of error will be dismissed. If an issue of fact is raised as to this matter between the parties to the case, the writ of error will not be dismissed. This is the rule which is deducible from the former decisions of this court. In *Railroad Co. v. Blanton*, 80 Ga. 563, 6 S. E. 584, the fact that the act sought to be enjoined had been fully completed was not denied. This was true, also, in *Thornton v. Investment Co.*, 97 Ga. 342, 22 S. E. 987, as well as in *Cranston v. Bank*, 97 Ga. 406, 23 S. E. 822. In *Henderson v. Hoppe*, 103 Ga. 684, 30 S. E. 653, it was ruled that where, in response to a motion to dismiss the writ of error, a counter affidavit was filed, which, while not in terms admitting the statements made in the affidavit of the defendant in error, did not deny them, the writ of error would be dismissed. When it is shown *prima facie* to the satisfaction of this court that the act sought to be enjoined has been completed, and, in response to the motion to dismiss, the plaintiff either admits the existence of the fact as claimed by the defendant in error, or fails to deny the existence of the same, the writ of error will be dismissed. But when the existence of the fact is in any way denied, either by affidavit of the party or his counsel, or by statement of counsel in open court, the motion to dismiss will be overruled.

2. It is contended that the judge properly refused to grant the injunction in this case for the reason that the plaintiff, not being the owner of the vessel or the cargo, had no right to bring an action in his own name. The petition distinctly alleged that the plaintiff was the master of the vessel, and from the uncontradicted evidence it appeared that he was the duly-appointed master of the vessel. The master of a ship "is treated not as ordinary agent, but as in some sort and to some extent clothed with the character of a special employer or owner of the ship, and representing not merely the absolute owner (*dominus navis*), but also the temporary owner, or charterer for the voyage (*exercitor navis*). In short, our law treats him as having a special property in the ship, and entitled to the possession of it, and not as having the mere charge of it as a servant. On this account he may bring an action of trespass for a violation of that possession." *Story, Ag. (8th Ed.)* § 116. "The master's general agency for the owners in relation to the ship, and his special property in her and her cargo and freight, authorize him to bring in his own name actions which the owners have in relation to the ship, her cargo or freight." *Ben. Adm. Prac. (3d Ed.)* § 384. See, also, 1 *Cycl. Law & Proc.* 851. If the master of a ship has a right to bring an action at law to recover possession of the ship from a wrongdoer, there seems to be no good reason why he should not have a right to bring a suit in equity if his rights as master cannot be fully protected without the aid of the equity powers of the court.

3. It is contended, however, that, even if it be admitted that the plaintiff was the duly-appointed master of the ship, he has abandoned the ship and the voyage by causing an attachment to be issued in his favor and levied upon the ship for wages due him and the mate. When the master of a ship causes the vessel to be seized under a process against the owner issued in his own name and at his instance, he does an act which is inconsistent with his employment and duties as master, and this act would be a sufficient reason for the owner to terminate his employment as master. *Budge v. Mott*, 47 Wis. 611, 3 N. W. 381. But the right to treat such an act as terminating the employment is in the owner, and, until he sees fit to terminate the employment, others must recognize the master as the duly-appointed agent of the owner. The doing of an act by the master of a ship which is inconsistent with his employment as such does not of itself terminate the relation which he sustains to the owner, but the same continues until the owner takes advantage of the right which the law gives him to put an end to the master's employment. Certainly one who is wrongfully interfering in any way with the ship or its cargo will not be heard to deny the right of the master to protect both the vessel and the cargo in the interest of the owner, at least until the latter has expressed his intention of dispensing with the services of the master. The plaintiff in the present case had not only the right, but it was his duty, to protect the vessel and the cargo against the defendant, if he was a wrongdoer, in order that the rights of the owner might be preserved. Whether the master will be allowed to proceed with an action in his own name in behalf of the owner, and at the same time with a proceeding in his own name against the owner, is a question to be settled by the owner, and one which a person who is a wrongdoer both against the owner and the master as his representative cannot raise. If the owner sees proper to permit the master to sue him, and at the same time to sue for him, it is certainly no concern of any one else,—especially a wrongdoer.

4. According to some of the text writers, there is a very decided conflict among the courts as to whether it is essential that the return of the officer to the levy of an attachment should show that the property was levied on as that of the defendant therein. See *Drake, Attachm. (7th Ed.)* § 207; 1 *Wade, Attachm.* § 144. *Dr. Waples* says the general rule is that "the fact that the property was seized as that of the defendant should plainly appear, if not definitely stated"; that should the return fail to state this fact, but aver that the attachment was made in obedience to the writ, it will be implied that the property was seized as that of the defendant; and that such failure could be cured by amendment. The author states further that there is no important conflict among

the authorities, and he seeks to harmonize the decisions by the statement that, if the statute makes it "sacramental" that the officer must definitely state that the property belongs to the defendant, he must comply; otherwise no direct statement is necessary, if there is shown a substantial obedience to the writ. *Waples, Attachm. (2d Ed.) § 314*. We shall not stop to inquire whether the conclusion of the learned author with respect to the unanimity of the decided cases is correct or not, as we are of opinion that our statute is mandatory with regard to this matter. Section 5421 of the Civil Code provides as follows: "The officer making a levy shall always enter the same on the process by virtue of which such levy is made, and in such entry shall plainly describe the property levied on, and the amount of the interest of the defendant therein." It has been held, under authority of this section, that where the return of the officer states that the property was levied on as that of a named person, and it appears from the record that such person is not the sole owner, a sale of the interest of such person under the levy would be enjoined. *Sims v. Phillips, 51 Ga. 433, 436*. If the failure of the return to state the "amount of the interest" of the defendant in the property would invalidate the levy, certainly the failure to state that any interest whatever of the defendant was sought to be reached by the levy would have the same effect. The section of the Code quoted has been treated as being applicable to the levy of an attachment. *Hiles-Carver Co. v. King, 109 Ga. 181, 34 S. E. 353*. And it has been directly ruled by this court that such an omission in the return of the levy of an attachment on real estate against a nonresident would invalidate the levy, and confer upon the court to which the attachment was made returnable no jurisdiction to enter a judgment against the defendant therein. *Security Co. v. Watson, 99 Ga. 733, 735, 27 S. E. 160 (3)*. It has been suggested that there might be a difference as to this matter between attachments against realty and those issued against personalty, on the idea that when an attachment is levied on personalty the actual property is seized and taken into the officer's custody, whereas in the case of real estate a constructive seizure is sufficient. It is to be noted, however, that in this state more strictness in this regard is required in cases of the levy of attachments upon real estate than in those of ordinary executions. The levy of an attachment upon realty against a nonresident is the commencement of the suit against him, and the officer must do some act which is sufficient to put the owner or his tenant upon notice that he has seized the land and is in possession of it. *Baker v. C. Aultman & Co., 107 Ga. 839, 33 S. E. 423*. We have been unable to find that any distinction as to the contents of

the officer's entry of levy has been drawn between the two classes of property. The following cases distinctly rule that the levy of an attachment upon personal property is void if the officer's return fails to state that the property was levied on as the property of the defendant: *Clay v. Nellson, 5 Rand. 596; Anderson v. Scott, 2 Mo. 15; Newton v. Strang, 48 Mo. App. 538*. It having been settled in the case cited above, in 99 Ga., and 27 S. E., that the levy of an attachment against a nonresident would be invalid if the return failed to state that the property was seized as that of the defendant, we do not feel disposed to hold, in view of the authorities, that the rule is not applicable to the levy of an attachment upon personalty. In the present case there was nothing whatever on the face of the return to indicate whose property was seized, and, conceding that this omission might have been supplied by amendment, no offer to amend was made. The parol testimony that the property was in fact attached as that of the defendant will manifestly avail nothing in the absence of an offer to amend the return. The return is the sole evidence of what the officer has done in regard to the levy, and on it sufficient facts must appear to give the court jurisdiction. As the court was without jurisdiction in the attachment case to order a sale of the property, the sale was a nullity, and the defendant acquired no title by virtue thereof. Judgment reversed. All the justices concurring.

Application for a Rehearing.

(July 16, 1901.)

After the judgment in this case was rendered, and before the remittitur was transmitted to the court below, the defendant in error filed a motion for a rehearing. After a careful examination of the grounds of the motion, and of the record in the light thereof, we have reached the conclusion that the judgment as rendered was correct, and therefore that the motion for a rehearing must be denied. A brief reference to the several grounds of the application will be made, and our reasons for overruling the same will be stated.

It is contended that the judgment rendered is based upon the assumption that the uncontradicted evidence showed that Tuells was master of the vessel at the time he filed the petition, while in fact there was a conflict on this point. We do not think that the judge could have held otherwise, under the evidence, than that Tuells was, at the time he filed the petition, authorized to act as master of the vessel, and as such to assert any right which he might have as master in behalf of himself, the owner, or others interested in the vessel and her cargo. It is conceded that the uncontradicted evidence showed that Tuells was the duly-ap-

pointed master of the vessel. It is claimed, however, that there was testimony from which the judge could have found that his connection with the vessel had ceased. We can find no evidence whatever showing that Gonzalez had ever expressly discharged Tuells from his position as master, nor is there any evidence that Torras, as the authorized agent of Gonzalez, had expressly discharged Tuells. It is true that Torras, in his answer, which was used as an affidavit, says that "the entire crew, as well as the master, were discharged from any and all connection with said vessel long prior to the filing of his said petition," and in an affidavit says that "prior to said sale he was the authorized agent of Gonzalez in and about the said vessel; that the crew and the master were discharged, and ceased to perform any of their duties, and had no longer any connection with said vessel and its cargo"; and that after the sale he entered into quiet, peaceable, and exclusive possession of the vessel, and was in possession at the time of the filing of the plaintiff's petition and the levy of the attachment in his favor. We think the statement in the answer and affidavit of Torras that Tuells was discharged as master is merely a conclusion of the affiant, and a conclusion which is not authorized by the evidence in the case. There is no evidence whatever, as has been stated, that Tuells was ever expressly dismissed from his position as master either by Gonzalez or Torras, as his authorized agent. If he had been so dismissed by either, the fact would no doubt have been established by direct evidence, and the matter would not have been left, to say the most of it, in its present equivocal shape. Taking the evidence in the case as an entirety, no other conclusion could be properly reached than that Tuells was still master of the vessel, notwithstanding his possession had been interfered with and his right to assert his authority as master denied by Torras and others, who certainly were not at all times acting in the interest of the owner of the vessel.

A rehearing is asked upon the further ground that the court did not pass upon the question as to whether Tuells, as the representative of Gonzalez, was estopped from raising any question as to the validity of the entry of levy which was held to be void. In reference to this ground of the motion it is sufficient to say that nowhere in the pleadings in the case was an estoppel set up, nor was this question presented to the court when the case was argued here, although we could not have considered it if it had been presented, for the reason that the question is not raised in the pleadings.

In reference to those grounds of the motion for a rehearing which ask a reconsideration of those questions which were expressly passed upon when the judgment was rendered, we can only say that we are satisfied

with the conclusions reached, and see no reason for changing them in any way. Motion for rehearing denied. All the justices concurring.

(113 Ga. 361)

HOLMES v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 20, 1901.)

NUISANCE—ACTION TO ABATE—LIMITATIONS.

A general grant of power to grade streets, and to establish in connection therewith a system of drainage, does not carry with it any right on the part of a municipality to create and maintain a nuisance by causing surface water polluted by filth and laden with noxious odors to be discharged upon the premises of a private citizen; and he may, when such a thing has been done, maintain against the city an action to recover the damages he has in consequence sustained. (a) The present action was not barred by the statute of limitations.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by N. Holmes, executor, against the city of Atlanta. Action dismissed, and plaintiff brings error. Reversed.

This was a suit against the city of Atlanta for damages alleged to have been sustained by reason of the flooding of the plaintiff's land in that city with surface water from rains, etc., within four years next before the filing of the suit, in consequence of the manner in which the defendant had, more than four years before suit, graded the surrounding streets and constructed the drainage in that locality. The petition alleged that within the four years the water thus cast upon the land filled and destroyed various wells dug in it during that period; that it made a large ditch across the land, periodically washed away the plaintiff's fence, periodically destroyed his garden, and deposited on the land trash, stale vegetables, and other refuse matter, and that the flooding of the land and the depositing of the refuse matter have periodically created noisome smells, which are offensive; that he has houses on the land; and that by reason of the flooding the rental value of the property has decreased. The court sustained a motion to dismiss the action on the ground that it was barred by the statute of limitations, because not brought within four years after the doing of the work from which the damage was alleged to have resulted. To this the plaintiff excepted.

W. H. Terrell, for plaintiff in error. J. A. Anderson, J. T. Pendleton, J. L. Mayson, and W. P. Hill, for defendant in error.

LUMPKIN, P. J. As will be seen from the statement of facts set forth in the foregoing official report of this case, the plaintiff predicated his right to recover upon the theory that the city was maintaining a nuisance, in that the surface water discharged upon his premises was contaminated by filth, and as a consequence refuse matter was deposited

upon his lot, which created noisome smells, caused the water in his wells to become unfit for use, and in other respects rendered his property undesirable for residence purposes, and decreased its rental value. Treating these allegations as true, the case falls squarely within the doctrine announced in *Smith v. City of Atlanta*, 75 Ga. 110, wherein it was held: "Although a municipal corporation had the right, under its charter, to establish a system of grading and drainage, yet this should have been done so that it would not prove a nuisance to the citizens; and if a culvert were dug across a street, whereby the surface water from the lands of adjacent proprietors was gathered, charged with the filth of sinks, and thrown upon the land of another, producing noxious scents and sickness, and rendering the enjoyment of her property impossible, the city would be liable for damages." Legislative authority to make public improvements does not carry with it the right to conduct the work incident thereto in a careless, negligent, or unskillful manner. *City of Atlanta v. Word*, 78 Ga. 276. It was accordingly ruled in *Warnock's Case*, 91 Ga. 210, 18 S. E. 135, that: "The municipal government of Atlanta, though invested by statute with plenary powers over the subjects of streets, sewers, drainage, water supply, and sanitation, has no right to create and permanently maintain a nuisance dangerous to health and life, which nuisance consists of openings called 'manholes' in a sewer located in a public street contiguous to the dwelling of a citizen, the manholes being allowed to emit poisonous gases in large quantities through perforated covers placed over them." Where a nuisance is not of a permanent and continuing character, but such as a city may at will abate, a citizen has no right to assume that the same will be maintained indefinitely. His remedy, therefore, is not to recover in one action all past and future damages, but to bring from time to time separate suits for recurring injuries sustained, instituting each within the period prescribed by the statute of limitations for taking steps to recover damages actually suffered up to the time the action is filed. *City Council v. Lombard*, 101 Ga. 724, 28 S. E. 994. The present case is distinguishable from that of *Atkinson v. City of Atlanta*, 81 Ga. 625, 7 S. E. 692. There it appeared that the plaintiff brought against the city an action for damages which she alleged she had sustained "from the grading of certain streets and the construction of certain sewers by the city, by reason of which a large body of water was emptied upon her lots, and her property thereby injured." There was no suggestion on her part that the public improvements made were unauthorized; that there was no necessity, in carrying them into effect, to impose upon her land the servitude complained of; or that the work was unskillfully and negligently done. It did not, therefore, appear that the city had ventured beyond its corporate pow-

ers in thus throwing uncontaminated water upon her premises; and, while she undoubtedly became entitled to compensation for the damages incurred in subjecting her property permanently to an authorized public use, she allowed her cause of action to become barred by the lapse of time. She could not, of course, by arbitrarily characterizing as a nuisance a lawfully inaugurated flow of pure water over her land, take her case out of the operation of the statute of limitations. See, in this connection, the remarks of Blandford, J., who, in pronouncing the opinion of the court in that case, took occasion to differentiate it from that of *Smith v. City of Atlanta*, supra, by pointing out the fact that in the case last mentioned it appeared that the city, without any authority of law, caused surface water charged with filth to be "thrown upon the plaintiff's land, producing noxious scents and sickness, and rendering his premises untenable." Let the plaintiff in the present case be afforded a fair opportunity to show by competent evidence whether or not, in point of fact, the city has been maintaining the alleged grievous nuisance of which he in his dismissed petition complained. Judgment reversed. All the justices concurring.

(113 Ga. 967)

CRAMER et al. v. TRUITT.

(Supreme Court of Georgia. July 20, 1901.)

EVIDENCE—RECORD OF JUDGMENT—STATEMENTS OF COUNSEL.

When, on the hearing of a case in a justice's court, objection was made to the admission in evidence of certain documents purporting to be the original record and judgment in a cause tried before a judge of the superior court, the magistrate could not, in passing upon the question thus presented, properly take cognizance of the fact that in the course of a private conversation, which had occurred before the pending case came on for trial, one of the attorneys for the party objecting to the introduction of these documents had admitted the genuineness of the same. (a) The documents were clearly inadmissible, and the facts of the present case distinguish it from that of *Rogers v. Tillman*, 72 Ga. 479.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by S. M. Truitt against H. N. Cramer & Co. Judgment for plaintiff. On levy of execution an affidavit of illegality was interposed by defendants. Judgment dismissing the affidavit, and defendants bring certiorari, and from the overruling of the same bring error. Reversed.

T. C. Battle and W. I. Heyward, for plaintiffs in error. C. B. Reynolds, for defendant in error.

LUMPKIN, P. J. To the levy of an execution based on a judgment rendered by a justice's court in favor of S. M. Truitt an affidavit of illegality was interposed by H. N. Cramer & Co., the defendants in execution. The issue thus formed came on for trial be-

fore the magistrate, who, after the introduction of certain evidence offered in behalf of the respective parties, dismissed the affidavit of illegality. Cramer & Co. thereupon sued out a certiorari to the superior court, the overruling of which is assigned as error. It appears that on the trial before the magistrate the plaintiff in *fi. fa.* undertook to show that the issue sought to be raised by the affidavit of illegality was *res adjudicata*. To this end he offered in evidence the original order of the judge of the superior court of Fulton county dismissing a certiorari in the case of *H. N. Cramer & Co. against S. M. Truitt*. Defendants objected to the introduction of that order of the court, because the best evidence of what the judge did in that proceeding was a certified copy from the minutes of the superior court of Fulton county. The justice overruled defendants' objection, and admitted the order. The plaintiff offered the original papers for certiorari in the case in which said order was made. Defendants objected to the same on the ground that a certified copy of the petition for certiorari, made by the clerk of the superior court of Fulton county, and not the original petition, was the only evidence that could be used in the justice's court. The magistrate overruled this objection, and admitted these papers. In the answer filed by the magistrate he sets forth the following explanation of the rulings just referred to: "While the original certiorari and order of the judge thereon were admitted in evidence, this court nevertheless had knowledge that the same had been dismissed, and the judgment of its predecessor ordered to stand as though no certiorari had been taken therefrom. This was not denied, and was also admitted to be true by * * * one of counsel for *H. N. Cramer & Co.* This admission, however, was not made during the trial of the case, but was made by him in conversation with respondent before the same came on for trial; and respondent was of the opinion, after hearing the evidence, that said case had been fully adjudicated by the judge of the superior court." It is not to be doubted that the objection urged against the admissibility of what purported to be an original order passed by a judge of the superior court was well taken. "The only legal way to prove proceedings of the superior court is by an extract from the minutes of that court duly certified by its clerk." *Bowden v. Taylor*, 81 Ga. 199, 6 S. E. 277. It is equally well settled that what purports to be an original record of the superior court is not admissible in evidence on the trial of a case pending in another court. *Bigham v. Coleman*, 71 Ga. 176; *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 740; *Belt v. State*, 103 Ga. 13, 29 S. E. 451. The mere fact that it was within the private knowledge of the magistrate that a certiorari had been sued out, and that the judge of the superior court had passed an order dismissing the same, had no bearing upon the question whether or not

the papers offered in evidence were admissible. *Odell v. Dozier*, 104 Ga. 204, 30 S. E. 813. So the real question presented is whether or not, in view of the magistrate's statement with regard to a conversation which took place between himself and one of the attorneys for Cramer & Co., the present case falls within the ruling made in *Rogers v. Tillman*, 72 Ga. 479, which is relied on by the defendant in error. It was in that case held: "While the practice of carrying original court records from one county to another for use as evidence is disapproved, yet, where an original record has been brought into court, and admitted to be such, it is admissible in evidence. A certified copy would not be higher or better evidence than the original." On the trial of the case, which occurred in the Muscogee superior court, "the original record of an affidavit of illegality, which had been filed by Rogers, and tried in the Harris superior court, was offered in evidence, together with the verdict and judgment thereon." Counsel for the party against whom this evidence was sought to be introduced "consented to the admission of the affidavit of illegality, and admitted that the judgment, order of the court, and verdict offered were the original." In view of this admission, the trial judge permitted the original record to be introduced, notwithstanding the captious objection was urged "that a certified copy was the proper evidence." In this ruling he was sustained by this court. It is important to note that the judge based his action upon a voluntary admission of counsel, made in open court during the actual progress of the trial, and not upon any private knowledge which he may, as an individual, have had concerning the genuineness of the papers in question. This admission of counsel, being made while actively engaged in conducting a pending cause, was certainly binding upon his client. As it was made in open court, while the investigation was being carried on, the trial judge could properly take cognizance thereof, base his ruling thereon, and afterwards certify, when signing the bill of exceptions brought to this court, to the facts in regard to the matter. In the case now under consideration it affirmatively appears that the magistrate based his ruling, not upon any fact brought to light at the hearing before him, but upon information which he, in his individual capacity, had, before the case "came on for trial," received from "one of counsel for *H. N. Cramer & Co.*," during the course of a private conversation with him. This so-called "admission" was not, so far as appears, made by the attorney in the presence of his clients, or while he was undertaking to represent them in the doing of anything connected with the case in which he was employed as counsel. It would, therefore, seem that Cramer & Co. were not bound thereby (*Thomas v. Kinsey*, 8 Ga. 421; *Cassels v. Usry*, 51 Ga. 621); and, if not, then testimony concerning what the attorney said on the oc-

casion referred to could not properly have been admitted on the trial of the case before the magistrate (Farrar v. Brackett, 86 Ga. 464, 12 S. E. 686). As matter of fact, no evidence of any admission was offered at that trial, nor during its progress was there brought to light any information on the subject of which the magistrate could take cognizance in passing upon the questions presented to him for decision. Consequently, there was nothing concerning an admission to which he could, in his judicial capacity, properly undertake to certify. The writ of certiorari called upon him to answer as to what actually transpired during the progress of the trial. All that he stated in his answer with regard to the information which, prior to the trial, had come to his knowledge in the course of a private conversation with an attorney for one of the parties, was entirely gratuitous. Statements of this character have no proper place in a magistrate's answer, not being responsive to the writ of certiorari, but totally irrelevant and unauthorized. Nor can they rightly be regarded as competent allunde evidence, to be considered in passing upon the merits of a duly-verified petition for certiorari. Scroggins v. State, 55 Ga. 380. Our conclusion, therefore, is that the record before us discloses that the magistrate committed palpable error in ruling as he did, and that the judge of the superior court made an equally grave mistake in not sustaining the certiorari. Judgment reversed. All the justices concurring.

(112 Ga. 1028)

HENDRIX v. WEBB.

(Supreme Court of Georgia. July 20, 1901.)

RES JUDICATA—HOMESTEAD—WAIVER.

1. A judgment against the maker of a promissory note estops him from subsequently raising any question of usury in the debt, and also binds the beneficiaries of a homestead set apart upon the application of such maker.

2. That a creditor unsuccessfully contested the right of his debtor to a homestead in the property sought to be set apart does not estop him from setting up a waiver by the debtor of the benefit of a homestead, for the reason that his right to make such waiver was not passed upon in the contest over the allowance of the homestead.

(Syllabus by the Court.)

Error from superior court, Franklin county; R. B. Russell, Judge.

Action by H. H. Webb against Alice Hendrix. Verdict for plaintiff. Judgment execution levied, and defendant and Effie V. Hendrix interposed claim. Verdict finding property subject, and Alice Hendrix brings error. Affirmed.

Fermor Barrett, for plaintiff in error. Chas. L. Bass, for defendant in error.

COBB, J. This was a claim case, in which the following facts appeared from the evidence: In May, 1900, H. H. Webb brought suit against Mrs. A. L. Hendrix upon a prom-

issory note dated November 12, 1894. This note "contained the usual homestead waiver," and its payment was secured by a deed to the property now in controversy, executed by the maker for that purpose. In this suit Mrs. Hendrix filed a plea of usury, but the plea was not sustained, and on May 8, 1900, Webb recovered judgment on the note. Thereafter he made to Mrs. Hendrix a reconveyance of the property described in her deed to him, and on May 12, 1900, execution was issued on the judgment, and levied on the land described in the two deeds mentioned. To this levy Mrs. Hendrix and Effie Viola Hendrix, on August 2, 1900, interposed a claim as beneficiaries of a homestead. It appears from the evidence that on May 31, 1900, Mrs. Hendrix filed in the court of ordinary a petition praying that the property now in dispute be set apart as a homestead and exemption for the benefit of herself and Effie Viola Hendrix, an adopted daughter. H. H. Webb and another, as creditors, filed a caveat containing the "statutory objections." On the hearing the objections were overruled, and the homestead allowed August 1, 1900. The caveators appealed from the judgment of the ordinary allowing the homestead to the superior court, making therein certain amendments to their objections. The appeal was dismissed in the superior court, and the homestead allowed and approved by that court on August 6, 1900. The court directed the jury to return a verdict finding the property subject. The claimants filed a motion for a new trial, which was overruled, and Mrs. Hendrix excepted.

1. One ground of the motion for a new trial complains that the court erred in rejecting evidence offered by the claimants whereby they sought to show that the note which was the foundation of the judgment upon which the execution was based was infected with usury. As shown above, the note contained a waiver of homestead, and there was nothing on the face of the note to indicate that usury had been exacted. While usury in a debt will defeat a waiver of homestead made in a note which represents the debt, it is well settled that, where such a note has been reduced to judgment, both the maker of the note and the beneficiaries of a homestead set apart after the execution of the note are estopped from setting up that the waiver of homestead was void because of usury in the debt. This proposition is fully settled by the following cases, and further elaboration thereof is unnecessary: Ezzard v. Estes, 95 Ga. 712, 22 S. E. 713, and cases cited; Johnson v. Davis, 97 Ga. 282, 22 S. E. 911, and cases cited; Bank v. Gammage, 109 Ga. 220, 34 S. E. 307, and cases cited. The present case presents a stronger reason for the rule than any of those cited, for here the maker of the note, who was one of the claimants, and one of the beneficiaries in the homestead, actually litigated unsuccessfully the question of usury in the suit on the note.

2. Further complaint is made in the motion

for a new trial that the court erred in admitting in evidence the note and deed executed by Mrs. Hendrix to H. H. Webb, the plaintiff in execution. The ground of objection to the evidence was that, having unsuccessfully contested the right of the claimants to a homestead and exemption in the property levied on, he "was estopped thereby." If it is sought by this objection to raise the point that, because the plaintiff in execution filed objections to the setting apart of the homestead, he is estopped from insisting on the waiver of homestead contained in the note, the objection is entirely without merit. The plaintiff in execution was concluded by his objections from afterwards attacking the validity of the homestead, but no question as to the right of the applicant to waive the benefits of any homestead which might be set apart to her was involved, and such a waiver, when made, was binding upon her, and all those who might become the beneficiaries of any homestead which she should have set apart to her. The verdict directed was the only possible legal result in the case. Judgment affirmed. All the justices concurring.

(113 Ga. 1058)

CARTER v. GARRETT.

(Supreme Court of Georgia. July 22, 1901.)

CERTIORARI—PROCEDURE—QUESTIONS DETERMINED.

1. A superior court, in disposing of a certiorari, cannot properly predicate its action upon any oral "representation" of fact made while the hearing is in progress, but must try the case by the record.

2. The only question which the certiorari in this case properly presented for determination by the superior court was whether or not the verdict complained of was warranted by the evidence, and, as that court did not pass thereon, direction is given that it do so at the next hearing.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Action by E. J. Garrett against Charles H. Carter. Verdict for defendant, and plaintiff brings certiorari. Judgment for plaintiff, and defendant brings error. Reversed.

J. C. Edwards and J. R. Grant, for plaintiff in error.

LUMPKIN, P. J. At the May term, 1900, of the justice's court for the 422d district, G. M., of Habersham county, there was tried on appeal a case in which E. J. Garrett was plaintiff and Charles H. Carter defendant. It appears that the plaintiff began proceedings for the foreclosure of a landlord's lien; that the same were met by a counter affidavit on the part of the defendant, in which he set up a cross demand against the plaintiff; that the trial resulted in a verdict for the defendant for \$45.15, and that the plaintiff sued out a certiorari. The petition for certiorari alleged that the verdict was contrary to evidence, and without evidence

to support it; that a constable had improperly participated with the jury in making up the verdict; and that at divers times before the trial on appeal the plaintiff had directed the magistrate to dismiss the action, and had "tried" to have it dismissed. But the petition contained no recital that the plaintiff had moved at the trial under review to have the case stricken from the docket, or that he then raised any objection to the case being heard on its merits. The answer of the magistrate set forth the evidence introduced at the hearing, but contained nothing verifying the alleged misconduct on the part of the constable. It also set forth in detail the magistrate's version of various interviews had between himself and the plaintiff in advance of the trial with respect to the dismissal of the action. At the hearing in the superior court the case was disposed of by an order in the following words: "It being represented to this court that the case brought by E. J. Garrett vs. Chas. H. Carter (the same being an affidavit to foreclose a landlord's lien) was dismissed by the plaintiff before the defendant had filed any counterclaim or set-off, and before defendant had acquired any rights to prevent a dismissal, it is therefore ordered that the same be sent back for a new trial; and, if the case had been dismissed by plaintiff before any set-off had been filed, then the officer before whom it was issued is ordered to dismiss the whole proceeding, and have no trial. Let plaintiff in certiorari have leave to enter up judgment against defendant for costs in this court." It is evident that the recitals in the petition for certiorari and in the magistrate's answer with respect to the attempted dismissal of the action were wholly irrelevant, the same relating to matters occurring anterior to the trial on the appeal in the justice's court, and as to which no ruling was invoked during the progress of that trial. As the charge of improper conduct on the part of the constable was not verified, the only question presented for determination by the judge of the superior court was whether or not the evidence warranted the verdict, and upon this question he did not undertake to pass. The judgment actually rendered was clearly erroneous, the same having been based upon an oral "representation" made by some one, whose identity is not disclosed, while the case was pending for disposal in the superior court. The certiorari ought to have been tried on its merits, and by the record, and not upon any outside representations. *Milam v. Sproull*, 36 Ga. 393; *Scroggins v. State*, 55 Ga. 380; *Fouche v. Morris*, 112 Ga. 143, 37 S. E. 182; *Brown v. Alexander*, *Id.* 247, 37 S. E. 368. We therefore reverse the judgment, with direction that the superior court at the next hearing pass upon and determine the question whether or not the verdict in the defendant's favor was sufficiently supported by evidence. Judgment reversed, with direction. All the justices concurring.

(112 Ga. 1040)

LANE v. STATE.

(Supreme Court of Georgia. July 22, 1901.)

LARCENY—EVIDENCE OF VALUE.

Even if the accused, under the facts as they appear in the record, could be lawfully convicted of the offense of larceny, the judge erred in not granting a new trial in the present case, for the reason that there was no proof that the article alleged to have been stolen was of any value.

(Syllabus by the Court.)

Error from city court of Dublin.

Joe Lane was convicted of larceny, and brings error. Reversed.

Howard & Armistead, for plaintiff in error. F. G. Corker, Sol., and Griner & Williams, for the State.

COBB, J. The accused was placed upon trial upon an indictment charging him with the offense of simple larceny, and was convicted. His motion for a new trial having been overruled, he excepted. Upon an examination of the brief of evidence which is contained in the record, it does not appear that there was any evidence showing the value of the article alleged to have been stolen, or that it was of any value. For this reason the conviction was unauthorized, and the judge should have granted a new trial. *Hawkins v. State*, 95 Ga. 458, 20 S. E. 217; *Smith v. State*, 95 Ga. 460, 21 S. E. 45; *May v. State*, 111 Ga. 840, 36 S. E. 222. It does not distinctly appear from the evidence for the state exactly what was the relation that existed between the prosecutor and the accused, so far as the property which was alleged to have been the subject of the larceny was concerned, but from the statement of the accused it clearly appears that the relation between them was that of landlord and cropper. If this was the true relation existing between them, the accused would not be guilty of simple larceny, even if it be true that he converted a portion of the property to his own use without the consent of the landlord. In *Padgett v. State*, 81 Ga. 466, 8 S. E. 445, it was held that it was not a trespass upon the part of a cropper to remove a portion of the crop from the premises, and sell the same, without having settled with the landlord, and that for this reason a cropper could not be indicted under section 4440 of the Code of 1882 (Pen. Code, § 219), declaring certain acts of trespass to be indictable; among them being "the taking and carrying away * * * any article, or property of any value whatever, from the land * * * of another, without the consent of the owner." The taking which is necessary to complete the offense of larceny must be a trespass against the owner's possession. 18 Am. & Eng. Enc. Law (2d Ed.) p. 469. See, also, *Beall v. State*, 68 Ga. 820. The conversion by a cropper of a portion of the crop to his own use is, therefore, neither larceny nor an indictable trespass under our

Code, though such conduct on the part of a cropper will render him indictable under the statute now contained in Pen. Code, § 680. See, also, *Hackney v. State*, 101 Ga. 516, 28 S. E. 1007. Judgment reversed. All the justices concurring.

(113 Ga. 1031)

SOUTHERN COTTON SEED OIL CO. v. EDWARDS et al.

(Supreme Court of Georgia. July 20, 1901.)

LANDLORD AND TENANT—RELATIONSHIP—ACTION ON CONTRACT.

1. One who, without consideration, merely agrees to place another in possession of property is in no legal sense a lessor; nor can he be held liable as such, if, through no fault of his own, the person to whom he yields possession of the property is afterwards deprived of the use and enjoyment thereof.

2. In no view of the facts brought to light on the trial of the present case were the defendants entitled to a finding in their favor.

(Syllabus by the Court.)

Error from city court of Clarkesville; O. L. Bass, Judge pro hac.

Action by the Southern Cotton Seed Oil Company against Edwards, Simmons & Co. Judgment for defendants, and plaintiff brings error. Reversed.

O. H. Sutton and King & Spalding, for plaintiff in error. Geo. P. Erwin and Robt. McMillan, for defendants in error.

LUMPKIN, P. J. The Southern Cotton Seed Oil Company brought an action against Edwards, Simmons & Co., and the individuals composing that firm, to recover a certain amount of money alleged to have been advanced to it for a specified purpose, and for which the defendants had failed to account. They filed an answer in which they admitted that this sum had been advanced to them, but denied that they were liable to account therefor. Their defense was, in substance, as follows: The plaintiff and certain other companies entered into a contract with the defendants by the terms of which they were to buy cotton seed to be shipped to and resold to these companies. "It was agreed, among other things, that these defendants were to be furnished by petitioner with a wagon scale on which to weigh seed, which said scale was at that time located in Toccoa, and near defendants' place of doing business." They were to "furnish all the necessary help, labor, etc., in representing petitioner and in purchasing seed for [it] at Toccoa, and were to receive a profit on seed so bought." The money advanced to them "was furnished defendants under said contract, and for the purpose of carrying out the same." They "undertook in good faith to carry out the provisions of said contract, and engaged and employed one additional clerk at a cost of \$100, and rented a warehouse to store seed at a cost of \$50," and also "made all the necessary ar-

rangements, and prepared to purchase and handle large quantities of cotton seed, and could and would have purchased and handled several thousand bushels of cotton seed," had the plaintiff not "failed and refused to furnish the scales to weigh such seed." After the above-mentioned contract was entered into, the plaintiff "took and carried away the scales that [it] had in town and had contracted and agreed that defendants should use." As a result, it was "impossible for defendants to purchase cotton seed," and they suffered damages, not only to the extent above indicated, but in "the further sum of one hundred and fifty dollars as profit on cotton seed." They therefore sought, by way of recoupment, to recover the damages thus sustained. The trial of the case resulted in a verdict in favor of the defendants, and the company made a motion for a new trial, which was overruled, and it excepted. The questions presented for our decision will be fully covered by the brief discussion which follows.

1. A copy of the contract referred to in the answer filed in behalf of the defendants appears in the record before us. It recited that: "This agreement between the Southern Cotton Oil Company, Georgia Cotton Oil Company, Gate City Cotton Oil Company of Atlanta, Ga., and Elberton Oil Mills, and Edwards, Simmons & Co., of Toccoa, is as follows: So, Cotton Oil Company, Gate City Oil Company, Georgia Cotton Oil Company, Elberton Oil Mills place their wagon scales in the possession of Edwards, Simmons & Co. only for the purpose of weighing cotton seed to be shipped to said Southern Cotton Oil Co., Gate City Oil Co., Georgia Cotton Seed Oil Co., Elberton Oil Mills. It is agreed and understood that all cotton seed so weighed on said scales belonging to said oil company shall be shipped to said oil companies at the prices named to said Edwards, Simmons & Co. at the time said seed were purchased from the seed raisers. Any violation by Edwards, Simmons & Co. will be considered a cancellation of agreement, and the said oil companies will have the right to take possession of wagon scales without any further notice. This agreement can be terminated by either party giving the other ten days' notice of their intention to cancel the same." The contract purported to have been signed by an authorized agent of the oil companies on August 23, 1897, and under his signature appeared the following: "Mem. Will allow 12½ cents pr. ton for use of house." It is to be noted that this writing embraced no covenant on the part of the Southern Cotton Oil Company whereby it either expressly or by necessary implication obligated itself to keep Edwards, Simmons & Co. at all times supplied with suitable scales upon which to weigh such cotton seed as they might buy. On the contrary, reference was had exclusively to particular wagon scales already erected, which may or may not have been suitable, and which the oil companies agreed simply to "place" in the possession of that firm

"only for the purpose of weighing cotton seed to be shipped to" them. Evidently, it was not contemplated that Edwards, Simmons & Co. should be regarded as technical lessees of the oil companies, and, as such, entitled to absolute control over these scales for any definite term, or at any fixed rental. Indeed, there is no suggestion that the oil companies undertook, as lessors, to warrant their title thereto, or to guaranty that they had a right to maintain the same at the points at which they were located, or that Edwards, Simmons & Co. would be kept in undisturbed possession thereof. The agreement entered into was exceedingly loose and general in its terms. The oil companies did not obligate themselves to take any given quantity of seed at any specified price, nor did Edwards, Simmons & Co. assume any binding obligation to purchase and resell to them a single pound of seed. Furthermore, the agreement was subject to cancellation at any time "by either party giving the other ten days' notice of their intention to cancel same." No reasonable inference can, therefore, arise that the oil companies undertook to do more than "place their wagon scales in the possession of Edwards, Simmons & Co.," and thereby confer upon that firm the privilege of exercising whatever rights they might have with respect to the use and enjoyment of the same. In view of the fact that Edwards, Simmons & Co. entered into no binding obligation to actually buy and ship to the oil companies any seed at all, it is obvious that there was absolutely no consideration for a promise on their part to do even this much; and, unless they declined to yield possession of the scales, or, after duly surrendering possession thereof, wrongfully deprived Edwards, Simmons & Co. of the use of the same, they could not justly be charged with a failure to meet their moral obligations in the premises.

2. As matter of fact, the Southern Cotton Seed Oil Company actually placed the defendants in possession of its wagon scales at Toccoa. Subsequently they were condemned by the town authorities, and the defendants wrote a letter to the company, in which it was notified of this occurrence. The company "sent a man up to see about the matter." He employed the defendants to "take up" its scales, "and ship them to Atlanta." This they did, and the company paid them for their services. One of the defendants was sworn as a witness on the trial, and testified, in this connection, as follows: "The scales in front of our store belonged to plaintiff, and were to be used by us, but were condemned by town authorities; and with the understanding that we were to use those in front of our warehouse on R. R. right of way belonging to Elberton Mills, a party to the contract, we, at request of plaintiff, shipped the scales to them. When we went to weigh on Elberton scales, found Ramsey and Scafer using them; * * * and when we wanted to use them were forbidden by Ramsey and

Scafer." The witness did not, however, state that either the plaintiff or its agent was a party to this "understanding," or were responsible for the conduct of Ramsey and Scafer (whoever they may have been) in preventing the defendants from using the scales which belonged to the Elberton Mills. The plaintiff introduced the testimony of its agent, taken by interrogatories, who testified: "I arranged with defendants to take up scales and ship them. Defendants said they would have no use for them; they could weigh on other scales they had a right to use. Defendants said scales ought to be removed, as the town council had so ordered." They interposed no objection, but "took job of removal," saying they would "not need scales for season of 1897." It is a matter worthy of comment that the defendants did not undertake to meet this testimony by offering to prove that, in point of fact, they did not make the statements concerning which this witness testified, but agreed to the removal of the scales only upon an express undertaking by him, or his principal, that the scales belonging to the Elberton Mills should be placed at their disposal. Furthermore, there was no evidence before the jury upon which it could probably base an estimate of the amount of damages, if any, which the defendants sustained by reason of their being deprived of the use of the scales belonging to the plaintiff. There was no proof whatever concerning their alleged loss of profits. They did not in fact, as stated in their answer, rent "a warehouse to store seed, at a cost of \$50." They already had one, and merely "partitioned off one corner, or part of it, and reserved it for holding cotton seed." What expense or loss was thus incurred was not shown, nor did it appear what was the rental value of the corner so reserved. It is true they "hired an extra clerk to help weigh seed at \$100 per year." But, in view of the terms of the written contract, upon the faith of which they acted, they had no right to assume that they would necessarily need his services for that period. As has been seen, that contract contained an express stipulation to the effect that, upon giving ten days' notice of an intention to cancel the agreement entered into, the plaintiff could, at its pleasure, terminate the same. Moreover, the defendants introduced no evidence tending to show that, by reason of their having no need of this clerk's services after the company's alleged breach of its contract, they really lost anything; or, if so, how much. For aught that appears, he may have performed in their behalf, during the year for which he was employed, services the value of which was far in excess of the salary they obligated themselves to pay him; or, upon finding that his services were no longer needed, he may have voluntarily elected not to hold them to their contract to give him employment for a year. On the whole, we are forced to the conclusion that in no view of the case can the finding in

favor of the defendants be legally upheld. Judgment reversed All the justices concurring.

(113 Ga. 1099)

HOLLINGSWORTH v. HOWARD.

(Supreme Court of Georgia. July 23, 1901.)

NEW TRIAL—ADMISSION OF EVIDENCE—JOINT TORT FEASORS—JUDGMENT AGAINST ONE.

1. Admitting irrelevant testimony will not be held cause for a new trial, unless it appears that the same was of sufficient consequence to injuriously affect the party complaining thereof.

2. There may, in an action against joint tortfeasors, be a lawful recovery against one only of them.

3. The evidence in the present case warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Dekalb county.

Action by A. W. Howard against R. H. Hollingsworth and A. J. Almand. Verdict for plaintiff. From an order refusing a new trial as to Hollingsworth, he brings error. Affirmed.

R. W. Milner and H. M. Dorsey, for plaintiff in error. J. K. Hines, for defendant in error.

LUMPKIN, P. J. An action was brought by A. W. Howard against R. H. Hollingsworth and A. J. Almand to recover damages alleged to have been sustained by the plaintiff on account of false representations made to him by the defendants to the effect that the Union Loan & Trust Company of Atlanta, a banking corporation which had a branch at Lithonia, where the parties to this case reside, was a solvent institution. Almand was president and Hollingsworth vice president of the branch bank. The petition alleged that, by means of their false representations, the plaintiff was induced to deposit in that bank a stated sum of money, which he lost because of the failure of the parent concern. It was in the petition also alleged that these representations were made "with intent to deceive" the plaintiff, and to induce him "to confide in, and extend credit to, and make deposits in, said bank," and that they in fact "did deceive" him. There was a verdict in favor of the plaintiff against both defendants. They filed a motion for a new trial, which was granted as to Almand, but refused as to Hollingsworth, who thereupon sued out a bill of exceptions, and brought the case to this court. We shall confine our discussion to those grounds of the motion for a new trial which were insisted upon in the argument here.

1. Error is assigned upon admitting the testimony of one L. B. Norton, "to the effect that the defendant Hollingsworth had made certain representations to him (Norton) concerning the solvency of the Union Loan & Trust Company." Obviously, this statement of the testimony alleged to have been inadmissible is too vague and indefinite to enable

this court to say that allowing its introduction was prejudicial to the plaintiff in error. It does not appear what the representations of Hollingsworth thus sought to be proved were. All we know is that the court permitted Norton to testify that Hollingsworth said something to him "concerning the solvency" of the bank. What this was does not appear. Neither the substance nor the tenor of the representations testified to is stated. While it would seem that any representation by Hollingsworth to Norton with respect to the condition of the bank, not known to or acted upon by Howard, would have been irrelevant, the mere fact that irrelevant testimony was admitted will not justify this court in ordering a new trial, when the nature of the objectionable testimony is not sufficiently disclosed to enable it to see that letting the same in could have resulted to the prejudice of the party complaining of its admission. Hollingsworth may have made all sorts of conceivable remarks to Norton about the solvency of the bank, proof of which in the controversy between Hollingsworth and Howard would not have operated against the former of these two. On the contrary, such proof might relate to remarks by Hollingsworth helpful to his defense. It requires both error and injury to obtain here a reversal of a judgment, and both must affirmatively appear.

2. One ground of the motion for a new trial reads as follows: "The verdict is contrary to law, in this, to wit: The declaration in this case alleges a joint offense or cause of action on the part of the two defendants, while the evidence fails entirely to show any connection had by one of the defendants, Almand, with any of the representations made to the plaintiff." It was insisted in support of this ground that, unless the plaintiff's evidence made out a case against both defendants, there could be no recovery against either. The verdict was in fact against both; but, even if it had been rendered against Hollingsworth alone, it would have been good, if sustained by sufficient evidence to show liability on his part. It is well settled in this state that, in an action against joint tortfeasors, there may be a recovery against one only of the defendants. See *Telegraph Co. v. Griffith*, 111 Ga. 558, 559, 36 S. E. 859, and cases cited. Note specially the decision announced in *Austin v. Appling*, 88 Ga. 55, 59, 18 S. E. 955, and the authorities upon which it was predicated.

3. It is also complained that the verdict was contrary to the evidence, because there was no proof that the plaintiff, in depositing his money, acted on Hollingsworth's representations, and also that there was no proof that those representations were fraudulently made. The plaintiff did testify: "I don't think I would have made this deposit in this bank without Mr. A. J. Almand being connected with it;" but his testimony as a whole was amply sufficient to show that he acted upon, and was misled to his hurt by, Hollings-

worth's assurances that the bank was solvent.

In view of the allegations of the petition, it was incumbent on Howard to prove actual fraud on the part of Hollingsworth. We think there was sufficient evidence to show this. The collapse occurred very soon after Howard's deposit was made, and there was proof of circumstances warranting the inference that Hollingsworth knew the parent bank was in an insolvent and failing condition when he represented to Howard that it was financially sound. We do not, of course, undertake to say that Hollingsworth actually knew the bank was about to go under, but simply that there was evidence enough to warrant the jury in finding that he did. Judgment affirmed. All the justices concurring.

(112 Ga. 802)

PLANTERS' & PEOPLE'S MUT. FIRE ASS'N OF GEORGIA v. DE LOACH.

(Supreme Court of Georgia. July 18, 1901.)

APPEAL—REVIEW—ASSIGNMENTS OF ERROR—INSURANCE POLICY—VALIDITY OF CONTRACT—ACCEPTANCE OF PREMIUM—ACTION.

1. When a bill of exceptions, properly certified, purports to set forth evidence material to the consideration of the errors complained of, the assignments of error therein contained will be determined solely with reference to the evidence therein set forth, unless additional evidence, incorporated in a brief thereof, and made a part of the record, is duly brought up in the manner provided by law. The foregoing is true, notwithstanding that in a cross bill of exceptions in the case there is an averment, in effect, that certain material evidence has been omitted from the main bill of exceptions, and the alleged omitted evidence is set forth in the cross bill of exceptions.

2. A writing in the form of a policy of fire insurance will not constitute a valid contract of insurance, when it is not, at the time the contract therein purports to go into effect, executed by one authorized to execute contracts in behalf of the alleged insurer.

3. The mere acceptance by the person described in such a writing as the insurer of a sum of money as an assessment or premium will neither have the effect of rendering valid the unexecuted writing, nor of estopping the alleged insurer from making the defense that the writing was not executed by any one authorized to act in its behalf, when it appears that the assessment or premium was accepted in ignorance of the fact that the writing was not executed by one authorized at the time of its delivery to act in behalf of the insurer, and that upon the discovery of this fact the insurer promptly repudiated the act of the person who had delivered the writing, and returned to the person claiming to be insured all of the money which the insurer or its authorized agent had received from him.

4. Although the rules of an association provide that litigation shall be conducted for the association by the president, together with a majority of the directors, one who is the plaintiff in an action against the association, which is defended by a duly-licensed attorney at law, will not be allowed to raise the question as to whether the defense is conducted by the officer required by the rules, otherwise than by calling in question the rights of the attorney at law to appear in behalf of the association. The presumption is that the attorney at law has the authority of the proper officers of the

association to appear, and this presumption can be overcome only in the manner provided in Civ. Code, § 4423.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action by S. E. De Loach against the Planters' & People's Mutual Fire Association of Georgia. From the judgment defendant brings error, and plaintiff assigns cross error. Judgment on main bill of exceptions reversed, and cross bill affirmed.

E. J. Giles and Jas. K. Hinds, for plaintiff in error. Burkhalter & Morgan, for defendant in error.

COBB, J. 1. The main bill of exceptions purported to set forth the evidence introduced at the trial, and the certificate of the judge was in the usual form, stating that the bill of exceptions "is true, and contains all the evidence * * * material to a clear understanding of the errors complained of." The cross bill of exceptions contains the following averment: "The defendant in error alleges that the plaintiff in error has omitted facts and rulings by the court in said case material to a clear understanding of the errors complained of, and hence the defendant in error has hereto attached what occurred in the trial of the said case, omitted by plaintiff in error, material to a clear understanding of the said case, and incorporates in this her cross bill of exceptions all evidence material and the rulings of the court material that were omitted in the direct bill of exceptions, and prays that the supreme court may pass on the omitted evidence and the omitted rulings of the court in this her cross bill of exceptions in conjunction with the direct bill of exceptions." The cross bill contains evidence which does not appear in the main bill, and some of it seems to be in conflict with what is stated in the main bill. The cross bill is certified by the judge in the usual form, the language of the certificate, so far as it is material to the present discussion, being exactly that quoted above from the certificate to the main bill. It is not the office of a cross bill of exceptions to add to or change in any way the main bill of exceptions. The cross bill of exceptions is a remedy provided for the successful party in the trial court to have reviewed rulings made against him during the trial, in the event his adversary is successful in obtaining a judgment in the supreme court which in its effect leaves the case to be tried again in the trial court. See Civ. Code, § 5527. The cross bill of exceptions must contain, or specify, so much of the evidence as is material to a clear understanding of the errors therein complained of. Other evidence than what is necessary for this purpose has no proper place in the cross bill of exceptions, and if contained therein must be entirely disregarded. It was the right, even if it was

not the duty, of the judge to have refused to sign the cross bill of exceptions until all of this matter, entirely unnecessary and utterly irrelevant, so far as anything in the cross bill is concerned, had been stricken therefrom. See *Little v. Sparks*, 112 Ga. 220, 37 S. E. 364. So much of the evidence contained in the cross bill of exceptions as is material to the errors complained of therein will be considered in passing upon the questions therein made. No other evidence therein will be considered for any purpose whatever, and certainly it will not be considered in any way so far as the errors complained of in the main bill are concerned. When there is no brief of evidence filed and made a part of the record, so that it may be brought to this court by a proper specification in the bill of exceptions, and the evidence is brought to this court in the bill of exceptions, the errors complained of must be determined in the light of the evidence contained in the bill of exceptions in which the assignment of error is contained. The question may be asked, if a judge certifies a main bill of exceptions which does not correctly set forth the evidence, what is the remedy? If there is no brief of evidence duly approved and filed, so that it can be transmitted to this court as record, we know of no remedy. See *Tumlin v. Furnace Co.*, 98 Ga. 594, 20 S. E. 44. It has been held that, after a bill of exceptions has been duly certified, it is not within the power of the judge to alter or change the same in any way by an additional certificate. *Dyson v. Railway Co.*, 113 Ga. 827, 38 S. E. 749. The principle of this ruling is applicable to any additional certificate, even though it be the usual certificate required to be affixed to a cross bill of exceptions.

2. The official report which precedes this opinion contains a correct summary of the evidence as it is contained in the main bill of exceptions. From this evidence no other conclusion can be possibly reached than that the paper relied on by the plaintiff, as containing the contract of insurance between her and the defendant, was not signed by any authorized officer or agent of the association at the time or subsequent to her application for membership in the association, and not only that she was never admitted as a member of the association by the constituted authorities, but that her application was expressly declined. A contract of fire insurance is not valid unless in writing. Civ. Code, § 2089. The writing relied on to make the contract of insurance not having been signed by any one authorized by the association to execute contracts in its behalf at the time that it is claimed that the contract was entered into, the court erred in not excluding the paper from evidence.

3. It is claimed, however, that the unauthorized act of the agent in delivering the policy has been ratified by the association. If the contract had been duly executed, and the

officers of the association had, after a full knowledge of all the facts, treated the plaintiff as a member, such conduct on the part of those authorized to act in behalf of the association might have had the effect of rendering the contract valid. But such is not the case. In the first place, there was no contract in writing at the beginning, and nothing but a writing will ever make a valid contract of fire insurance. In the second place, all that was done by the officers of the association which could be at all construed as treating the plaintiff as a member of the association was, according to the uncontradicted evidence, done in ignorance of the facts in relation to her claim of membership, and as soon as the truth was known the association promptly repudiated the acts of those who had, without authority, been assuming to act in its behalf, and restored to the plaintiff every cent which it or any of its authorized agents had received from her. There was nothing whatever in the evidence to authorize a finding that the defendant was estopped from making the defense that it was not bound because the contract of insurance was not evidenced by a writing executed by one authorized to act in its behalf.

4. The policy provides that, whenever litigation is unavoidable, the president, together with a majority of the directors, shall conduct the suit for the association. The defendant's answer in the present case was signed by "Enoch J. Giles, Defendant's Attorney," and was sworn to by "H. C. Smith, President Association." The plaintiff moved to dismiss the answer "because it showed upon its face that the defense was being conducted by the president alone, now ex-president, and without the aid or help of any director of the said association." The motion was overruled. H. C. Smith was sworn as a witness, and testified that he was no longer president of the association. Plaintiff then sought to have him answer whether he was receiving any assistance from the directors, or was conducting the defense alone, and whether he had any authority to make the defense in the case. The court refused to allow these questions. This ruling and the one just referred to are made the subject-matter of exception in the cross bill of exceptions. We see no error in these rulings. As a general rule, the president of a mutual insurance company can defend a suit brought against it. 4 Joyce, Ins. § 3657. Whether this rule would apply to a person who was president when the answer was filed, but resigned before the case came on for trial, or whether the language above referred to in the policy sued on in the present case makes it imperative that the president should be assisted by a majority of the directors, are questions which we do not deem it necessary to decide. The answer was signed by a person as attorney at law for the defendant. The name of this attorney is also signed to the bill of exceptions filed by the defendant, and he ac-

knowledgeed service of the cross bill of exceptions filed by the plaintiff. It is therefore fair to assume that he conducted the trial for the defendant. No question was made as to the attorney's authority, and no motion was made to require him to produce his authority. The presumption of law is that he was duly authorized to represent the defendant in the case. Civ. Code, § 4423. It was, therefore, so long as the right of the attorney at law to appear for the defendant stood unimpeached, entirely immaterial whether the president or directors appeared at all, or offered the attorney any assistance, and the fact that he may have been aided in the trial by a person not connected with the association can afford the plaintiff no cause for complaint. Judgment on main bill of exceptions, reversed; on cross bill, affirmed. All the justices concurring.

(113 Ga. 1087)

DALTON v. STATE.

(Supreme Court of Georgia. July 22, 1901.)

CRIMINAL LAW—DEFENSE—CONSENT OF VICTIM.

A person who has formed an intention to commit a crime, and who, unaided by any one else, performs acts which make the offense complete, will not be excused by reason of the fact that another, with the consent and approval of the victim of the crime, was present, aiding in and encouraging its commission. It would be otherwise if such a person originated the intention to commit the crime or induced its perpetration.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; R. B. Russell, Judge.

John Dalton was convicted of train wrecking, and brings error. Affirmed.

O. A. Nix, for plaintiff in error. O. H. Brand, Sol. Gen., for the State.

COBB, J. When one is informed that another intends to commit an offense against him or his property, the law permits him to afford opportunities for its commission, and lay traps which may result in the detection of the offender. To this end he may employ another to act with the intending criminal, and be present with him at the time the crime is to be committed; and, if the intending criminal does himself acts which would constitute the offense, he will not, when charged with the crime, be protected from punishment by reason of the fact that, at the time the criminal act was performed by him, another, who was there with the knowledge, consent, and approval of the victim, and even by his direct employment, aided in and encouraged its perpetration. In such a case, however, it must appear that the person charged with the offense did himself everything necessary to make out a complete offense against the law. Nothing that was done by the person present with the knowledge and consent of the victim will be imputed to the accused; and if, in order

to constitute the offense, it is necessary that something done by such person shall be imputed to the accused, then the prosecution will fail. Or if it appears that the intent to commit the crime did not originate with the accused, but was suggested by the person present with him, with the knowledge and approval of the victim, the prosecution will likewise fail. See *Williams v. State*, 55 Ga. 391; *Varner v. State*, 72 Ga. 745; *State v. Jansen*, 22 Kan. 498; *Spelden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126, and note, page 129; 1 Whart. Cr. Law (10th Ed.) § 149 et seq.; 1 Bish. New Cr. Law, § 262 et seq.; 25 Alb. Law J. 184.

Applying these principles to the facts of the present case, a jury would be authorized to find that the plan to wreck the train originated with the accused; that while Patterson was present at the time the alleged attempt to wreck the train took place, with the knowledge, consent, and approval of the railroad company, and did himself certain acts which would amount to an attempt to wreck the train, the accused, independently of what Patterson did, performed acts which in themselves would make him guilty of a complete attempt to wreck the train. As a finding to this effect was authorized, the verdict cannot be said to be unsupported by evidence, although there was evidence from which the jury might have come to a contrary conclusion. There was no error of law complained of, and the discretion of the trial judge in refusing to grant a new trial will not be controlled. Judgment affirmed. All the justices concurring.

(113 Ga. 1146)

JOHNSON et al. v. GILMER, Sheriff.

(Supreme Court of Georgia. July 23, 1901.)

INJUNCTION—ADEQUATE REMEDY AT LAW.

1. The extraordinary equitable remedy of injunction does not lie in favor of one who has a complete and adequate remedy at law.

2. A court of equity will not, by injunction, prevent the misappropriation by officers of another court of funds collected from fines and forfeitures, and due another officer of such court. The remedy of the party aggrieved is by application to the judge of that court to have the fund properly applied.

(Syllabus by the Court.)

Error from superior court, Hall county; J. B. Estes, Judge.

Suit by M. A. Gilmer, sheriff, against F. M. Johnson and others. From a judgment for plaintiff, defendants bring error. Reversed.

Hubert Estes and H. H. Perry, for plaintiffs in error. W. A. Charters and H. H. Dean, for defendant in error.

COBB, J. The sheriff of the city court of Hall county filed in the superior court of that county a petition to restrain certain officers of the city court from paying, and a special

balliff of that court from receiving, certain moneys collected in the city court from fines and forfeitures which the petitioner claimed to be due him as insolvent costs. In response to the rule calling upon them to show cause why the injunction should not be granted the defendants filed a demurrer, in which, among other things, it was set up that there was no equity in the petition, and that the petitioner had an adequate remedy at law by proper motion in the city court. The judge granted the injunction, and the defendants excepted.

1. Since the passage of the uniform procedure act of 1887, a petition praying for only ordinary equitable relief has not been demurrable on the ground that the plaintiff has a complete and adequate remedy at law. *Reid v. Wilson*, 109 Ga. 424, 34 S. E. 608; *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782 (4); *Kruger v. Walker*, 111 Ga. 383, 36 S. E. 794. But this rule does not apply where extraordinary equitable relief, such as injunction, and the like, is sought. The extraordinary powers of a court of equity will never be exercised where the applicant has a remedy at law which is sufficiently complete and adequate to enforce his rights or redress his wrongs. *Stillwell v. Grocery Co.*, 88 Ga. 100, 13 S. E. 963 (2); *Hitchcock v. Culver*, 107 Ga. 184, 33 S. E. 35 (2); *Moore v. Town of Guyton*, 110 Ga. 330, 35 S. E. 339; *Railway Co. v. Cathcart*, 111 Ga. 818, 35 S. E. 640.

2. Every court has the inherent power to regulate the official conduct of its own officers, and the disbursement of funds collected in that court, and due them for their official services. The proper course, therefore, for the plaintiff in the present case to have pursued would have been to present to the judge of the city court his account for official services, and have the same approved. If the account was approved, and the officers whose duty it was to collect and disburse the moneys declined to pay to the sheriff his pro rata of the insolvent costs, his remedy would have been to bring them before the court by a rule calling upon them to show cause why they had not paid him the amount due him. If they had already improperly disbursed his portion of the fund, he would have the right to proceed against them for the sum so misappropriated, either by a rule in the city court or an action at law in any court having jurisdiction. If the judge refuses to approve his account, he has a remedy to correct this error, if an error, by certiorari to the superior court or writ of error to this court. In no view of the matter was the plaintiff entitled to an injunction. A court of equity is loath to interfere with the internal and purely ministerial affairs of another court. Under this view of the matter it is unnecessary to express any opinion on the question of the compensation of the special balliff appointed for the city court. Judgment reversed. All the justices concurring.

(113 Ga. 1068)

HOLMES v. STATE.

(Supreme Court of Georgia. July 23, 1901.)

INVOLUNTARY MANSLAUGHTER—EVIDENCE.

The charges excepted to embraced familiar and well-settled rules of law, all of which were, in view of the testimony adduced at the trial, appropriate and applicable. No error of law was committed, and the evidence, while warranting the verdict of involuntary manslaughter which the jury returned, was sufficient to sustain a conviction of a higher offense. It follows that the overruling of the motion for a new trial affords the plaintiff in error no just cause of complaint.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

J. L. Holmes was convicted of involuntary manslaughter, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 1042)

VENABLE v. RANDALL.

(Supreme Court of Georgia. July 22, 1901.)

NONSUIT—SETTING ASIDE.

It appearing that the court granted a nonsuit upon evidence which would have warranted a verdict in favor of the plaintiff, there was no error in setting aside such judgment and reinstating the case.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by W. L. Randall against Sam Venable. From an order setting aside a judgment of nonsuit, defendant brings error. Affirmed.

C. D. Maddox and W. A. Sims, for plaintiff in error. McElreath & McElreath, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1007)

PORTER v. OCEAN S. S. CO.

(Supreme Court of Georgia. July 20, 1901.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK.

Where an employé sued his master for injuries alleged to have been sustained by reason of the master's negligence, and the evidence shows that, if the master was negligent at all, the plaintiff knew of such negligence, and took the resulting risk, it was not error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Tony Porter against the Ocean Steamship Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Lester & Ravenel and R. L. Colding, for plaintiff in error. Lawton & Cunningham, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1111)

SPARKS v. GEORGIA S. & F. RY. CO.

(Supreme Court of Georgia. July 23, 1901.)

RECEIVERS—CLAIMS—CROSS ACTION—NOTICE—INTERVENTION—COSTS.

1. Leaving out of consideration all questions as to the state of accounts between the parties, it results as matter of law, from the terms of the various orders and decrees of the court, disposing of the assets of the company, of which the plaintiff in error was receiver, that the title to the claim against the defendant in error, upon which his cross action was based, had, before the institution of the present action against him, passed to the purchasers of the property, franchises, etc., of the company first above indicated, and, accordingly, that such cross action was not maintainable. And the cross action was not maintainable for the further reason that such receiver had not, in due time, filed a notice of this claim, as required by the court's decree.

2. The rulings of the court, which are conclusive of the issues involved, are upheld as correct.

3. The matter of charging the costs in such a case as this, it being an intervention in an equitable proceeding, is one largely in the discretion of the trial judge, and therefore there was, in passing the order directing that the costs accruing in this case be paid from the fund in the hands of the commissioner, no abuse of the discretion with which that officer was invested.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by W. B. Sparks against the Georgia Southern & Florida Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Guerry & Hall, for plaintiff in error. Hall & Wimberly, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 920)

RAY v. GREEN et al.

(Supreme Court of Georgia. July 19, 1901.)

LOST DEED—ACTION TO ESTABLISH—EVIDENCE—NONSUIT.

1. In a suit to establish a lost deed, a quit-claim deed, executed at the same time, to the same land conveyed in the alleged lost deed, to the same grantee, and attested by the same witnesses, but executed by a different grantor, is irrelevant, and not admissible in evidence.

2. If a plaintiff fails to establish the material allegations of his petition, or if his testimony is contradictory and uncertain as to such allegations, the court, on motion to nonsuit, should construe the evidence most strongly against him, and may, if no other testimony appears, be authorized to grant a nonsuit; but, if the plaintiff introduce other witnesses, whose testimony is sufficient to establish the allegations of the petition, it is error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Jr., Judge.

Action by Carrier I. Ray against John M. Green and others. Judgment for defendants. Plaintiff brings error. Reversed.

Hall & Wimberly and L. D. Moore, for plaintiff in error. Guerry & Hall, Abbott, Cox & Abbott, and M. G. Bayne, for defendants in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1020)

WILLIAMS et al. v. LANCASTER et al.

(Supreme Court of Georgia. July 20, 1901.)
ADMINISTRATOR—ACTION ON BOND—ACCOUNTING—VENUE—PETITION—DEMURRER—JUDGMENT—COLLATERAL ATTACK.

1. Under the code procedure of this state, heirs at law may sue an administrator and his sureties upon his bond (Civ. Code, §§ 3398, 3502), and, as courts of equity have concurrent jurisdiction with the courts of ordinary in the settlement of the accounts of administrators (Id. § 3495), may, by way of amendment to the action (Id. § 4833 et seq.), pray for an accounting and settlement with the administrator. The court in the trial of the case will administer legal principles as to the legal portion of the action, and equitable principles as to the equitable portion of the action. *De Lacy v. Hurst*, 9 S. E. 1052, 83 Ga. 229.

2. Such an action may be brought in the county of the residence of any of the parties, as the obligation of the principal and sureties on the bond is joint and several. Civ. Code, § 3398.

3. Under the allegations in the equitable part of the petition, there was sufficient equity to withstand a general demurrer, nor was the petition multifarious or bad for a misjoinder of parties, nor did the amendment thereto add a new cause of action. See *Richardson v. Adams*, 24 S. E. 849, 99 Ga. 81.

4. Heirs at law may bring their action for their distributive shares against the administrator and the sureties upon his bond, and pray for an accounting and settlement, at any time after the expiration of one year from the time of his qualification. Civ. Code, § 3493; *Adams v. Adams* (this term) 39 S. E. 291. If there are debts due by the estate, the administrator can plead and prove them, and thus protect himself and creditors of the estate. *Parker v. Dowdy*, 58 Ga. 439; *Adams v. Adams*, supra.

5. If such administrator has procured an order from the ordinary for the sale of land for the purpose of paying debts of the estate, a prayer by the heirs at law for an accounting and settlement with him, and to enjoin the execution of the order of sale, is not a collateral attack upon the judgment granting the order.

6. A collateral attack upon a judgment may be made in any court upon the ground of fraud. Civ. Code, §§ 5370, 4032; *McArthur v. Matthewson*, 67 Ga. 134. If the allegations of fraud are not sufficiently explicit, the petition is subject on this ground to a special, and not to a general, demurrer.

7. A prayer in such a petition that, upon a final accounting between the heirs and the administrator, the latter may be compelled by the decree of the court to deliver to the heirs the land sought to be sold, does not render the suit one respecting the title to land, and the decree prayed may be had in a court of equity in a county other than that in which the land lies.

8. If the allegations in the petition are true, the conduct of the administrator, and his treatment of the heirs, was not too strongly characterized in that part of the petition to which the administrator filed a special demurrer.

9. In order to determine, upon the hearing of a demurrer, the sufficiency of the allegations of a petition in equity, the court has no power to look beyond the allegations of the petition or

to consider the answer thereto. *Tommey v. Ellis*, 41 Ga. 260; *Griffin v. Stewart*, 29 S. E. 29, 101 Ga. 720.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Judge.

Action by M. E. Williams and others against J. W. Lancaster and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Hardeman, Davis, Turner & Jones, H. E. Coats, and Hall & Wimberly, for plaintiffs in error. Anderson & Grace and Hall & Wimberly, for defendants in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1142)

BASS DRY-GOODS CO. v. GRANITE CITY MFG. CO.

(Supreme Court of Georgia. July 23, 1901.)
PARTNERSHIP—CONTRACT—PAROL EVIDENCE—CONSTRUCTION.

1. Where a partnership engaged in the manufacture of clothing, and was closing out the business, and had a lot of clothing in its warehouse, and one of the partners, traveling as a salesman to sell the remnant of the stock, made a contract to sell a certain quantity of goods then on hand, the partnership was bound by the contract so made, although the other partners sold these goods to other purchasers before receiving the order of the first partner, and although the latter sold the goods for less than their market value. Civ. Code, § 2651.

2. Evidence as to conversations between the seller and buyer prior to the making of the written contract were inadmissible to show the terms of the contract, or the understanding of the parties in reference thereto.

3. Limitations on the authority of a partner to bind the partnership cannot affect third persons, who have no notice of such limitations.

4. Where the contract is for the sale of "about" 147 dozen pairs of pants, with nothing by which the particular goods sold may be identified, the contract is to sell the amount named with such accidental variations as may arise from slight and unimportant excesses or deficiencies. *Brawley v. U. S.*, 96 U. S. 103, 24 L. Ed. 622; 1 Am. & Eng. Enc. Law, 199, and notes.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by the Bass Dry-Goods Company against the Granite City Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. E. McClelland and Rogers & Rogers, for plaintiff in error. Jos. N. Worley, for defendant in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1047)

ROSS v. COOLEY.

(Supreme Court of Georgia. July 22, 1901.)
FRAUDULENT CONVEYANCE—CHANGE OF POSSESSION—PROPERTY OF MINOR—EXECUTION—CLAIM OF THIRD PERSON.

1. As a general rule, possession of personalty by an alleged donor, after he had executed an

Instrument purporting to evidence a gift of the property, is a badge of fraud, which, in proceedings instituted by a judgment creditor of the former to subject the property to his debt, must be satisfactorily explained in order to uphold the validity of the gift.

2. The property of one person cannot ordinarily be made subject to the payment of the debts of another. The right of a creditor to subject the property of one having title thereto to the debt of another, on the theory that credit was extended to the possessor, upon the faith of his apparent ownership, rests on purely equitable grounds, the underlying principle of which is that the owner, by concealing his title, permitted the person in possession and use of the property to commit a fraud on the creditor.

3. When it is made to appear that a father owing no debts at the time, by an instrument in writing, conveyed title to personal property to his minor son, and delivered the instrument to the donee, and kept possession of the property for him, and in the regular course of business, more than a year thereafter, contracted a debt which he was unable to pay, the question whether such property is subject to the debt depends on the bona fides of the gift, and is not affected by the claim that credit was extended to the father on the faith of his owning such property, the creditor not having taken a lien. *Dodd v. Bond*, 14 S. E. 581, 88 Ga. 355. (a) The father being the proper custodian of property belonging to his minor child, possession of such by him is not indicative of fraud. *Hargrove v. Turner*, 37 S. E. 80, 112 Ga. 134, and authorities there cited.

4. A verdict for the claimant was a proper one in this case, and the judge committed no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Trial of right to property between Martin Cooley and P. S. Ross. From a judgment for claimant, Ross brings error. Affirmed.

Lester & Ravenel, for plaintiff in error. W. P. La Roche, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1153)

ROBSON v. COFIELD.

(Supreme Court of Georgia. July 24, 1901.)

TENANCY AT WILL.

Where one person enters upon the premises of another under a contract by the terms of which the relation of landlord and cropper arises between them, the subsequent failure or refusal of the latter to comply with the stipulations of his contract as to making a crop does not render him a tenant at will of the landlord, and, as such, subject to be disposed under a summary warrant.

(Syllabus by the Court.)

Error from superior court, Washington county; E. L. Brinson, Judge.

Action between J. A. Robson and L. Cofield. From the judgment, Robson brings error. Affirmed.

J. A. Robson and Jas. K. Hines, for plaintiff in error. Evans & Evans, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1142)

CULVER v. SILVER.

(Supreme Court of Georgia. July 23, 1901.)

APPEAL—REVIEW—BRIEF OF EVIDENCE—AFFIRMANCE.

1. This court will not review the evidence in a case when it is apparent that there has been no bona fide effort to brief the evidence as required by law, and when the document purporting to be a brief of the evidence is extensively interspersed with objections to testimony, statements and arguments of counsel, and evidence to which objections were sustained, and also with colloquies between counsel and court, none of which should properly find place in a brief of evidence. *Price v. High*, 33 S. E. 956, 108 Ga. 145; *Moore v. Medlock*, 88 S. E. 825, 113 Ga. 250.

2. Where, in such a case, no question is presented for decision which can be determined without reference to the evidence, the judgment below must be affirmed.

(Syllabus by the Court.)

Error from superior court, Hancock county; S. Reese, Judge.

Action between Laura Culver and Eda Silver. From the judgment, Culver brings error. Affirmed.

T. L. Reese, for plaintiff in error. R. H. Lewis and C. A. Picquet, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1153)

LOUISVILLE & N. R. CO. et al. v. HARRISON.

(Supreme Court of Georgia. July 24, 1901.)

INSTRUCTIONS—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Even if the charges complained of were not entirely accurate in the statements of law therein contained, they were not, in view of the evidence, prejudicial to the defendants. The newly-discovered evidence was somewhat cumulative and impeaching in character, and it does not appear, from the ground of the motion for a new trial based thereon, that the facts set out in such evidence could not, by the exercise of proper diligence, have been discovered before or during the trial. The evidence warranted the verdict, and no cause for reversing the judgment overruling the motion for a new trial has been shown.

(Syllabus by the Court.)

Error from superior court, Newton county; J. B. Estes, Judge.

Action by F. B. Harrison against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Jos. B. & Bryan Cumming and J. M. Pace, for plaintiffs in error. E. F. Edwards, J. F. Rogers, A. D. Meador, and C. T. Ladson, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1153)

JOHNSON v. EQUITABLE LOAN & SECURITY CO.

(Supreme Court of Georgia. July 24, 1901.)

BILL OF EXCEPTIONS—VERIFICATION.

A certificate to a bill of exceptions must verify the statements therein contained unequivocally and without qualification; and, when the certificate to a given bill of exceptions fails to do this, the writ of error must be dismissed. *Hawkins v. City of Americus*, 30 S. E. 519, 102 Ga. 788; *Woodruff v. Swann*, 31 S. E. 174, 105 Ga. 510; *Fort v. Sheffield*, 33 S. E. 660, 103 Ga. 781; *Sanges v. State*, 34 S. E. 327, 110 Ga. 260; *McCullough Export Lumber & Warehouse Co. v. National Bank of Brunswick*, 36 S. E. 465, 111 Ga. 132, 135; *Taylor v. Howard*, 37 S. E. 892, 112 Ga. 847.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by the Equitable Loan & Security Company against Eliza Johnson. Judgment for plaintiff, and Johnson brings error. Dismissed.

Robt. L. Rodgers, for plaintiff in error.
W. W. Braswell, for defendant in error.

PER CURIAM. Writ of error dismissed.

(113 Ga. 1012)

SAVANNAH & S. RY. CO. v. PUGHSLEY.

(Supreme Court of Georgia. July 20, 1901.)

INJURY TO EMPLOYE—DEFECTIVE TOOLS.

The evidence for the plaintiff, which was believed by the jury, showing that a co-employee of the plaintiff was furnished with a defective tool by the master, with full notice to the latter of the defect, and that by reason of this defect and of the use of the defective tool by such co-employee the plaintiff, who neither had, nor was chargeable with, notice of the defect in the tool, was injured, a verdict finding the master liable for the injuries thus sustained will not, after its approval by the trial judge, be set aside by this court, as contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Bryan county; P. E. Seabrook, Judge.

Action by Fred Pughsley against the Savannah & Statesboro Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Groover & Johnston and Brannen & Moore, for plaintiff in error. H. B. Strange, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1086)

ARMSBY CO. v. SHUMAKE et al.

(Supreme Court of Georgia. July 23, 1901.)

SALE—ACCEPTANCE—DEFECTIVE QUALITY—RIGHT TO RETURN—NEW TRIAL.

1. When, under a contract of sale, the articles which are the subject-matter of the sale are to be of a given quality, the actual receipt by the purchaser of the articles will not preclude him from refusing to accept them on the ground that they are not of the quality stipulated for in the contract, when an inspection

and examination of such articles, as well as a refusal to accept the same, accompanied by a tender of the articles, is made within a reasonable time after they are received. See *Benj. Sales (Bennett's 7th Am. Ed.)* §§ 139, 701, 703; *Clark, Cont. p. 142*; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154.

2. In a case of the character above referred to, the fact that some of the articles (a very small part of the whole number) were lost or stolen from the purchaser, without negligence on his part, or inadvertently sold by him before it was discovered that the articles were not of the quality required by the contract of sale, would not alone interfere with his right to refuse to accept the balance; the purchaser being chargeable with the market value of such of the articles as were not offered to be returned for the reasons above mentioned.

3. The verdict of the jury sufficiently covered the issues made in the pleadings, and, when construed in the light thereof, is capable of exact enforcement.

4. A new trial will not be granted because a verdict in favor of the defendant, in a case where several pleas are filed, does not specify upon which plea it is found, when there was no request to instruct the jury to so frame the verdict, and no objection was made to the verdict on this ground when the same was rendered. *Ventress v. Rosser*, 73 Ga. 534 (1c); *Little v. Rogers*, 24 S. E. 856, 99 Ga. 95 (2), and cases cited.

5. The rulings upon evidence and the charges excepted to, not dealt with in the preceding notes, were free from any error which required the granting of a new trial. The newly-discovered evidences, even if not cumulative, was not of such a character as should, or, in all probability, would, produce a different verdict from that rendered. Though the evidence was directly conflicting, there was evidence abundantly sufficient to sustain the verdict, and the discretion of the trial judge in refusing to grant a new trial will not be controlled.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Armsby Company against Shumake & Murphy. Judgment for defendants, and plaintiff brings error. Affirmed.

C. D. Maddox, for plaintiff in error. Rosser & Carter, for defendants in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1007)

TANXLEY v. LAMPKIN et al.

(Supreme Court of Georgia. July 20, 1901.)

LABORER'S LIEN—EVIDENCE.

Where a laborer institutes a suit to foreclose a lien which he claims against real estate, and on the trial of the issue formed thereon there is no testimony to show that he has completed his contract of labor, a verdict for the defendant is demanded by the evidence. In the present case, therefore, the court did not err in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by John Tanxley against Henry Lampkin and others. Judgment for defendants. Plaintiff brings error. Affirmed.

B. B. McCowen, for plaintiff in error. S. F. Garlington, for defendants in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1067)

GROGAN et al. v. TATE et al.

(Supreme Court of Georgia. July 22, 1901.)

APPEAL—REVIEW—ASSIGNMENT OF ERRORS—SUFFICIENCY.

Where a bill of exceptions recites that, upon the call in the court below of a case against several defendants, two of the latter exhibited to the trial judge the record of a former trial of the case which showed certain things, and then, "for the purpose of giving direction to [the] subsequent hearing" of the case, moved the court to strike their names as parties defendant, that this motion was denied, and that movants excepted to this ruling, and assign the same as error, and no record is brought up or specified, no question is properly presented for decision by this court. The bill of exceptions does not show upon what ground movants based their motion to strike their names, nor upon what ground the court overruled such motion, and it is therefore impossible for this court to determine, without guessing, what was the ruling to which exception is sought to be taken, or whether error was committed by the trial judge. It follows that the writ of error must be dismissed.

(Syllabus by the Court.)

Error from superior court, Elbert county; S. Reese, Judge.

Action by E. B. Tate and others against George C. Grogan and others. From the judgment, defendants bring error. Dismissed.

Geo. C. Grogan, for plaintiffs in error. J. N. Worley, I. O. Van Duzer, and O. P. Harris, for defendants in error.

PER CURIAM. Writ of error dismissed.

(113 Ga. 1006)

WILLIAMS et al. v. WILLIAMS et al.

(Supreme Court of Georgia. July 20, 1901.)
APPOINTMENT OF ADMINISTRATOR—PARTIES IN INTEREST.

In order for one to be heard in a proceeding before the ordinary for the appointment of an administrator of the estate of a deceased person, he must show that he has an interest in the choice of administrator, either as heir or creditor of the deceased. Railroad Co. v. Peacock, 58 Ga. 146. A claim to own the property named in the petition for administration is not sufficient; some interest on the part of the objector in the assets and their distribution must appear.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by W. F. Williams and others against J. S. Williams and others for the appointment of administrator. Judgment for defendants. Plaintiffs bring error. Affirmed.

Salem Dutcher, for plaintiffs in error. F. T. & J. B. Lockhart, for defendants in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1011)

LANG et al. v. CAMP PHOSPHATE CO.

(Supreme Court of Georgia. July 20, 1901.)

LIMITATIONS—DEMURRER TO PLEADING.

It appearing that the plaintiff's action was not based upon any written contract, but upon

claims in the nature of open accounts against the defendant, and that suit was not instituted for more than four years after the debt became due, the court below did not err in sustaining the demurrer to the plaintiff's petition upon the ground that its allegations showed upon their face that the claim was barred by the statute of limitations.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by J. M. Lang & Co. against the Camp Phosphate Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Mercer & Mercer and R. R. Richards, for plaintiffs in error. Denmark, Adams & Freeman and W. T. Johnson, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1152)

TIERNAN v. KAISER et al.

(Supreme Court of Georgia. July 24, 1901.)

EQUITY—DECREE—CONFLICTING EVIDENCE—REVIEW.

This was an equity case, which was referred to an auditor. While on some of the points involved the evidence was conflicting, every finding of the auditor is supported by evidence, and the discretion of the judge of the superior court in overruling all of the exceptions of fact will not be interfered with. Neither the exceptions of law to the auditor's report, which were overruled by the judge, nor the assignments of error in the bill of exceptions upon the final decree, present any sufficient reason for reversing the judgment in the case.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between J. P. Tiernan and N. Kaiser and others. From the judgment, Tiernan brings error. Affirmed.

A. H. Davis, for plaintiff in error. Slaton & Phillips, for defendants in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1154)

PRIOR v. PRIOR et al.

(Supreme Court of Georgia. July 24, 1901.)

ACTION AGAINST ADMINISTRATOR—FAILURE TO COLLECT ASSETS.

This being an action by legatees against an executor predicated upon his alleged failure to collect certain notes due to his testator by a third person, and the evidence showing affirmatively that this person was insolvent, and not showing that the executor could, by due diligence, have collected anything upon these notes, the verdict against him was unwarranted. The general grounds of the motion for a new trial ought to have been sustained, but the special grounds of the same were without merit.

(Syllabus by the Court.)

Error from superior court, Screven county; B. D. Evans, Judge.

Action by W. L. Prior and others against G. R. Prior. Judgment for plaintiffs. Defendant brings error. Reversed.

Oliver & Overstreet and H. B. Strange, for plaintiff in error. E. K. Overstreet and White & Boykin, for defendants in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1155)

WELLMAKER et al. v. WELLMAKER.

(Supreme Court of Georgia. July 24, 1901.)

VOLUNTARY CONVEYANCES—VALIDITY.

The facts that one who, while indebted, was possessed of a considerable amount of land, and had, prior to the institution of a suit against him, from time to time, conveyed to his children, separately, particular parts of such land, and subsequently sold the balance to his wife and son-in-law, do not, without more, render void a voluntary conveyance, made to one of his daughters a considerable time prior to the sale, when it also appears that, at the date of such conveyance, the grantor reserved to himself land sufficient to pay off his indebtedness. (a) The trial judge did not err in directing a verdict for the claimant.

(Syllabus by the Court.)

Error from superior court, Lincoln county; S. Reese, Judge.

Action between J. M. Wellmaker and others, executors, against L. E. Wellmaker to determine claim to land on levy of execution. Judgment for claimant, and executors bring error. Affirmed.

Colley & Sims, for plaintiffs in error. John T. West and Thos. E. Watson, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1167)

PARKER v. SALMONS.

(Supreme Court of Georgia. July 24, 1901.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT—ACTION FOR RENT—EVIDENCE—HARMLESS ERROR—PLEADING—AMENDMENT—EXECUTORS—VERDICT.

1. While a party may not lawfully give evidence in his own favor in a suit wherein the personal representative of one deceased is the opposite party, as to transactions or communications which the living party had with the deceased, yet the evidence of such party as to independent facts, knowledge of which was not derived from transactions or communications with the deceased, is admissible. (a) In an action by the owner of land to recover rent, brought against an executor, evidence by the plaintiff to the effect that the testator was in possession, and cultivated the land, is admissible. *Gomez v. Johnson*, 32 S. E. 600, 106 Ga. 515, and cases there cited.

2. In an action brought by one as the owner of land, for the rent thereof against the executor of her deceased father, evidence offered by the executor to the effect that, prior to the testator's death, he placed the plaintiff on another and distinct tract of land, and allowed her to hold and occupy it as her home, and receive the profits thereof, is not, standing alone, admissible evidence. Nor is evidence

that the testator on a given date conveyed other land to the plaintiff, for the consideration of love and affection, relevant or admissible.

3. It was erroneous to admit in evidence a plat purporting to be a division of certain land, together with a writing entered thereon by apparently a private person, being in effect a certificate from such person, identifying it as certain land described in a deed, without proof of the correctness of the plat. As, however, such a plat is immaterial to the issues in an action to recover rent of land where title is not in question, such error does not authorize a verdict in favor of the plaintiff to be set aside, and a new trial granted.

4. An amendment to an imperfect plea of plene administravit præter, which was not demurred to, setting up that the estate would be insolvent if the plaintiff had judgment against it, and averring that the necessary expenses of administration and the year's support of the widow, being claims and debts superior to the debt of the plaintiff, would consume the assets of the estate, should have been allowed; but, in view of the verdict which was returned and of the judgment rendered thereon, which, when properly construed, is a judgment quando acciderint, and not a judgment de propriis, such error will not cause a reversal of the judgment.

5. When, in an equitable petition, instituted by an executor, seeking to enjoin a defendant from erecting buildings on a certain tract of land, the fact that the title thereto is a matter for adjudication by reason of the answer of the defendant, averring that title to the land is in her, does not render the action such a suit in ejectment as will bar the defendant, after title has been adjudicated to be in her, from instituting her separate action against the executor to recover rent alleged to have accrued prior to such adjudication, the prohibitory terms of the statute (Civ. Code, § 4998) apply only to those persons who have as plaintiffs in a prior ejectment suit recovered possession. Hence an amendment to a plea setting up an adjudication of title under a proceeding such as is first above indicated was properly overruled.

6. When, to an action instituted against him, an executor has filed a plea of plene administravit præter, and a judgment, following the verdict against him, does not authorize the seizure of the personal goods of the executor to satisfy the judgment, a reversal of such judgment will not be had for the failure of the trial judge to properly charge the jury in relation to the effect of their verdict, nor the refusal to admit specified evidence going to show that there are other debts, of higher dignity than that of the plaintiff, sufficient to absorb the entire estate in his hands.

7. There was no error in refusing to admit in evidence the will of the testator, as there was no question of the fact that plaintiff was the owner of the land, to recover the rent of which the action was instituted.

8. A verdict finding a given sum against the executor, "to be paid out of any assets in the hands, or that come into the hands, of the executor to be administered on," and a judgment that the sums named in the verdict be levied of the goods and chattels, lands and tenements, of the deceased, in the hands of the executor, and of the goods and chattels, lands and tenements, that may come into the hands of the executor, belonging to the estate of the deceased, are not inconsistent. In no event is the judgment de propriis, and, though irregular, and not framed according to the provisions of the statute, when construed with the pleadings and evidence, cannot be held to be a conclusive finding of assets in the hands of the executor, and will stand only as a judgment quando acciderint.

9. There was no error in overruling the demurrer.

10. There was sufficient evidence to authorize the verdict rendered.

(Syllabus by the Court.)

Error from superior court, Hart county; S. Reese, Judge.

Action by Sarah Salmons against J. W. Parker, executor. Judgment for plaintiff. Defendant brings error. Affirmed.

A. G. McCurry, for plaintiff in error. J. H. Skelton and O. C. Brown, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1006)

CENTRAL OF GEORGIA RY. CO. v. HURST.

(Supreme Court of Georgia. July 20, 1901.)

CARRIERS—LIVE-STOCK SHIPMENTS—NEGLIGENCE—EVIDENCE.

1. Giving full effect to the contract between the parties, the railroad company could only be made liable in the event an injury was occasioned to the animals shipped, or any of them, caused by the negligence of the railroad company. While the evidence apparently preponderated against the fact of negligence, one witness testified to facts from which negligence might by the jury be found to have existed, and, as the verdict has been approved by the trial judge, it cannot be said that it was without evidence to support it.

2. There was no material error of law committed of which complaint was made.

(Syllabus by the Court.)

Error from superior court, Burke county; W. M. Henry, Judge.

Action by C. W. Hurst against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Seaborn H. Jones, for plaintiff in error. Johnston & Fullbright, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 982)

GOLDEN GEORGIA, Limited, v. McMANUS.

(Supreme Court of Georgia. July 20, 1901.)

APPEAL—REVIEW—EVIDENCE—TAKING PAPERS TO JURY ROOM—INSTRUCTIONS.

1. The evidence submitted by the plaintiff was sufficient to authorize the verdict rendered in his favor.

2. The trial judge committed no error in rejecting evidence of which complaint was made. That which was excluded related to transactions between plaintiff and a third person, and was not pertinent to the issues involved in the case on trial.

3. The stenographic report of the evidence of the plaintiff on another trial was not documentary evidence. The judge committed no error in refusing to allow the same to be taken by the jury to their room when they retired to consider the case.

4. It does not appear that the trial judge failed to state to the jury the contentions of the defendant with sufficient fullness and fairness.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by P. F. McManus against the Golden Georgia, Limited. Judgment for plaintiff. Defendant brings error. Affirmed.

Tompkins & Alston, for plaintiff in error. Goodwin & Hallman, J. A. Anderson, and R. G. Hartsfield, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1087)

TERRELL v. FRASER.

(Supreme Court of Georgia. July 23, 1901.)

GENERAL VERDICT—SUFFICIENCY—NEW TRIAL—GROUNDS.

1. Where, in an action on promissory notes given for the purchase money of land for which defendant held the plaintiff's bond for title, there was a general verdict for the plaintiff, it was not cause for a new trial that the verdict did not find that he was entitled to a special lien on the land, although he prayed in the petition that such a lien be established. A general verdict was all he was entitled to as matter of right. He may show by aliunde proof the priority of the lien of his general judgment as to the land when it becomes necessary. *Marshall v. Charland*, 34 S. E. 671, 109 Ga. 306; *Bush v. Bank*, 36 S. E. 900, 111 Ga. 666; *Paint Co. v. Hamilton*, 35 S. E. 696, 111 Ga. 823.

2. The grounds of the motion for a new trial, other than that dealt with above, in essence, amount to no more than general complaints that the verdict is contrary to, and not supported by, the evidence, in that the amount thereof is less than that to which the plaintiff was entitled; nor do the grounds here referred to properly present for decision any special question of law. This being so, and it appearing that there was sufficient evidence to sustain the verdict rendered, and it having been approved by the trial judge, the judgment denying a new trial will not be disturbed.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by Z. T. Terrell against R. A. Fraser. Judgment for plaintiff for less than amount claimed, and he brings error. Affirmed.

W. H. Terrell and S. O. Tapp, for plaintiff in error. E. M. & G. F. Mitchell, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1170)

MARTIN v. REYNOLDS & HAMBY
ESTATE MORTG. CO., Limited.

REYNOLDS & HAMBY ESTATE MORTG. CO., Limited, v. MARTIN.

(Supreme Court of Georgia. July 24, 1901.)

DIRECTING VERDICT.

The defendant having by its plea assumed the burden of proof, and the evidence introduced in favor of the plea failing to sustain the same, the court did not err in directing a verdict in favor of the plaintiff.

(Syllabus by the Court.)

Error from superior court, White county; J. B. Estes, Judge.

Action by the Reynolds & Hamby Estate Mortgage Company, Limited, against John Martin. From a judgment for plaintiff, defendant brings error. Plaintiff assigns cross error. Judgment on main bill of exceptions affirmed, and cross bill dismissed.

Spencer R. Atkinson, G. S. Kytie, and W. A. Charters, for plaintiff in error. I. L. Oakes and H. H. Perry, for defendant in error.

PER CURIAM. Judgment on main bill of exceptions affirmed; cross bill dismissed.

(113 Ga. 1086)

KLINE v. RUSSELL.

(Supreme Court of Georgia. July 23, 1901.)

GARNISHMENT—CLAIM OF EXEMPTION—INSTRUCTIONS—LABORER.

1. Where a debtor claimed that a sum which his creditor was seeking to reach by a process of garnishment was due to him as a laborer, and therefore not subject to such process, it was not upon the trial of an issue thus arising erroneous to charge: "If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a 'laborer.' If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a 'laborer.'" *Oliver v. Hardware Co.*, 25 S. E. 403, 98 Ga. 249.

2. According to the rule laid down in the case above cited, and in view of the evidence appearing in the record, the plaintiff in error was not a laborer whose wages were exempt from the process of garnishment. See *Ensel v. Adler*, 85 S. E. 334, 110 Ga. 326, and cases cited; *Stuart v. Poole*, 88 S. E. 41, 112 Ga. 818.

3. The preceding notes deal with the only questions presented in the motion for a new trial, in so far as the grounds thereof were verified by the trial court.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by J. J. Russell against B. H. Kline. From the judgment, Kline brings error. Affirmed.

Geo. W. Brooks, for plaintiff in error. R. J. Hancock, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1012)

AMBOS v. SAVANNAH, T. & I. O. H. RY.

(Supreme Court of Georgia. July 20, 1901.)

INJUNCTION—DENIAL—WRIT OF ERROR—DISMISSAL.

It appearing to this court that, since the refusal of the application for temporary injunction by the court below, the defendant has done all the acts sought to be enjoined, no supersedeas having been granted, the writ of error is dismissed without prejudice. This case

is controlled by the decision in *Gallaher v. Schneider*, 85 S. E. 321, 110 Ga. 322.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Henry Ambos against the Savannah, Thunderbolt & Isle of Hope Railway. From an order refusing an injunction, plaintiff brings error. Dismissed.

R. R. Richards, for plaintiff in error. Osborne & Lawrence, for defendant in error.

PER CURIAM. Writ of error dismissed.

(113 Ga. 1110)

F. W. HAZLEHURST CO. v. NAPIER et al.

(Supreme Court of Georgia. July 23, 1901.)

SALE OF PERSONALTY—STATUTE OF FRAUDS.

It appearing from the evidence introduced in support of the plaintiff's action that the same was based upon the breach of a parol contract touching the sale of personalty amounting in value to more than \$50, and that the case did not fall within any of the exceptions named in the statute of frauds, there was no error in sustaining the motion to nonsuit.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by the F. W. Hazlehurst Company against Napier Bros. From a judgment of nonsuit, plaintiff brings error. Affirmed.

Marion W. Harris, for plaintiff in error. Hardeman, Davis & Turner, for defendants in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1154)

COLE v. ALEXANDER.

(Supreme Court of Georgia. July 24, 1901.)

MONEY HAD AND RECEIVED—IMPROVEMENTS—EVIDENCE.

An action upon an account for money had and received, and for the erection of improvements on land, is not sustained by evidence showing that the defendant sold land to the plaintiff and received a part of the purchase money; that the latter, while in possession, made improvements on the premises, and then abandoned the same, from fear of personal violence on the part of the defendant. (a) Taking the evidence most strongly for the plaintiff, he did not establish the cause of action set forth in his petition, and was therefore not entitled to recover.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by H. Alexander against J. E. Cole. Judgment for plaintiff, and defendant brings error. Reversed.

Jos. N. Worley, for plaintiff in error. Geo. T. Magill and L. C. Van Duzer, for defendant in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1010)

**BRUSH ELECTRIC LIGHT & POWER CO.
v. WELLS.**

(Supreme Court of Georgia. July 20, 1901.)

WRIT OF ERROR—WHEN LIES.

Where the losing party, in the trial of an action in the court below, moves for a new trial upon many grounds, and the trial judge, by written order, grants the motion generally, the movant cannot except to the grant of his motion, although, in a colloquy between his counsel and the judge, the latter may have stated that the new trial was granted for reasons other than those given in the motion.

(Syllabus by the Court.)

Error from city court of Savannah; L. M. Norwood, Judge.

Action between the Brush Electric Light & Power Company and Rebecca Wells. Verdict for Wells, and the company moves for a new trial, and from the grant of the motion generally brings error. Dismissed.

A. O. Wright and Saussy & Saussy, for plaintiff in error. Twiggs & Oliver, for defendant in error.

PER CURIAM. Writ of error dismissed.

(113 Ga. 1041)

THOMPSON v. WEBB.

(Supreme Court of Georgia. July 22, 1901.)

APPEAL—REVIEW.

There was no error in admitting testimony, and there was sufficient evidence to warrant the jury in finding that the defendant admitted liability for the plaintiff's demand, and promised to pay the same. This being so, and the verdict returned against him in the justice's court having, on certiorari, been approved by the judge of the superior court, the supreme court will allow it to stand.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Josette Webb against J. B. Thompson. Judgment for plaintiff. Defendant brings error. Affirmed.

Westmoreland Bros., for plaintiff in error. Thos. L. Bishop, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 981)

COWDERY v. JOHNSON.

(Supreme Court of Georgia. July 20, 1901.)

**REJECTMENT—VERDICT—DESCRIPTION OF
PROPERTY.**

The evidence did not sufficiently show any particular number of front feet or inches of land that the plaintiff was entitled to recover; hence a verdict finding for him "the piece of land in dispute" cannot legally stand, when it appears that the land sought to be recovered was described as 1.8 of a foot of a particular lot fronting on a named street, and running back to an alley.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Ida J. Johnson against J. W. Cowdery. Judgment for plaintiff. Defendant brings error. Reversed.

Rosser & Carter and H. N. Randolph, for plaintiff in error. Westmoreland Bros., for defendant in error.

LITTLE, J. This was an action for the recovery of a strip of land of the uniform width of 1.8 feet along the boundary line between two lots in the city of Atlanta. The jury returned a verdict in favor of the plaintiff for the piece of land in dispute. The evidence fails to show with any definiteness the width of this strip of land, certainly as to one end of it. This being true, a finding for the plaintiff, as above set out, is contrary to the evidence, and without evidence to support it. The trial judge, therefore, erred in refusing to set the verdict aside and grant to defendant a new trial. Judgment reversed. All the justices concurring.

(113 Ga. 1150)

BOWDOIN v. STATE.

(Supreme Court of Georgia. July 24, 1901.)

**CRIMINAL LAW—SEPARATION OF JURY—VER-
DICT—IMPEACHMENT BY JUROR—NEW
TRIAL—APPEAL—REVIEW.**

1. That the judge, during the trial of a misdemeanor case, and while the evidence was being submitted, in the presence of, and without objection from, counsel for the accused, allowed the jury to disperse during a night recess, is not, after a verdict of guilty, cause for a new trial, when there is no evidence of any attempt to influence the jury, or of any improper conduct on their part. See *Eberhart v. State*, 47 Ga. 598 (5); *Carter v. State*, 56 Ga. 467 (4); *Kirk v. State*, 73 Ga. 620 (3); *Riggins v. Brown*, 12 Ga. 271 (10); *Adkins v. Williams*, 23 Ga. 222 (3); *Stix v. Pump*, 37 Ga. 332 (3); *Barfield v. Mullino*, 38 S. E. 647, 107 Ga. 730.

2. A verdict cannot be impeached by anything coming from a juror, directly or indirectly. *Railway Co. v. Sommer*, 37 S. E. 735, 112 Ga. 512.

3. Newly-discovered evidence, when purely impeaching in its character, is not cause for a new trial.

4. Grounds of a motion for a new trial, not approved by the trial judge, cannot be considered by the supreme court.

5. An assignment of error upon the admission of evidence cannot be considered by this court, unless the evidence admitted, or the substance thereof, be set out in the motion for new trial, or attached thereto as an exhibit.

6. Where one of the grounds of a motion for a new trial in a criminal case is that two of the jurors who rendered the verdict had each previously expressed an opinion adverse to the innocence of the accused, the trial judge, as to this ground of the motion, occupies the position of a trier, and this court will not undertake to control his discretion in the matter, unless it clearly appears that it has been abused. *Ray v. State*, 15 Ga. 223; *Costly v. State*, 19 Ga. 614; *Vann v. State*, 9 S. E. 945, 83 Ga. 44; *Hill v. State*, 16 S. E. 976, 91 Ga. 153; *Carter v. State*, 32 S. E. 845, 106 Ga. 372; *Hackett v. State*, 33 S. E. 842, 108 Ga. 40; *Roberts v. State*, 34 S. E. 203, 110 Ga. 253. Considering the evidence submitted upon this question, there does not appear to have been any abuse of discretion in overruling this ground of the motion.

7. The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

Little, J., dissenting in part.
(Syllabus by the Court.)

Error from superior court, Gordon county; George F. Gober, Judge.

Frank Bowdoin was convicted of misdemeanor, and brings error. Affirmed.

J. W. Harris, for plaintiff in error. Sam P. Maddox, for the State.

PER CURIAM. Judgment affirmed.

LITTLE, J., dissents to the proposition laid down in the first headnote.

(113 Ga. 1166)

ADAMS v. CAUTHEN.

(Supreme Court of Georgia. July 24, 1901.)

SALE OF LAND—PAYMENT OF PRICE—LEVY IN EQUITY—NECESSITY OF DEED.

1. Where land is sold, and three promissory notes, payable to bearer, given for the purchase money, the vendee receiving bond for titles, and the vendor reserving title in himself, and two of the notes are paid off, and the other transferred without indorsement or guaranty, and without any transfer of title to the land to the transferee, this operates as a payment of the purchase money, the vendor ceases to hold any interest in the land, the vendee's equity becomes complete, and the land is subject to levy and sale at the instance of any transferee of the unpaid note. *Carhart v. Reviere*, 1 S. E. 222, 78 Ga. 173, and cases cited. While such transferee's claim cannot be enforced as for purchase money (*Hunt v. Harbor*, 6 S. E. 596, 80 Ga. 746), he does occupy the position of a creditor of the vendee.

2. The above is true although no deed from the vendor to the vendee has been filed and recorded. *Heyward v. Finney*, 63 Ga. 353.

3. Whether this debt may be enforced against the land in the hands of one who has purchased and paid for the vendee's interest under the bond for titles is a question not made and not decided.

(Syllabus by the Court.)

Error from superior court, Hart county; S. Reese, Judge.

Action between T. L. Adams and L. E. Cauthen, administrator. From the judgment, Adams brings error. Reversed.

Geo. C. Grogan and A. G. McCurry, for plaintiff in error. J. H. Skelton and I. O. Van Duzer, for defendant in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1151)

CITY OF FITZGERALD v. MERCHANTS' & PLANTERS' BANK.

(Supreme Court of Georgia. July 24, 1901.)

WRIT OF ERROR—DISMISSAL—GENERAL ASSIGNMENT OF ERRORS.

The question of practice presented by the motion to dismiss the writ of error in this case was directly passed on and definitely settled in the case of *Kimball v. Williams*, 33 S. E. 994, 108 Ga. 812. In view of the decision therein rendered, which was approved and followed

in *Wheeler v. Worley*, 35 S. E. 639, 110 Ga. 513, the motion must be sustained. See, also, *Long v. Harrison*, 36 S. E. 926, 111 Ga. 884, and the cases cited in *Collins v. Carr*, 36 S. E. 959, 111 Ga. 867.

(Syllabus by the Court.)

Error from superior court, Irwin county; D. M. Roberts, Judge.

Action between the Merchants' & Planters' Bank and the city of Fitzgerald. From the judgment the city brings error. Dismissed.

E. W. Ryman, for plaintiff in error. L. Kennedy, for defendant in error.

PER CURIAM. Writ of error dismissed.

(113 Ga. 1063)

CLARKE et al. v. FOX.

(Supreme Court of Georgia. July 22, 1901.)

GARNISHMENT—DEFAULT—JUDGMENT—SETTING ASIDE.

A motion to set aside a judgment rendered against a partnership, as garnishee, in default of answer on the grounds that, "if the garnishment summons was ever served upon them, it was so served at a time when the partner served was on the eve of departure for Europe, whence he returned late in the year; * * * that the partner who took his place in the office was not advised of the service"; "that they were not indebted to the defendant, but he is indebted to them,"—was properly overruled. (a) The grounds stated do not show prima facie that the garnishees were prevented from making answer by accident, mistake, or any unavoidable circumstance for which the law will have regard, and therefore this case does not come within the ruling made in *Atlanta Journal v. Brunswick Pub. Co.*, 36 S. E. 929, 111 Ga. 718.

(Syllabus by the Court.)

Error from superior court, McIntosh county; P. E. Seabrook, Judge.

Action by R. D. Fox against Clarke Bros. Judgment for plaintiff. Defendants bring error. Affirmed.

Charlton & Charlton, for plaintiffs in error. Giquilliot & Stubbs, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1061)

WALKER v. STATE.

(Supreme Court of Georgia. July 23, 1901.)

CRIMINAL LAW—NEW TRIAL.

There was ample evidence to warrant the verdict, and consequently no error in denying a motion for a new trial, based on the general grounds.

(Syllabus by the Court.)

Error from city court of Americus; Charles R. Crisp, Judge.

Charlie Walker was convicted of crime, and brings error. Affirmed.

W. W. Dykes and Blalock & Cobb, for plaintiff in error. J. A. Ansley, Jr., for the State.

PER CURIAM. Judgment affirmed.

(113 Ga. 1067)

KENNEDY v. SCHOFIELD SONS & CO.

(Supreme Court of Georgia. July 22, 1901.)

NONSUIT—ACTION BY EMPLOYE.

This being a suit by a servant against his master to recover for personal injuries, and the evidence for the plaintiff showing no negligence on the part of the master, there was no error in awarding a nonsuit.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by Moses Kennedy against J. S. Schofield Sons & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Marion W. Harris, for plaintiff in error. Dessan, Harris & Harris, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1042)

WALKER et al. v. HODGES et al.

(Supreme Court of Georgia. July 22, 1901.)

HOMESTEAD—ALIENATION.

The constitution of 1868 did not, and that of 1877 does not, contain any provision forbidding a head of a family from alienating his "reversionary interest" in a homestead set apart under the statutory provisions now embraced in Civ. Code, § 2866 et seq.; nor was there of force either in December, 1879, or on December 8, 1877, any statutory provision making such alienation unlawful.

(Syllabus by the Court.)

Error from superior court, Washington county; B. D. Evans, Judge.

Action by J. T. Walker & Co. against W. R. Hodges. Judgment for plaintiffs. On levy of execution, vendees of defendant interposed claim. Verdict for claimants, and plaintiffs bring error. Affirmed.

Rawlings & Hardwick, for plaintiffs in error. Evans & Evans, for defendants in error.

COBB, J. On December 8, 1877, a homestead was set apart to W. R. Hodges under the provisions of Code, 1873, § 2040 et seq., now embraced in Civ. Code, § 2866 et seq. In December, 1879, Hodges attempted to convey by deed the reversionary interest in the land set apart as a homestead. Executions founded on judgments rendered in 1895 against Hodges were levied on the land, and claims were interposed by the vendees in the deed. The court directed a verdict in favor of the claimants, and the plaintiffs in execution excepted. The case was argued here on the assumption that the same rule as to the power of the head of a family to alienate the homestead property would apply to the homestead set apart under the statutory provisions above referred to as applied to what is known as the "constitutional homestead"; and we were asked to decide whether the constitution of 1877 took effect immediately upon its ratification, or not until after the proclamation of the governor, so as to determine whether the

homestead in question was governed by the provisions of the constitution of 1868 or that of 1877. It has been held that the head of a family might convey the reversionary interest in a homestead set apart under the constitution of 1868 (*Huntress v. Anderson*, 110 Ga. 427, 35 S. E. 671), while this is an open question as regards the homestead provided for in the constitution of 1877. In so far as the homestead provided for in the section of the Code of 1873, and now embraced in Civ. Code, § 2866, is concerned, no restriction upon the power of the head of a family to alienate his reversionary interest was contained in the constitution of 1868, nor is now contained in the constitution of 1877. It will therefore be at once seen that, so far as this case is concerned, it is perfectly immaterial when the constitution of 1877 took effect. There was not at the time the homestead was set apart to Hodges, or at the time he made the deed to the reversion, any statute of force prohibiting such an alienation. This being so, he had a perfect right to make the deed, and the interest in the land thereby conveyed was not subject to an execution issued on a judgment against him rendered after the deed was made. There was no error in directing a verdict for the claimants. Judgment affirmed. All the justices concurring.

(113 Ga. 962)

SOUTHERN STATES EXPLORING & FINANCE SYNDICATE, Limited,
v. McMANUS.

(Supreme Court of Georgia. July 18, 1901.)

EVIDENCE—ADMISSIBILITY—PARTIAL NONSUIT—INSTRUCTIONS.

1. It does not appear, as alleged in the motion for new trial, that the contentions of the defendant were not fairly and fully stated to the jury.

2. It was not erroneous to allow the plaintiff to testify to the fact that he sent a report to the defendant, when the judge, at the time the evidence was admitted, restricted such evidence to the fact that the report was made.

3. The judge properly rejected evidence relating to transactions between the plaintiff and another, which had no relevancy to the issues on trial.

4. The refusal to grant a nonsuit as to a particular item of the plaintiff's account was proper, there being no such thing as a "partial nonsuit." *Swain v. Insurance Co.*, 29 S. E. 147, 102 Ga. 96; *Railroad Co. v. Gibson*, 32 S. E. 151, 106 Ga. 229; *Railway Co. v. Hardin*, 33 S. E. 436, 107 Ga. 379.

5. The request to charge was not warranted by the evidence, and was therefore properly refused.

6. There was, under the evidence, no error in charging the jury of which complaint is made in the motion.

7. The record contains sufficient evidence to support the verdict.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by P. F. McManus against the Southern States Exploring & Finance Syndicate, Limited. Judgment for plaintiff. Defendant brings error. Affirmed.

Tompkins & Alston, for plaintiff in error.
Goodwin & Hallman, J. A. Anderson, and
R. G. Hartsfield, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1141)

**THORNTON v. MUTUAL BUILDING &
LOAN ASS'N.**

(Supreme Court of Georgia. July 23, 1901.)

**ACTION ON CONDITIONAL CONTRACT—RIGHT
TO JURY TRIAL.**

Where suit is brought upon a written contract, which is not unconditional, a judgment entered thereon by the court without a jury is void.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

Action by the Mutual Building & Loan Association against J. G. Thornton. Judgment for plaintiff. On levy of execution, defendant filed affidavit of illegality. Affidavit overruled, and defendant brings error. Reversed.

A. G. McCurry and O. C. Brown, for plaintiff in error. W. L. Hodges and J. H. Skelton, for defendant in error.

SIMMONS, C. J. An execution issued upon a judgment against Thornton was levied upon certain real estate. Thornton filed an affidavit of illegality. One of the grounds of this illegality was that the contract which was the basis of the judgment was a conditional contract, and that the judgment was void because entered by the court without a jury. The judgment was shown to have been rendered by the court without a jury, and contained a recital that no issuable defense upon oath had been filed to the suit. The contract upon which the judgment was based was a bond given by the defendant to the plaintiff, a building and loan association. It contained a condition that it should be void if Thornton should pay certain weekly and monthly dues, and all taxes and assessments, and comply with all the by-laws, rules, and regulations of the association. Under this contract Thornton would never have to pay the sum named in the bond, or any part thereof, if he complied with the by-laws, rules, and regulations of the association, and paid the dues, taxes, and assessments. Until a breach was shown, nothing was due upon the bond; and such proof should have been made before a jury. That this contract was not unconditional must be apparent. The court can enter up judgment without a jury only in "civil cases founded on unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation." It must follow that the judgment here in question was void. Civ. Code, § 5076; *Rodgers v. Caldwell*, 112 Ga. 635, 37 S. E. 865. The court therefore erred in overruling the affidavit of illegality. Judgment reversed. All the justices concurring.

39 S.E.—31

(113 Ga. 1163)

ROZIER et al. v. EVANS.

(Supreme Court of Georgia. July 24, 1901.)

ACTION ON NOTE—DIRECTING VERDICT.

The evidence demanded a verdict for the plaintiff, and the court did not err in so directing.

(Syllabus by the Court.)

Error from superior court, Hancock county; S. Reese, Judge.

Action by Samuel Evans against E. A. Rozier and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Wm. H. Burwell and R. H. Lewis, for plaintiffs in error. Allen & Pottle and Roberts & Hines, for defendant in error.

LEWIS, J. This was a suit by Evans against the administrator of Burnet to obtain a judgment on a promissory note, with a special lien on realty conveyed by deed of the deceased to secure the payment of the note. By amendment, Mrs. F. M. Burnet and W. H. Burwell were made parties defendant. The court directed a verdict for the plaintiff, and the defendants except to the overruling of their motion for a new trial. The only real defense to the suit was a plea of usury, it being claimed that 12 per cent. per annum was included in the principal of the note sued on. It appears that the deceased, E. S. Burnet, borrowed \$1,000 from Smith, under whom the defendant in error holds. This does not seem to have been denied by the defendants on the trial below. The note was for \$1,126 principal, and bore 8 per cent. interest from its maturity. It seems that, in order to secure an unincumbered title to the property conveyed to secure his note, Smith was obliged to take up a mortgage amounting to \$125, and to pay \$1 to the clerk for recording. There was no contradiction to the evidence to the effect that this mortgage existed, and that it was paid off by Smith. The transaction was therefore cleared of all suspicion of usury, a verdict for the plaintiff was demanded by the uncontradicted evidence, and we will not reverse the judge below for so directing. Judgment affirmed. All the justices concurring.

(113 Ga. 1102)

BRUHL v. COLEMAN et al.

(Supreme Court of Georgia. July 23, 1901.)

**EXPRESS PACKAGE—DELIVERY TO WRONG
PERSON—LIABILITIES.**

Where one had given a general order to an express company that all matter addressed to him should be delivered by it to the conductor of a named railroad, and, in a particular instance, a package of goods which had been received by the conductor from the express company under such order was tendered by an agent of the railroad company to the person who had given the order, and he declined to receive it because it was not intended for him and was not his property, and the agent of the railroad company thereupon delivered the goods

to an imposter, who pretended to be the rightful consignee, and loss to the consignor was thus occasioned, both the person giving the order and the railroad company became liable to the consignor for the value of the goods; and this is so though the imposter exhibited to the agent of the railroad company, before the goods were delivered, some evidence tending to show that the goods were really intended for him.

Little, J., dissenting in part.
(Syllabus by the Court.)

Error from superior court, Emanuel county; B. D. Evans, Judge.

Action by F. E. Bruhl against J. O. Coleman and the Midville, Swainsboro & Red Bluff Railroad. Judgment for defendant. Plaintiff brings error. Reversed.

R. C. Jordan, Roland Ellis, and J. Alex Smith, for plaintiff in error. Saffold & Mitchell, for defendants in error.

FISH, J. In March, 1895, F. E. Bruhl, the plaintiff, a merchant in Macon, received an order for jewels to be sent by express, purporting to have been written at Swainsboro, and signed, "J. C. Coleman, per W. H. C." He sent the goods by express in a package addressed to J. C. Coleman, who was a responsible merchant in Swainsboro. The nearest express office to this destination was Midville, from which station ran the Midville, Swainsboro & Red Bluff Railroad to Swainsboro. The express agent at Midville had a standing order from J. O. Coleman to deliver all express matter addressed to him to the conductor of such railroad. This package was so delivered, and was by the conductor carried to Swainsboro, and placed in the custody of the railroad depot agent; the railroad company, as was its usual custom, receiving a charge for carrying the package. It was offered by the depot agent to J. C. Coleman, who, after opening it, refused to take it. About half an hour later, a man, representing himself to be named J. C. Coleman, came to the depot agent, "identified himself by presenting the express receipt," and received the package. He disappeared from Swainsboro soon afterwards, and has since been seen in a prison in Canada, under the name of Hutton. He seems to have been known also by the names of Smith and Rothschild. The plaintiff never received any payment for the jewels, and brought this suit against J. O. Coleman and the railroad company to recover their value. He alleged that the railroad company negligently and fraudulently delivered the goods to a person other than the consignee; that in receiving the package from the express company it acted as J. O. Coleman's agent; and that J. O. Coleman, by giving the express company the order for delivery, opened up the opportunity by which the fraud was perpetrated on the plaintiff. A nonsuit was granted, and the plaintiff excepted.

Under these facts, the granting of a nonsuit was erroneous. In *Express Co. v. Wil-*

liams, 99 Ga. 482, 27 S. E. 743, it was held, in effect, that the order given to the express company by Coleman made the railroad company his agent, to receive for him, at Midville, all express matter addressed to him, and that a delivery of such matter by the express company to the railroad company, made in pursuance of such order, was a good delivery to him. Mr. Justice Atkinson, in delivering the opinion, said that "the goods were delivered in accordance with the direction of the consignor to the consignee, by and through the duly-appointed agent of the latter, who was fully authorized to receive them. Having discharged its [the express company's] full duty towards the consignor, it can make no difference that, subsequent to the time the goods went into the hands of the duly-accredited agent of the consignee, they were by him negligently delivered to a person other than the consignee, who was not entitled to receive them." It was accordingly held that the express company was not liable to the consignor. The rulings made in that case were, upon a review thereof, in *Bruhl v. Express Co.*, 103 Ga. 583, 30 S. E. 269, adhered to and approved. It follows, therefore, in the present case, that when the express company, in pursuance of the order of the defendant Coleman, the real consignee, delivered the package of jewelry to his agent, the railroad company, it was a delivery to him, and he therefore necessarily became responsible for its proper disposition. When the depot agent of the railroad company tendered it to him, and he, upon opening the package, discovered that the jewelry was not his property,—knowing at the time that it had been delivered to the railroad company, as his agent, by the express company, and in pursuance of his order,—it was his duty to have returned it to the express company, or to have had his agent, the railroad company, to do so. His refusal to receive it from his agent, and permitting such agent to retain its possession, made him liable for its wrongful delivery by his agent. The only right the railroad company had to the possession of the jewelry was by virtue of the order from Coleman to the express company. Under this order it had been received by the railroad company from the express company, for the sole purpose of being carried from Midville to Swainsboro for J. C. Coleman, and to be there delivered to him; and when the railroad company was informed by Coleman, its principal, that the order did not cover this particular property, as it was not intended for him, then, the railroad company, having no right to its possession, and being put on notice of such fact, should have returned it to the express company, and a delivery to one for whom it was never intended by the consignor was a conversion by the railroad company, for which it also was liable to the consignor.

The fact that the imposter to whom the goods were delivered by the railroad company "identified himself by presenting the

express receipt" can make no difference. It was the duty of Coleman and his agent, the railroad company, when it was discovered that the goods did not belong to Coleman, to return them to the express company. They were under no duty to deliver them to any one else, and when they undertook to deliver them to one claiming to be the true owner they assumed all the risk involved in such a transaction, and if they made a mistake they must be held liable therefor, whatever may have been the good faith in which they acted. Judgment reversed. All the justices concurring, except LITTLE, J., who dissents as to the liability of J. O. Coleman.

(113 Ga. 1097)

GRIFFIN v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 23, 1901.)
INJURY TO EMPLOYE—NEGLIGENCE—QUESTION FOR JURY.

When, in the trial of an action by an employé of a railway company against it for personal injuries, the plaintiff introduces testimony warranting a finding that the defendant was negligent, and it is, under all of the evidence, an open question whether or not the plaintiff was guilty of negligence contributing to the injuries, the case should be submitted to a jury, and not disposed of by granting a nonsuit. (a) The granting of a nonsuit in the present case was erroneous.

(Syllabus by the Court.)

Error from superior court, Newton county; J. B. Estes, Judge.

Action by W. T. Griffin against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

E. F. Edwards and Guerry & Hall, for plaintiff in error. Lawton & Cunningham, for defendant in error.

PER CURIAM. Judgment reversed.

(113 Ga. 1128)

CONWELL et al. v. ANDREW.

(Supreme Court of Georgia. July 23, 1901.)
APPEAL—REVIEW.

There being sufficient evidence to sustain the verdict, and no material error of law having been committed, the supreme court will not interfere with the discretion of the trial judge in overruling the motion for a new trial, the charge he gave the jury fully and fairly covering the material issues involved.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action between Conwell & Neal and Fannie P. Andrew. From a judgment, Conwell & Neal bring error. Affirmed.

Z. B. Rogers and Rogers & Rogers, for plaintiffs in error. Joa N. Worley, for defendant in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 983)

LOUISVILLE & N. R. CO. v. THOMPSON.
(Supreme Court of Georgia. July 20, 1901.)

TRIAL—INSTRUCTIONS—INJURY TO RAILROAD EMPLOYE—EVIDENCE.

1. It is not error on the part of the trial judge to fail to charge the jury on the law relating to the impeachment of witnesses, in the absence of a proper request so to do.

2. In an action brought by one to recover damages against a railroad company for injuries sustained by the negligent act of one of its servants in the operation of a locomotive, at a time when the injured person was in the employment of the company, it was not error on the part of the trial judge, after instructing the jury that to entitle the plaintiff to recover he must be free from fault or negligence contributing in any material degree to the injury, to fail further to charge that if the plaintiff, by the use of ordinary care, could have avoided the injury, he could not recover. Railroad Co. v. Duggan, 51 Ga. 212 (see opinion in that case, p. 213).

3. The evidence apparently preponderated in favor of the defendant, but the jury had the right to accept that of the plaintiff on the trial of the case, if they believed it to be true, which was sufficient to sustain a verdict in his favor; and, this having been sanctioned by the trial judge, his judgment overruling the motion for a new trial must therefore stand.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by C. T. Thompson against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and Sanders McDaniel, for plaintiff in error. Arnold & Arnold, for defendant in error.

PER CURIAM. Affirmed.

(113 Ga. 786)

ST. PAUL FIRE & MARINE INS. CO. et al. v. BRUNSWICK GROCERY CO.

(Supreme Court of Georgia. July 24, 1901.)
EXCLUSION OF WITNESSES—EVIDENCE—ADMISSIONS IN PLEADINGS—INSURANCE POLICY—ASSIGNMENT.

1. One who filed a claim to a fund in the hands of a garnishee, and who dissolved the garnishment, was a party to the issue formed by the plaintiff's traverse of the garnishee's answer; and upon the trial of such an issue it was erroneous for the court, in acting upon a motion of the plaintiff to separate the garnishee's witnesses, to exclude the claimant, over her objection, from the court room during the trial.

2. Admissions made by a party to a case on trial, in pleadings filed by such party in previous litigation with others, are, if relevant to the issues in the case being tried, admissible in evidence.

3. An assignment of a policy of fire insurance must be in writing.

4. Where a husband conveys property to his wife for the purpose of defrauding his creditors, and she subsequently has the same insured for her own benefit, and a loss covered by the policy occurs, the insurance company, if in any event liable to the husband for such loss, certainly is not if it issued its policy in ignorance of the fraudulent transaction between him and his wife, and hence cannot in such a

case be by garnishment made liable to his creditors.

(Syllabus by the Court.)

Error from city court of Brunswick; J. D. Sparks, Judge.

Action by the Brunswick Grocery Company against L. M. Russell. Judgment for plaintiff. Garnishment served on the St. Paul Fire & Marine Insurance Company. From a judgment for plaintiff the garnishee and L. M. Russell bring error. Reversed.

The Brunswick Grocery Company obtained a judgment against L. M. Russell, and had summons of garnishment served upon the St. Paul Fire & Marine Insurance Company. Subsequently to the service of the summons of garnishment, the wife of the defendant, whose initials were the same as those of her husband, claimed the fund in the hands of the garnishee, and dissolved the garnishment, in accordance with the statute. After such dissolution the insurance company filed its answer, denying any indebtedness to the defendant, which was traversed by the plaintiff. Upon the trial a verdict was rendered in favor of the traverse. The garnishee and the claimant made a motion for a new trial, which being overruled, they excepted. It appeared upon the trial that L. M. Russell, the husband, opened a grocery business at the corner of Monk and Oglethorpe streets in the city of Brunswick in October, 1896. There was introduced in evidence a bill of sale of the stock of groceries, absolute upon its face, made by the husband to the wife, dated October 20, 1896, purporting to have been made in consideration of \$425 paid by her to him, and to be attested by one Currie and by Anderson, a notary public. Anderson testified that the paper was signed or acknowledged before him January 9, 1898; that he had no recollection as to the matter, but that he kept a book of his official entries, and such book showed that he attested the paper upon that date; that he supposed Currie, the other witness, was present; that he would hardly have signed it if Currie had not been present. The husband and wife testified that the bill of sale was not taken to Anderson to be attested by him until after it was executed; that it was executed and delivered to her on the day that it bears date; that it was made to secure her for \$425 of her separate estate, which was loaned by her to him, and used by him in paying for goods purchased by him for use in his business; and that no part of the loan had ever been paid to her. The husband testified that he took the bill of sale to Anderson, the notary public, on January 9, 1898, to have it attested officially, in order that it might be recorded. On March 20, 1897, the St. Paul Fire & Marine Insurance Company, the garnishee, issued a policy of fire insurance for \$500, to continue one year, on the stock of goods at the corner of Monk and Oglethorpe streets, to

"L. M. Russell." The husband and wife testified that this policy was taken out for her, as additional security for the loan she had made him; that she told him to take it out for her; and that he delivered it to her immediately after it was issued. According to the evidence, the first time anything was said to the agent, who issued the policy, in regard to the wife's interest in the insurance, was in January, 1898, about two or three weeks before the fire. This was when the husband went to the agent to have an indorsement made on the policy as to the removal of the goods to a different store from the one mentioned in the policy. The agent testified that the husband then said he wanted the policy put in his wife's name, as he owed her some money; that the goods were hers, as he had turned them over to her to secure a debt he owed her; and that he (the agent), on ascertaining that the initials of the wife were the same as those of the husband, informed him that he did not think it necessary to make any indorsement on the policy other than the one as to the removal of the goods. The date of the indorsement for removal was January 15, 1898. As to this matter, the husband testified: "The L. M. Russell mentioned in that policy of insurance is Mrs. L. M. Russell. It was taken out for her, and it has always been hers. I have never had any interest in it at all, and have never had any interest in the \$500, the proceeds. * * * He [the insurance agent] said he could change the policy from one building to the other. * * * When I carried the policy to [him] to have the transfer put on it, I spoke to him about it being L. M. Russell, when it should be Mrs. L. M. Russell. Then he said: 'That is all right. Your initials are the same.' He said: 'At any rate, I will fix that all right on the books,' and I left the policy with him there a week. When I got back he told me the policy was in Mrs. Russell's name." The grocery business was carried on by the husband in his own name. Plaintiff's judgment was founded on a debt for goods bought by the husband from the plaintiff for use in the business mentioned. Plaintiff had no notice that the wife claimed any interest in the stock of goods or in the policy of insurance until after the goods were destroyed by fire.

Alvan D. Gale and Owens Johnson, for plaintiff in error. Krauss & Franklin, for defendant in error.

FISH, J. (after stating the facts). Notwithstanding the fact that, upon the dissolution of the garnishment by the claimant, the garnishee, upon the filing of its answer, was, by operation of law, discharged from all further liability (Civ. Code, § 4721), and was therefore not interested in the determination of the issue made by the traverse of its answer, it appears from the record that upon the trial of the case the garnishee assumed

the position of the real party at issue with the plaintiff, and the case was tried on that theory. Mrs. Russell, the claimant, who was the real party at issue with the plaintiff, appears to have taken no part as such in the trial, save to object to being sent from the court room upon motion of the plaintiff to separate the garnishee's witnesses. The garnishee made her a party movant in its motion for a new trial, and they both excepted to the overruling of the same. As the court below and the attorneys of the real parties at interest treated the garnishee as a party to the issue made, and as the trial was had upon that understanding, we will consider the case on the same line.

1. One ground of the motion for a new trial was that, upon plaintiff's motion to separate the witnesses for the garnishee, Mrs. Russell, the claimant, was placed under the rule by the court, and, over her objection, was excluded from the court room during the progress of the trial, except while she was testifying as a witness. As she was in fact a party to the issue on trial, it was her right to be present, and it was therefore manifestly erroneous to exclude her from the court room.

2. Complaint was made in the motion for a new trial "because the court, over the objection of the garnishee's counsel, admitted in evidence a certified copy of an answer filed by the St. Paul Fire & Marine Insurance Company in the case of *Mrs. L. M. Russell v. said insurance company* in the city court of Brunswick," in which answer the insurance company set up that the policy of insurance sued on was issued to Mr. L. M. Russell, and not to Mrs. L. M. Russell, and that she had no right of action on it. Movants further complained "because the court, over the objection of garnishee's counsel, admitted in evidence" certified copies of the answers of the St. Paul Fire & Marine Insurance Company to summonses of garnishment served upon it in the cases of *Currie against Mr. L. M. Russell*, and the *Savannah Wooden-Ware Company against Mr. L. M. Russell*, in which answers it was admitted that the insurance company had issued to Mr. L. M. Russell an insurance policy for \$500 on groceries and store fixtures, that they had been destroyed by fire, and that Mr. Russell was making a claim for the loss. It appears that the garnishee alone objected to the introduction of this evidence, and upon the grounds that the answer to the suit was inadmissible because the declaration was not offered with the answer, and that the answers to the garnishments were not admissible because there was no evidence that the suits mentioned therein were ever instituted, and because all this evidence was immaterial. There was no merit in these objections. The evidence was relevant and admissible against the garnishee, as admissions made in its pleadings in other litigation, and it was not necessary to introduce the other pleadings therein. If the claimant,

Mrs. Russell, had objected to this evidence, there would have been no question as to its inadmissibility as against her.

3. Another ground of the motion for a new trial was that the court erred in instructing the jury that, if the policy of insurance was issued to the husband, it could not be assigned to the wife, except in writing. There was no error in this charge. Section 2089 of the Civil Code requires that a contract of fire insurance must be in writing. As an assignment of an insurance policy with the assent of the company is a new contract of insurance between it and the assignee, it must, under the provisions of this section of the Code, be in writing. If the garnishee in this case issued the policy of insurance to L. M. Russell, the husband, and he, desiring to assign it to his wife, whose initials were the same as his own, had the agent of the garnishee to enter into a parol agreement that, as the policy was issued to "L. M. Russell," such name in the policy should thenceforth stand for the wife, and that she should be considered as the assignee of the policy, such agreement would not be a good assignment.

4. Error is assigned in the motion because the court, in its charge to the jury, read paragraphs 1 and 2 of section 2695 of the Civil Code, which provide that fraudulent assignments by debtors shall be void as to creditors, and also read section 3533, Id., in reference to fraudulent misrepresentations avoiding a sale, and section 4025, Id., defining actual and constructive fraud, and instructed the jury that, if they believed from the evidence that the bill of sale from Russell to his wife was collusive and fraudulent, they should find in favor of the traverse. As there was no contention that the husband, in conveying the goods to his wife, practiced any fraud upon her, the charge, as to the provisions of the last two sections referred to, was wholly inappropriate. It was also erroneous to instruct the jury in reference to the law of fraudulent conveyances as set out in the first two paragraphs of section 2695. Even if the bill of sale from the husband to the wife was fraudulent, and therefore void as to his creditors, it was nevertheless valid as between him and her. *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1068; *Tufts v. Du Bignon*, 61 Ga. 322; *McDowell v. McMurria*, 107 Ga. 812, 33 S. E. 709; *Flannery v. Coleman*, 112 Ga. 648, 37 S. E. 878. If the insurance company subsequently to the execution of the bill of sale entered into a contract with the wife whereby it insured the goods for her, and agreed to pay the loss, if any, to her, the husband, after such loss, could not require the company to pay him for the loss, because the company had made no contract with him, and was therefore not indebted to him. This would seem to be so even if the company issued the policy with knowledge of the fraud as to the husband's creditors, characterizing the transaction between him and his wife, and is certainly so if, as was apparently true in the

present instance, the company issued the policy in ignorance of any such fraud. If the husband could not hold the company liable, neither could his creditors, for it is well settled that creditors cannot reach by garnishment assets which their debtor could not recover from the garnishee. *Bates v. Forsyth*, 69 Ga. 365(b); *Tim v. Franklin*, 87 Ga. 95, 13 S. E. 259. The insurance company made no objection to paying the wife, but, on the contrary, contended that the policy was issued to her, and that she was entitled to payment thereon for the loss occasioned by the destruction of the goods by fire.

There are numerous other grounds in the motion for a new trial, but it is unnecessary to deal with them specifically, as the rulings made sufficiently indicate the line upon which the case should be tried when it comes up again in the court below. Judgment reversed. All the justices concurring.

(113 Ga. 1163)

COOLEY v. KING et al.

(Supreme Court of Georgia. July 24, 1901.)

WRIT OF ERROR—DISMISSAL—DECEIT—EVIDENCE.

1. The motion to dismiss the writ of error, being without merit, is overruled.

2. In all cases of deceit, knowledge of the falsehood constitutes an essential element. The evidence in this case fails to show that the representations made by the defendant, if untrue, were made in a fraudulent or reckless manner; hence a verdict for the plaintiff was without evidence to support it, and the trial judge erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by J. S. King & Co. against H. P. Cooley. Judgment for plaintiffs. Defendant brings error. Reversed.

I. C. Van Duzer, for plaintiff in error. Rogers & Rogers and J. N. Worley, for defendants in error.

LITTLE, J. King & Co. brought an action of deceit against Cooley, and the trial resulted in a verdict for the plaintiff. The defendant made a motion for a new trial, which was overruled, and he excepted. The suit was based upon the following letter written by Cooley: "Critic, Ga. Feb. 10, 1898. Mr. J. S. King & Co.: I recommend to you Mr. John M. Craft, Sr. He is a man of means, and is a landholder. He likes your goods, and wants to trade with you because you sell cheaper than he can get it here. He is an honest man, and will pay his debts. He is the father of J. M. Craft, Jr. Please let him have goods. [Signed] H. P. Cooley." On this letter King & Co. sold goods to Craft on a credit to the amount of \$123.91. There appears to be very little, if any, conflict in the evidence. It was shown that the letter was written by the wife of the defendant, at his instance, and that the firm sold the goods on

the faith of the letter; that the bill was not paid; the account was sued to judgment, and an entry of nulla bona made on the execution issued thereon. The plaintiffs introduced as a witness, presumably to prove bad faith on the part of Cooley in writing the letter, Craft, Sr., the person named in the letter. He testified that he lived in South Carolina, and was probably insolvent; that he owned no land in Georgia, and did not own any in this state at the time the letter was written, but that he did own land in South Carolina, which was under a mortgage, and had other means, at the time the letter was written. He further testified that he was insolvent at the time of the trial; that no suit had been brought against him in South Carolina, nor effort made to collect the debt there; and that every statement made in Cooley's letter concerning him was true at the time it was made. The defendant testified that he directed his wife to write the letter; that the statements which it contained he thought to be true at the time they were made, and they were made in good faith; that he did not examine the title which Craft held to his land, but made the statements on the faith of what he saw and knew, without any intention to deceive the plaintiffs or anybody else; that he did not get one cent from the transaction. There was no conflicting or other evidence, relating to the good or bad faith of the defendant, on which the jury could have based their verdict. On the call of the case in this court, a motion was made to dismiss the writ of error on several grounds, all of which are without legal merit. See Civ. Code, § 5527. The motion must, therefore, be overruled.

The motion for a new trial contains a number of grounds. Some of these allege that the trial judge erred in his instructions to the jury in certain specified particulars. An examination of these charges shows that, as principles of law applicable in actions of deceit, the instructions complained of were legal and proper to be given in the trial of such actions.

It is also alleged in the motion that the verdict is without evidence to support it. We think that this ground of the motion is well taken, and that the verdict rendered should have been set aside, and a new trial granted, because it is not sufficiently supported by any evidence which appears in the record. It is a well-settled principle of law, which needs no elaboration at this period in the history of our jurisprudence, that, in order to recover in an action of deceit, it is indispensable that the scienter be both alleged and proven. *Wooten v. Callahan*, 26 Ga. 366, 32 Ga. 382; *Manes v. Kenyon*, 18 Ga. 291; *Brooke v. Cole*, 108 Ga. 251, 33 S. E. 849. Our Civil Code (section 8814) declares that, in all cases of deceit, knowledge of the falsehood constitutes an essential element; and, in defining what is meant by knowledge of the falsehood, the same sec-

tion declares that a fraudulent or reckless representation of facts as true which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood. It is an indispensable requisite to a recovery that the statements proven to have been made were untrue, and in this regard this case was not made out. The only legitimate conclusion which can fairly be drawn from the evidence is that they were true at the time Cooley made them, and the facts that Craft was insolvent at the time of the trial, and that after judgment no property of his could be found on which to levy an execution against him, does not prove that the representations were untrue when made. Nor is there anything in the evidence, even if they were shown to be false, which indicated that they were either fraudulently or recklessly made, nor which even tends to show that they were made with an intention to deceive. Hence the verdict cannot stand, and the trial judge erred in overruling the motion for a new trial. Judgment reversed. All the justices concurring.

(113 Ga. 721)

WILLIAMS v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

HOMICIDE—EVIDENCE.

The evidence against the accused was entirely circumstantial, and, while it raised a suspicion of his guilt, was not sufficient, though given its strongest intentment as against him, to exclude every other reasonable hypothesis. It was therefore error to refuse a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Ike Williams was convicted of murder, and brings error. Reversed.

Talbot Smith, S. J. Boykin, and Oscar Reese, for plaintiff in error. T. A. Atkinson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. The accused, Ike Williams, was convicted of the murder of Otis Word, and sentenced to be hanged. He moved for a new trial on the grounds that the verdict was contrary to law and the evidence. The motion was overruled, and he excepted. The evidence showed that the accused was acquainted with the deceased, who was a boy not quite 14 years of age; that on January 1st they were together in a store; that the boy purchased two silk handkerchiefs and a pocketbook, and had a small amount of money remaining; that these purchases were made in the presence of the accused; that just afterwards they were seen together on the street of the village. The accused was shown to have had some money also. At about 9 o'clock a. m. he and the boy were seen crossing a bridge near the village, the accused tossing some dice in his hand. This was the last time the boy was seen in life. The accused

was next seen at the house of one Robertson, where he arrived at about 11 a. m. The distance from the bridge to Robertson's was about 1½ miles. The accused assisted Robertson in loading some wagons, left the house, and went with Robertson for a short distance, and then walked through the fields to the house of his brother-in-law. Next day the accused was at another house, and had some blood on his sleeve. When asked if he had been to a hog killing, he replied that he had not, but that his nose had been bleeding. A day or two thereafter he left at the house of a friend a pair of trousers which had some spots on them. Then he left his shirt at a woman's house to be washed, but there was no blood on that. Some three weeks after the boy and the accused had been seen together the boy's body was found in a pond at a distance of from a quarter to a half a mile from the bridge they had been seen crossing. A deep gash had been made in the boy's neck apparently with some sharp instrument. He had been dead for some time. When the body was searched, no money was found upon it and none of the things the boy had purchased at the store on January 1st. Two pocketknives and an old cotton handkerchief were found in the pockets of his clothing. Before the finding of the body the accused was arrested, had a committal trial, and was discharged. Between this time and his final arrest a witness asked him if he was not afraid of being arrested again, and the accused replied that he was not, that he had been in other things besides that, and "knew" how to do when he got into things like that. The witness then asked him why he did not leave the community, remarking that, under similar circumstances, he would do so. The accused replied that that would put suspicion on him. After the finding of the body the accused was again arrested, and upon his person were found a small amount of money, some dice, "an old flour sack handkerchief, dirty and bloody," and a pocketbook, the latter not shown to be that purchased by the deceased. These were all of the incriminating facts shown by the evidence, and on them the jury based their verdict of guilt.

We have carefully read all of the evidence brought up in the record as having been produced on the trial in the court below, and have reached the conclusion that this evidence was not sufficient to show the guilt of the accused, under the law. Pen. Code, § 984, declares: "To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused." While the above-recited evidence raises a suspicion against the accused, it is not sufficient to exclude every other reasonable hypothesis save that of the guilt of the accused. The deceased evidently lost his life by the violence of some one, but there were opportunities, after he and the accused had

crossed the bridge, for others to have committed the homicide. There was no proof whatever that the accused and the deceased were ever seen together after they left the bridge. The fact that there was blood upon the sleeve of the accused on the next day might, unexplained, have been sufficient to arouse a suspicion, but it was promptly explained by the accused, and there was no proof to contradict his explanation. Even if the spot upon his trousers was blood, this was not sufficient to connect him with the killing; and besides it was a disputed question among the witnesses as to whether it was a blood stain or not. The reply given by the accused to the suggestion that he leave the community was not sufficient to connect him with the crime, and all of the evidence, taken together, was not sufficient to do this. The rule of law laid down by our Code, as above quoted, is a wise one. It is taken from the common law, and has been the rule in this country and in England for centuries. Under this rule, if the state relies upon circumstantial evidence, that evidence must be so strong as to exclude every other reasonable hypothesis save that of the guilt of the accused. It must be inconsistent with his innocence. This court has ruled on several occasions that, in cases involving life or liberty, this rule must not be relaxed. When a heinous crime has been committed in a community, and the people are greatly shocked thereby, it is natural for them to catch at any little circumstance to throw suspicion upon some person, and to conclude from this or that circumstance that he is the guilty party. The horror of the crime, and their desire, as good citizens, to see the guilty party punished and the law vindicated, frequently lead them to premature judgment, which oftentimes follows them into the jury box, where, as jurymen, they not infrequently find persons guilty on bare suspicion alone. This is demonstrated by the records of cases passed upon by this court, commencing with the earlier volumes of our Reports and continuing almost to the last one. For a reference to some of these cases, see *Bell v. State*, 98 Ga. 557, 19 S. E. 244. Juries should guard themselves in this respect, and not find verdicts on mere suspicion. They should uphold the law as laid down in their own Code, whatever may be their private views or prejudices. From the reports in the public prints, we know that the people of the county in which this trial was held have a grand example of a law-abiding citizen in their midst. Their own sheriff may have been of their opinion as to the guilt of this accused; yet when the trial judge, after refusing a new trial, granted a supersedeas in order that this writ of error might be sued out, the sheriff protected his prisoner at the hazard of his own life against an infuriated mob. He taught the mob that the law would shoot as well as hang. In our opinion, if other sheriffs in the state would exercise the same courage and fidelity to duty as did this

noble man, many lynchings would be prevented, and mobs grow much less frequent. All honor to this sheriff and his little posse! Judgment reversed. All the justices concurring.

(113 Ga. 715)

BARNES v. STATE.

(Supreme Court of Georgia. July 18, 1901.)

CRIMINAL LAW—INSTRUCTIONS—STATEMENT OF ACCUSED.

The evidence fully sustained the verdict which was rendered. There was no error committed by the trial judge in charging the jury which requires a reversal of the judgment. The issues made by the evidence were fairly submitted. The newly-discovered evidence, when considered in connection with the testimony of the witnesses sworn in the case, neither requires nor authorizes the setting aside of the verdict of guilty rendered against the defendant. The charge as a whole was fair and full, and correctly stated the law governing the issues raised by the evidence, and there was no error in refusing to grant a new trial.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Sylmon Barnes was convicted of crime, and brings error. Affirmed.

G. T. & J. F. Caun and R. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LITTLE, J. We have carefully gone over the grounds of the motion for a new trial in this case and the brief of evidence contained in the record, and a majority of the court are of the opinion that the trial judge committed no error in overruling the motion for a new trial. I dissent from the conclusion reached by my Brethren, and am of opinion that the verdict should be set aside, and a new trial granted, solely because of an error committed by the trial judge in his charge to the jury. In the twelfth ground of the motion for a new trial it is averred that the court erred in charging the jury as follows: "The prisoner has the right to make a statement not under oath. It is your province and duty to consider his statement in connection with the sworn testimony in the case, and give it such weight as you think proper. If you find the statement consistent and true, you have the right to believe it in preference to the sworn testimony in the case. You should do so not carelessly and capriciously, but under your oath as jurors, considering the statement in connection with the sworn testimony in the case, and testing it in the light of that testimony, giving it such weight as you think proper. That is a matter exclusively for your determination." I felt it my duty in the case of *Keller v. State*, 102 Ga. 506, 31 S. E. 92, when it was before this court for consideration, to enter my dissent to the correctness of a similar charge; and in the case of *Smalls v. State*, 105 Ga.

670, 81 S. E. 571, when a like charge in relation to the prisoner's statement was before this court for review, I was again impelled to dissent to so much of the ruling of the court as approved that charge. Subsequent reflection has but served to confirm the views which I entertained when those cases were considered, that the charge given was erroneous, and that under it the defendant was deprived of a material legal right to have his statement weighed by the jury, and given such weight as they may consider it to be worth, without testing the correctness of it by the evidence in the case, and to have the jury accept the same, if they believed it to be true, regardless of the question whether it is consistent with the evidence or with itself. In other words, our law allows a defendant charged with a crime to make just such statement as he chooses, and it gives the jury the right to reject the evidence if it is inconsistent with this statement and believe the latter if they choose to do so. The right to make a statement in criminal cases is, in my opinion, an unwise provision of law, and serves no good purpose. Some of the states permit a defendant charged with crime at his option to be sworn as a witness in the case, subject to cross-examination and to the penalties prescribed for perjury; and I can but believe that the interests of justice would be better subserved if, in place of the statement, this privilege was by law granted to defendants in criminal cases. But so long as the present law remains on our statute books it becomes my duty to enforce it as I understand it, and, believing that the charge of the court restricted the jury in their absolute right to accept the statement in preference to the evidence, the giving it was error for which a new trial ought to have been granted. Judgment affirmed. All the justices concurring, except LITTLE, J., dissenting.

(118 Ga. 1088)

SOUTHERN LIVE-STOCK INS. CO. v. BENJAMIN et al.

(Supreme Court of Georgia. July 23, 1901.)
ARBITRATION—AWARD—VALIDITY—OATH OF ARBITRATOR—EFFECT ON SURETY.

1. When by the terms of a submission in writing certain matters are referred to a named person to act as arbitrator between the parties, who is invested with all the powers conferred upon three arbitrators by the Code of the State of Georgia, and who it is stipulated shall hear evidence and make a finding on matters of fact involved in such dispute, just as three arbitrators would, such a submission is one made under the common law, though the powers of the arbitrator be measured by reference to statutory provisions; and it is therefore not a condition precedent to the validity of an award made by the chosen arbitrator that he should be sworn before his award is made.

2. Parties to an agreement to submit their differences to an arbitration (not statutory) may expressly waive that the arbitrator be sworn, even if, under the terms of the submission, the arbitrator is required to be sworn; and an award rendered by an arbitrator under such a submission, where the waiver is made,

is not illegal because of a failure on the part of the arbitrator to be sworn.

3. An award which is legal and binding on the parties to the submission is likewise binding on a surety on a bond given by one of the parties to pay the eventual condemnation money which is the amount of the award. (a) The surety on such a bond, not being a party to the submission, has no legal right to complain of an irregularity in the proceeding had under the submission which the principal could have legally waived, and which he did actually waive, inasmuch as the undertaking of the surety is independent of the submission. Liability on his part can only be avoided by showing that the award as to the principal was for some cause illegal.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Southern Live-Stock Insurance Company against Solomon Benjamin and another. Judgment for defendants, and plaintiff brings error. Reversed.

H. E. W. Palmer and T. L. Bishop, for plaintiff in error. J. L. Hopkins & Sons, for defendants in error.

LITTLE, J. A written agreement for arbitration was entered into between the Southern Live-Stock Insurance Company and Cronhelm, in which, after setting out the fact that matters of difference existed between the parties as to whether Cronhelm, who was formerly secretary and treasurer of the company, was indebted to said company in any amount, the following submission to arbitration was agreed to by the parties: "It is therefore agreed between said corporation and said Cronhelm that the matters in controversy shall be referred to L. Z. Rosser, Esq., who shall act as arbitrator between said parties, and who shall have all the powers conferred upon three arbitrators by sections 4225 to 4247, inclusive, of the Code of Georgia, 1882, and who shall hear evidence and make a finding upon the matters of law and fact involved in said dispute or controversy, just as three arbitrators would, and whose award and finding shall be reported to, and made the judgment of, the superior court of said county [Fulton], just as the award of three arbitrators would be made, with the right reserved to either party to appeal from or except to the award or finding of said arbitrator in the same manner as if the reference had been made to, and the award had been rendered by, three arbitrators under said sections of the Code of 1882." The following stipulation also appears in the submission: "It is further agreed that, as said Cronhelm was not under bond in said office of secretary and treasurer of said corporation, that he shall give bond, with a good and satisfactory security, for the eventual condemnation money in said case, and that the corporation will also give bond for the eventual condemnation money if any found against it." Thereafter, in accordance with the stipulation in the submission, Cronhelm entered into a bond with Benjamin security, in which, after referring to the r

ters in controversy between the parties, and the agreement to refer them to Rosser to make an award, which should be reported to the superior court, and the further agreement that each of the parties should give bond for the eventual condemnation money which might be found against either party to the arbitration, this obligatory instrument concluded as follows: "This instrument witnesseth that H. Cronhelm, as principal, and Sol Benjamin, as surety, hereby acknowledge themselves held and firmly bound unto the Southern Live-Stock Insurance Company to well and truly pay to said Southern Live-Stock Insurance Company the eventual condemnation money that may be found against him, said Cronhelm, whatever that may be; and for the compliance with this obligation said principal and surety bind themselves, their heirs and administrators." Rosser, as arbitrator, afterwards made an award, reciting that after hearing evidence touching the matter in dispute, and argument of counsel thereon, it was his award that Cronhelm was indebted to the company in stated sums, and that the company have judgment against him for these sums. The award was made in March, 1890, and at the September term of the superior court an order was regularly taken making the award the judgment of the court; and in accordance therewith judgment was rendered against the defendant for the sums awarded, an execution was issued, and a return of nulla bona made thereon by the sheriff. The insurance company then brought suit against Cronhelm as principal, and Benjamin as surety, for the amount of the judgment, setting out in its petition the facts above stated. No defense was made by Cronhelm, but Benjamin interposed a defense to the action by which he denied the alleged indebtedness, and set up that there was no valid award, and that the judgment of the superior court was not legal and did not bind him. He alleged, also, that the bond and submission referred to in the petition contemplated a legal arbitration and award; that the arbitrator selected determined the matter without having taken the oath required by law, which was a prerequisite to his jurisdiction as arbitrator, without which he was not legally qualified to act; the defendant did not know of his failure to take the oath, never consented that the arbitrator should hear the controversy or make the award without taking the oath, and has never acquiesced in or ratified the proceedings before him, or his award; was not a party to the record, nor to whatever proceeding may have been had in the superior court, did not know of them, and denied that they have any validity; and, further, that the arbitrator declined to act, and so entered it of record, but afterwards assumed to act; that he never afterwards consented that Rosser should sit as arbitrator, was never present at any of the hearings, knew nothing of what was going on, and has never ratified or acquiesced in the acts of Mr. Rosser in this particular. The

plea was demurred to on several grounds, which, in the view we take of the case, need not be specifically referred to. The demurrer was overruled, and to this the plaintiff excepted. At the trial the plaintiff introduced in evidence the submission, the bond, the award, the judgment of the superior court, and the execution. There was on the written submission an entry in the following terms: "I decline to further consider this case. This Nov. 16/98. L. Z. Rosser. The defendants introduced evidence to the effect that Benjamin was not represented by counsel at any of the hearings before the arbitrator, made no consent or waiver before him, and did not know the case was being tried until after the award had been made. Various witnesses testified that Rosser did not take an oath as arbitrator, but that the oath was waived by the attorneys of the plaintiff and Cronhelm. The assignments of error are that the trial judge erred in overruling the demurrer filed to the plea, that he erred in deciding that the arbitrator had to be sworn, and that he erred in directing a verdict in favor of Benjamin, the security, on his plea. These, with other assignments not necessary now to be specifically set out, will be considered in the discussion of the three questions which, in our opinion, control the case. These are: First, whether under the submission the law required the arbitrator to be sworn; second, if it did, whether this requirement could be, and was, waived by the parties; and, third, if required and waived, what effect such waiver would have on the rights of the defendant Benjamin.

1. We do not understand that it is seriously questioned by the parties that the submission and award rendered thereon were a common-law submission and award. In the supplemental brief filed for the defendant in error it is stated that it has never been claimed at any time, in any court, in any phase of the litigation, that the award now being considered was a statutory award. Certainly a consideration of the provisions of our Civil Code on the subject of arbitrament and award, contained in sections 4474 to 4509, inclusive, will characterize the submission in this case, and the award rendered thereunder, as an arbitration and award under the common law. Sections 4486 to 4509, inclusive, provide for such submissions to a named number of arbitrators possessed of certain designated powers, and impose certain duties and conditions not known to the common law; and a proceeding under these latter sections is expressly denominated a "statutory arbitration and award," as distinguished from a submission and award at common law, as set forth in the Civil Code (sections 4474 to 4485, inclusive). One of the provisions in relation to statutory awards is that the submission shall be in writing; another, that the arbitrators shall be three in number, chosen in a particular manner; and another, that these arbitrators shall take a particular oath; while

at common law the submission may be oral; any number of persons may be selected as arbitrators, who may hear and determine the matters submitted without any requirement that they take any oath. Another difference is that under a statutory submission the award shall be made the judgment of the superior court, under certain circumstances and conditions, while there is no provision of our law which prescribes that the award of arbitrators at common law may be made the judgment of the court. Indeed, while under both statutory and common-law submissions the rights of the parties are fixed by the award of the arbitrators, under the former the enforcement of these rights may be by execution issued upon the judgment of the superior court making the award of the arbitrators the judgment of the court, while under the latter the enforcement of those rights is to be had by suit on the award, which by section 4474 of the Civil Code, under a common-law submission, is made binding upon the parties. With these preliminary observations, we come to a consideration of the questions stated above in their order. It being determined that the submission agreed on in the case under consideration was a common-law submission, and it being conceded that the rules of the common law governing arbitrament and award do not require that the arbitrators shall be sworn, it is necessary to ascertain whether the submission makes such a requirement; for it cannot be disputed that, although in a submission under the common law the arbitrators are not required to take an oath, yet, if by the terms of the submission it is so directed or contemplated, then the taking of an oath is essential to the validity of an award. It may be well to remark here that the only interest which the surety, Benjamin, can have in the question, is to ascertain whether the award rendered was a legal one. He was not a party to the submission, nor to the award. His contract with the plaintiff was entirely independent and distinct from that of the submission. He undertook by an obligation, not statutory, but voluntary, to secure the payment of an award which might be rendered by the chosen arbitrator against his principal. When, therefore, in this suit, it being an action on the bond, proof was made of the submission and the award, a *prima facie* case in favor of the obligee was made against the principal and surety on the bond. This could only be rebutted by a successful attack on the award by the surety, and proof that the award was illegal in some manner or that it was the result of accident or fraud. In binding himself to pay the amount of the award, the surety, of course, undertook only to be liable for a legal award. It is claimed that by the terms of the submission and the bond it was contemplated and provided that the arbitrator should take the statutory oath. As we have said, the submission being at common law, it is not generally a requirement

that the arbitrator should be sworn. We must therefore determine whether or not, by the terms of the submission, the parties required or contemplated that the arbitrator should act only under the obligation of an oath. It will be noticed that the parties agreed that the matters in controversy should be referred to Mr. Rosser, "who shall act as arbitrator between the said parties, and who shall have all the powers conferred upon three arbitrators by sections 4225 to 4247, inclusive, of the Code of Georgia of 1882, and who shall hear evidence and make a finding upon the matters of law and fact involved in said dispute or controversy just as three arbitrators would." Evidently the parties sought by the use of this language to invest their chosen arbitrator with such powers as were by the Code conferred on arbitrators under a statutory submission. But it is not indicated that they were in any manner seeking to impose qualifications or conditions on the arbitrator. They simply sought expressly to define the powers with which by agreement they invested him, and these were not only those possessed by an arbitrator at common law, but also those powers which the statute conferred upon arbitrators chosen under its provisions. By reference to the sections of the Code named, it will be found that they embrace all the provisions of law in reference to a statutory award. Hence a correct construction of the submission in this regard is that the parties undertook simply to prescribe the powers with which the arbitrator selected by them should be invested. It was easy enough, if the parties had desired that the arbitrator be sworn, to insert such a requirement in the submission. But language which has for its object simply the investiture of powers cannot be construed so as to impose a qualification not required by the law under which the submission was made. The submission being silent as to the imposition of such a qualification, and the law under which the same was made not requiring the arbitrator to be sworn, it must be ruled that taking an oath by the arbitrator was not a condition precedent to his proceeding to hear evidence and make an award. Nor can any language which appears in the bond imply such a requirement. That instrument simply refers to the submission, and the award to be made by the arbitrator. It is our opinion, therefore, that inasmuch as the common law, under which the submission was made, does not require an arbitrator to be sworn, and the submission not expressly nor by necessary implication having done so, that it was not necessary, in order that an award rendered by him should be legal, that he should first have been sworn.

2 and 3. But, assuming for the sake of the argument that it was necessary to the validity of the award made by him that the arbitrator should have been first sworn, the evidence shows that taking the oath by Rosser as arbitrator was expressly waived by the

parties at the time he commenced to hear evidence under the submission. It is insisted, however, that no such waiver could legally have been made, and that, if it could, it would not be binding on Benjamin, the surety. We are aware that there are a number of decisions of respectable courts which rule that a waiver of this character is ineffectual where the statute requires the arbitrators to be sworn, and it must be conceded that our statute does so, in the case of a statutory award. While this submission is, in our opinion, one under the common law, yet if it had by its terms required, as a condition precedent to the making of an award, that the arbitrator should be sworn, we are disposed to think, nothing else appearing, that an award made without taking the oath would have been illegal. Certainly the purpose of the oath was only to better protect the interests of the parties, by insuring a faithful performance of the duties which the arbitrator had agreed to perform at the request of the parties under the sanction of an oath. This being true, and the parties themselves being the better judges of their own interests, and it being in their power alone to select an arbitrator, and to agree on the qualifications which he should possess, we know of no reason why, if it had been their purpose and intention by the terms of the submission that the arbitrator selected by them should have been sworn, that they could not, by agreement subsequently made, dispense with the oath. It may be otherwise as to a statutory submission, but certainly, when the law imposes no such requirement on an arbitrator, even if the parties should stipulate that he should be sworn, why might they not subsequently stipulate that he should not? The public was not concerned in the matter, nor were the rights of any third person to be passed on. The parties undertook originally to create a court for themselves outside of the statutory provisions. Their consent alone gave to it jurisdiction, their agreement alone vested it with powers, and the matter as to when they agreed, just so they did agree, must be immaterial; and if, after prescribing that the arbitrator should be sworn, they subsequently expressly agreed to waive this requirement, it was, after all, but a change which they made in the submission. As to the power of parties to waive their rights, even those with which they have been invested by law, our Political Code (section 10) declares that "Laws made for the preservation of public order or good morals can not be done away with or abrogated by any agreement, but a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest." Mr. Morse, in his work on Arbitration and Award, on page 102, on authority, upholds this right of waiver even in the selection of persons as arbitrators who have preconceived opinions on the subject-matter of the submission, and on page 264 cites a number of cases support-

ing the text,—that strict compliance with the terms of the submission may be waived by the parties; and Judge Bleckley, in rendering the opinion of this court in the case of *Wilkins v. Van Winkle*, 78 Ga. 557, 3 S. E. 761, clearly intimates that an express waiver of the oath on the part of the arbitrators may be made by the parties thereto, even in a statutory submission. See page 567, 78 Ga., and page 762, 3 S. E. For authorities so ruling outside of this state, see *Railroad Co. v. Alfred*, 3 Ill. App. 511; *Older v. Quinn*, 89 Iowa, 445, 56 N. W. 660; *Russell v. Seery*, 52 Kan. 736, 35 Pac. 812; *Tucker v. Allen*, 47 Mo. 488; *Cochran v. Bartle*, 91 Mo. 637, 3 S. W. 864; *Quarry Co. v. McCully*, 7 Mo. App. 580; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522; *Rice v. Hassenpflug*, 45 Ohio, 377, 13 N. E. 655; *Anderson v. City of Ft. Worth*, 83 Tex. 107, 18 S. W. 483; *Hill v. Taylor*, 15 Wis. 190; *Woodrow v. O'Conner*, 28 Vt. 776. In any event, under the general provisions of our law cited above, we have no hesitancy in ruling that it was within the power of the parties to the submission in this case to have waived the oath on the part of the arbitrator, even if such had been required by the term of the submission. The effect of such waiver, if no other objection could have been interposed to the award, was to make it legal and binding on the parties. But it is contended that such waiver could not be made so as to bind Benjamin, the surety on the bond. Why not? Benjamin had nothing to do with the submission. He was not a party to it. He had no differences to be settled by the arbitration. His contract with the company was an independent one, which did not stipulate for a particular kind of a submission, nor that the arbitrator should be sworn. His obligation bound him to pay the award rendered against his principal, Cronhelm, under the submission, made by the insurance company and Cronhelm, and his only right to attack the award rested on its illegality. As we have seen, it was not a statutory award. Hence its legality or illegality, in the absence of fraud, rested on the consent of the parties to the submission, and the fact that the award which was made was in accordance with its terms, agreed to in the submission or subsequently; and, if the award was legal as to Cronhelm, it must have been legal as to Benjamin, whose right to avoid his bond existed only in the event that the award was illegal. That illegality must necessarily have been such that Cronhelm could have avoided it, because it was not contemplated in his (Benjamin's) contract that the award should be made in any particular manner. On the contrary, the submission and award were to be by the agreement of the parties at variance,—the company and Cronhelm. If it had been stipulated by Benjamin that he would be responsible for an award made by Rosser only in a particular way, or under certain conditions, then he could have required that it be so made. In the absence of any stipulations

relating thereto, his inquiry is confined to the questions: Did Rosser render an award? If so, did it legally bind Cronhelm? If it did, then it is nominated in the bond that, if Cronhelm did not pay it, he would. We do not, under the line of reasoning which we think leads to a correct conclusion in this case, consider that the fact that the arbitrator at one time declined to consider the case affected the validity of the award afterwards made by him. Certainly it did not as to Cronhelm; for when the arbitrator changed his mind, and afterwards entered upon a hearing of the case, Cronhelm appeared and participated, so that, if there ever had been any reason why this declination (which is unexplained), would give Cronhelm a right to object to proceeding further under the submission, he declined to exercise that right, and went into the hearing just as if it had never been made. Therefore, as to Cronhelm, the award was legal and binding as far as this point is concerned. Being binding on Cronhelm, Benjamin's obligation was unaffected, because he undertook to see that Cronhelm would pay the award which should be rendered against him, and an award which legally fixed a liability on Cronhelm, measured the liability of his surety, who vouched for the payment of the eventual condemnation money by Cronhelm.

On the introduction of the submission and the award made by Mr. Rosser, the plaintiff in the suit on the bond given by Cronhelm and Benjamin was *prima facie* entitled to a verdict for the amount of the award. For the reasons stated above, it is our opinion that the defendant Benjamin in no way rebutted this *prima facie* right to recover. We are further of opinion that, while the trial judge did not err in directing a verdict in favor of the plaintiff against Cronhelm, he did commit error in directing a verdict, under the evidence, in favor of Benjamin. Judgment reversed. All the justices concurring.

(113 Ga. 1187)

BURCH v. PEDIGO et al.

(Supreme Court of Georgia. July 24, 1901.)

PURCHASE-MONEY NOTE—RESERVATION OF TITLE—TRANSFER—TROVER.

When a promissory note for the purchase money of personal property, which contains a reservation of title to the property in the payee until the note is paid, is, by the payee, transferred for value to a third person without recourse, the title reserved for securing the payment of the debt is divested; and if, at the time of such transfer, the title so held was not likewise transferred to the purchaser of the note as a security in his hands, it vests in the maker, and the transferee becomes an ordinary creditor of such maker. (a) An action of trover, brought by the transferee in such a case to recover possession of the property for which the note transferred was originally given, must fail because of a want of title in the transferee.

(Syllabus by the Court.)

Error from superior court, Lincoln county; S. Reese, Judge.

Action by Pedigo & Lyons for the use of B. H. Willis, against J. J. Burch. Judgment for plaintiffs, and defendant brings error. Reversed.

John I. West, for plaintiff in error. Colley & Sims, for defendants in error.

LITTLE, J. An action of bail trover was instituted against Burch in the superior court of Lincoln county to recover possession of two mules. The plaintiffs were Pedigo & Lyons, suing for the use of B. H. Willis, and it appears from an admission of the parties that Burch gave to Pedigo & Lyons a promissory note for the purchase price of the mules, which note contained a reservation of title in Pedigo & Lyons as security for the purchase money of the mules; said reservation being to Pedigo & Lyons or order, until said note was paid. Defendant, by his plea, set up that Willis was not a bona fide holder of the note for value before it became due, but that he held the same for the payee, and took the same after due with full notice, and that the note was given as a balance due on two mules, but that the payees had previously sold to the defendant a horse which failed to come up to a warranty which was made as to her soundness; hence there was a failure of consideration in the purchase of said horse of \$165; that the payees had agreed to refund him that sum, but had never done so, and he pleaded it as a set-off to this action. The note which was given for the mules was dated February 17, 1897, and due March 15, 1897. The transfer to Willis was written on the note in the following language: "For value received, we hereby transfer to B. H. Willis or order all our right and title to the within note, without any recourse on us. This, the 14th day of March, 1899;" and signed, "Pedigo & Lyons." It was admitted by the defendant that he was in possession of the property sued for. With this admission the plaintiff, having introduced the note referred to, closed. The defendant testified, in substance and in detail, to the facts set up in his plea, which evidence was, on motion of plaintiff's counsel, ruled out as irrelevant. There was no further evidence in the case, except that Willis, who is described as the usee, testified that the note did not belong to Pedigo & Lyons, the payees, but was his property, and was transferred to him for value received, without any understanding in relation thereto. He also testified that he knew nothing of any differences between the parties to the note in having a settlement, and that it was not put in his name for the purpose of bringing the suit, and that he knew nothing of the defendant having a claim against the payees until after he had bought the note, and that the mules were worth \$150. It was also shown that the note was duly recorded. Under the evidence the presiding judge directed a verdict for the plaintiff, as follows: "We, the jury, find for the plaintiff the sum of one hundred and sixty-one dollar, same being the face of the note, and inter-

thereon from maturity, and ——— dollars, cost of suit." A judgment was rendered for the sums named against the defendant and the surety on his bail bond. The defendant made a motion for a new trial on the ground that the verdict was contrary to law and to the evidence. That the trial judge erred in directing a verdict for the plaintiff, and in excluding from the jury the evidence of the defendant, and in refusing to permit defendant's attorney to prove by the usee in the action what amount he paid for the note which was in evidence. The motion was overruled, and the defendant excepted.

It must be borne in mind that the action instituted was that of trover. We think that it is somewhat inconsistent, under the rules governing actions of this character, that one man should sue for the use of another, inasmuch as no one can recover as plaintiff unless he shows three things,—right of possession of the property in himself, wrongful conversion by the defendant, and the value. This court ruled in the case of *Mitchell v. Railway*, 111 Ga. 760, 36 S. E. 971, that, "while * * * 'mere possession of a chattel * * * will give a right of action for any interference therewith,' such possession must be in the plaintiff's own right, and not as agent of another"; and in the same case that "a petition brought in the name of a person who had not such possession, to recover personal property taken from him, cannot be so amended as to proceed in the name of the plaintiff for the use of the real owner." In delivering the opinion in that case, in which very many of the principles applicable to the action of trover are contained, Mr. Justice Cobb said: "When, therefore, it appears that the legal right of action is not in the plaintiff, he has no right of action at all, either in his own name or in that of another." However, as no exception was taken to the form of the action by demurrer or otherwise, we will interpose none. Furthermore, it may be remarked, before passing to the main question which we think controls the case, that defendant pleaded a set off. That such a plea cannot be interposed in an action of trover, see *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100. Again, the trial judge directed a verdict for the plaintiff for the amount of the note given for the balance of the purchase money of the mules. This, we think, was clearly error. Indeed, we do not understand how the note had anything to do with the issues arising in this case, except, perhaps, for the purpose of showing that title to the mules was reserved to the seller. An action of trover is one to recover possession of an article which has been wrongfully taken from the possession of the plaintiff. The verdict ordinarily to be rendered thereon is either for the plaintiff or for the defendant. If a verdict is rendered for the plaintiff, its legal effect is that he shall have the property sued for; but by section 5335 of the Civil Code it is declared that the plaintiff shall have an option of saying

whether he will demand a verdict for damages or for the property and its hire, and it is the duty of the court to instruct the jury to render a verdict as he should thus elect (if he should be entitled to recover). While a money verdict may be found for the plaintiff in an action of trover, it but represents the damages he has sustained, and by another rule the amount of such damages may be the highest proven value of the property. In this case it does not appear that any election was made by the plaintiff at the trial. Considering the verdict alone, it was error on the part of the trial judge to instruct the jury to find a given sum of money in favor of the plaintiff.

But the controlling issue which compels a reversal in this case is that neither the plaintiff in the case nor his usee showed title to the property to recover which the suit was instituted to be in either, and this is easily determined from certain undisputed facts which appear in the record. These were: *Pedigo & Lyons* were the payees of the note given for the balance of the purchase money of the mules. In that note title to the mules was reserved to *Pedigo & Lyons* or order, until said note was paid. *Pedigo & Lyons*, for value received, transferred all their right and title to the note, without recourse on them, to *Willis* or order. The effect of the reservation was, of course, to keep the title in *Pedigo & Lyons* until the purchase money was paid. But it must be noted that there is no evidence that they gave to *Willis* any title to the property. The transfer written on the back cannot have this effect, for the matter transferred is the note; and while the transferee of a note reserving title may, if the transfer is unconditional, carry to the transferee title to the property, which by the terms of the note is reserved to the payee, yet, when that transfer is made by the payee, subject to the condition that the transferee shall have no recourse on the transferor in the event of nonpayment, then an entirely different rule prevails. *Pedigo & Lyons*, by virtue of this contract, which it was agreed was in the form of a negotiable instrument, held title to the mules until the note was paid. Such a title is sufficient to sustain an action of trover. It was in their power to transfer alone the debt represented by the note to another. It was also in their power to transfer, not only the debt, but also the title to secure the debt, which they had reserved. But when *Pedigo & Lyons* sold the note, and received value for it, their debt was paid; and if they sold or transferred the note, without at the time conveying to the purchaser the title to the property which they held as security for its payment, then the purchaser took the debt, the debt of *Pedigo & Lyons* was paid, and the title which they held as security for that debt, not having been conveyed, vested at once in the maker of the note, because of the fact that *Pedigo & Lyons* could have no further interest in the prop-

erty. Their debt, to secure the payment of which only was title in them reserved, having been paid, title was divested. It did not vest in the purchaser of the note because it was not transferred with the note. It therefore vested at once in the maker of the note. In the case of *Farrar v. Brackett*, 86 Ga. 403, 12 S. E. 686, the facts were that Farrar sued Brackett in bail trover for a steam engine and two sawmills. It also appeared that Farrar had purchased from Hill the notes given for one of the mills, but did not receive from Hill a conveyance of the mill, title to which had been reserved as security for the purchase money, but that Hill transferred simply the purchase-money notes to Farrar, without recourse. This court denied Farrar's right to recover in trover, and said: "The transfer without recourse of notes given for part of the price of a mill did not place the title to the mill in the person taking the notes, because when the person transferring them received the money thereon he was paid, and the title to the mill passed into the maker of the notes, of whom the purchaser of them was but an ordinary creditor." This ruling clearly denies both to Pedigo & Lyons and to Willis the right of recovery in an action of trover, under the evidence in this case; for the debt to Pedigo & Lyons was paid by the sale of the note to Willis, and the title to the mules, which the former had retained to secure their debt, was extinguished by the payment of their debt. Hence, no further liability on the note could attach to Pedigo & Lyons, because they transferred the note without recourse, and Willis could not recover because he had no title to the mules, inasmuch as the title which Pedigo & Lyons held had never been transferred to him. Therefore it must be ruled that when Pedigo & Lyons transferred the purchase money note which contained the reservation of title, without recourse, to Willis, not only was the title of Pedigo & Lyons extinguished, but, the debt having been paid, this title vested in the maker of the note. The verdict was therefore contrary to law, and the judgment overruling the motion for new trial is reversed. All the justices concurring.

(113 Ga. 987)

HUTCHERSON v. DURDEN.

(Supreme Court of Georgia. July 20, 1901.)

LIMITATIONS—SEDUCTION.

An action by a father to recover damages for the seduction of his daughter is barred by the statute of limitations, unless brought within two years from the time the right of action accrued.

(Syllabus by the Court.)

Error from superior court, Emanuel county; W. W. Larsen, Judge pro hac.

Action by Leonard Hutcherson against E. L. Durden. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. M. Warren, for plaintiff in error.
Alfred Herrington, for defendant in error.

FISH, J. This was a suit brought by a father to recover damages for the seduction of his daughter, who, according to the petition, was unmarried and living with him at the time the cause of action arose. At the trial, "after the plaintiff had closed his evidence, the defendant swore a number of witnesses, and then moved orally to dismiss plaintiff's case upon the ground that the declaration showed upon its face that the case was barred by the statute of limitations. The plaintiff then introduced in evidence the suit as originally brought between the parties for the same subject-matter, filed October 1, 1895, * * * and the order withdrawing the same at October adjourned term, 1896, prior to the filing of the present suit [on the] 22d day of January, 1897. Defendant then renewed his motion to dismiss plaintiff's suit." The court sustained the motion, and the plaintiff excepted.

It is contended here by counsel for the plaintiff in error that the motion to dismiss, being predicated upon a ground that would not have been good in arrest of judgment, should have been made at the appearance term, and could not have been lawfully entertained by the court during the trial of the case. So far as appears from the bill of exceptions or the record, this is the first time that this point has been raised. It does not appear that any objection was made to the court's entertaining and passing upon the motion to dismiss. This court can only determine questions which were raised in the court below. As no objection appears to have been made to the motion to dismiss, the plaintiff will be presumed to have waived any valid objection, if such there were, which might have been made thereto. The only ruling which appears to have been made by the trial court was upon the merits of the motion. Consequently the only question properly before this court for decision is whether or not the plaintiff's cause of action was barred by the statute of limitations when the original suit was brought. The defendant in error contends that, under section 3900 of the Civil Code, it was then barred, as more than two years had elapsed after the right of action accrued. The section cited reads as follows: "Actions for injuries done to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year." Is a suit brought by a father for the seduction of his daughter, within the meaning of this section of the Civil Code, a suit "for injuries done to the person"? A similar question arose in *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250, and the decision therein rendered is decidedly in point. There the statute under consideration amended section 2967 of the Code of 1882, which provided that no action for a tort

should "abate by the death of either party where the wrong-doer received any benefit from the wrong complained of," by providing that no action "for homicide, injury to the person or injury to property shall abate by death," and the question which invoked a construction of the amending statute was whether an action for libel was abated by the death of the plaintiff. The decision was that the action did not abate in consequence of the death of the plaintiff, it being held that the words "injury to the person" were not restricted to mere bodily or physical injuries, but extended "to all injuries to the person." Mr. Justice Lumpkin, who delivered the opinion, said: "Some light is thrown upon the question at issue by reference to the position which the amended section occupies in the Code. Title 8 of part 2 of the Code treats of 'torts, or injuries to persons or property.' Chapter 2 of that article treats of 'injuries to the person.' This chapter is divided into three articles. The first treats of 'physical injuries,' the second of 'injuries to reputation,' and the third of 'other injuries to the person.' According to this classification, it will be seen that injuries to reputation are included in the chapter dealing generally with injuries to the person. The article relating to physical injuries treats only of injuries to the body; that relating to the reputation includes and defines libel and slander; and the remaining article of that chapter deals with still other personal injuries, such as false imprisonment, malicious arrest, and injuries to health. All of the foregoing injuries, as has been shown, are classed under the general subdivision covering injuries to the person. It is more than probable that the legislature, in making this new law a part of the Code, intended that it should harmonize with its surroundings; and in amending this section it was doubtless their deliberate purpose that the words used in the amending act should be construed and understood with reference to the existing arrangement and classification of the law of torts, in which this new law found its place." Now, if we look further into the classification of the law of torts than it was necessary for the learned justice to do in the case which the court then had under consideration, we find that section 4 of article 3, the title of which article is, "Other Torts to the Person," treats of "Indirect injuries to the person," and that under this designation are grouped the section of the Code giving a husband "a right of action against another for abducting or harboring his wife"; the section giving a husband a right of action "for adultery, or criminal conversation with" his wife; the section giving a father, "or to the mother, if the father be dead, or absent permanently, or refuses to sue, a right of action for the seduction of a daughter, unmarried and living with her parent"; and the sections giving "a father, or if the father be dead a mother," a right of action "against any person who sells or

furnishes spirituous liquors to his or her son, under age, for his own use, and without his or her permission," and "a like right of action against any person who shall play and bet at any games of chance with a minor son for money or other thing of value." In our present Civil Code these same sections are found under the subtitle "Indirect Injuries to the Person," and all that appears above in reference to the classification of the law of torts in the Code of 1882 applies to the Civil Code. It is, we think, therefore, evident that the meaning of the expression "injuries to the person," as understood by the codifiers, and within the scheme of classification adopted in the Code, was not confined to mere physical or bodily injuries, but embraced all actionable injuries to the individual himself, as distinguished from injuries to his property, and equally evident that in the opinion of the codifiers the seduction of an unmarried daughter, living with her parent, was, relatively to that parent, an indirect injury to the person. In reference to actions for torts our statute of limitations provides: "All actions for trespass upon, or damages to realty shall be brought within four years after the right of action accrues." "Actions for injuries to personalty shall be brought within four years after the right of action accrues." "Actions for injuries done to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year." Civ. Code, §§ 3898-3900. Here we find that torts to property are divided into torts to realty and torts to personalty, though the time within which suit may be brought is four years in each instance. We find only one section, and, indeed, only one sentence, devoted to the limitation of actions for torts which do not invade property rights. That section fixes the limitation for actions for "injuries done to the person," and provides that suits for such injuries must be brought within two years after the right of action accrues, except in the case of injuries to the reputation, where the limitation on the right to sue is one year. So, if the expression or classification "injuries done to the person" includes only injuries inflicted upon the physical man or bodily organization, then, except as to injuries to the reputation, there seems to be no limitation provided in the Code for suits based upon any of the other torts which do not infringe upon or affect property rights, but each of which, under express provisions of the Code, affords a cause of action to the injured party. It is not reasonable to suppose that our lawmakers intended that there should be no limitation for suits for adultery or criminal conversation with a wife, for actions for abducting or harboring a wife, for suits for selling liquors to a minor son without the consent of his parent, for actions for gambling with a minor son, and for actions for the seduction of a daughter. Unless the actions for injuries which may be

brought in these respective cases come within the meaning of the expression or classification "injuries done to the person," we have been unable to find any limitation in the Code upon the right to sue for such injuries, or any one of them. Surely the failure to provide a special limitation for each of these actions, or to specifically include them all under one general statutory limitation, was not the result of oversight on the part of our legislators and codifiers. Is it not more reasonable to believe that this failure was due to the fact that the makers of our laws believed that actions in these cases were limited by the section which deals with actions "for injuries done to the person," and that they intended that they should be? We think, however, that section 3900 of the Civil Code itself shows that the expression "injuries done to the person," as therein used, includes not only injuries to the physical body, but every other injury, for which an action may be brought, done to the individual, and not to his property. This is shown by the fact that "injuries to the reputation" are specially excepted from the operation of the limitation provided for actions "for injuries done to the person." Why this exception, if "injuries done to the person" include only injuries to the bodily organization? Section 5 of the statute of limitations of March 6, 1868, provided, "All suits for injuries done to the person, shall be brought within two years after the right of action accrues, and not after." Section 6 of that act provided, "All suits for injuries done to the character or reputation shall be brought within one year from the time the right of action accrues and not after." It is significant that, when the laws of this state were first codified, these two separate sections of the statute of limitations were merged into not only one section, but into one sentence, and so merged that the conclusion is irresistible that in the opinion of the codifiers, and of the general assembly which adopted that Code as a body of laws for the state, the expression or classification "injuries done to the person," as used in the statute of limitations, included personal injuries other than injuries to the body, and that it was their intention that it should. Section 3900 of the Civil Code is in the exact language of section 2992 of our first Code, and the same language has been employed in each of the intervening Codes. So, the codifiers of the original Code and the codifiers of each subsequent Code have included "injuries to the reputation" under the general classification "injuries done to the person," and then, by express exception, have provided that the limitation of two years applied generally to all actions "for injuries done to the person" shall not apply to suits for "injuries to the reputation," but that actions for such injuries shall be brought within one year after the right of action accrues. Both the classification and the exception have twice received the sanction and approval of the general assembly, as the Code

of 1863 and the Code of 1895 were each adopted by legislative enactment. An injury to the reputation is an injury of an intangible character, of which there is no evidence in or on the bodily organization, and which can only affect the physical man indirectly, through the subtle influence of the mind over the bodily processes and the physical health. That such an injury as this was classed by our lawmakers among "injuries done to the person," we think, clearly shows that they intended by "injuries done to the person" all injuries for which an action would lie, done to the individual, as distinguished from injuries done to his property.

Our statute giving a right of action for the seduction of an unmarried daughter living with her parent sweeps away the flimsy fiction of the common law that a suit by a father for the seduction of his daughter can only be based on the relation of master and servant between the two, and must therefore be for the loss of the daughter's services, although when the plaintiff has thus brought his suit he can recover for the real wrong and injury inflicted upon him. In this state "the seduction is the gist of the action," and "no loss of service need be alleged or proved." Civ. Code, § 3870. Section 3899 of the Civil Code, which provides the limitation within which suits for injuries to personalty may be brought, cannot, therefore, apply to such an action; for "the gist of the action" is what must be looked to in determining whether it is an action for injuries to personalty, or one "for injuries done to the person." The real gravamen of the action is the shame, mortification, humiliation, and sense of family dishonor and disgrace from which the plaintiff suffers. "The gist of the action" being not any property right of the parent in the services of his daughter, but the seduction itself, for which, "in well-defined cases, the damages should be exemplary," it is clear that within the intent and meaning of our Code, and under the decision in *Johnson v. Bradstreet Co.*, supra, the expression "injuries done to the person," as used in our statute of limitations, includes the injuries inflicted upon a father by the seduction of his daughter.

Irrespective of the considerations above presented, there is excellent outside authority for holding that the expression, "injuries done to the person," used in a statute, includes the injuries inflicted upon a father by the seduction of his daughter. This will be seen by reference to the elaborate and able opinion in *Johnson v. Bradstreet Co.*, supra, where Mr. Justice Lumpkin discusses the meaning of the words "injury to person" in the light of the common law, and subsequently cites the following authorities, which are very much in point in the present case. On page 84, 87 Ga., and page 252, 18 S. E., he says: "Aside from this, the following authorities seem to sustain our judgment in the case before us: In *Cregg v. Railroad Co.*, 75 N. Y. 192, 31 Am. R

459, construing the meaning of the words 'actions on the case for injuries to the person of the plaintiff,' found in a New York statute, the court held that these words included actions for slander, libel, assault and battery, and false imprisonment, and that cases of this kind were to be treated as actions for injuries done to the person of the plaintiff. Under section 2157 of the Code of Alabama, actions for injuries to the person or reputation are abated by the death of a party. Construing this section in the case of *Garrison v. Burden*, 40 Ala. 513, it was held that an action to recover damages for the seduction of the plaintiff's wife was an action for injuries to the person, and therefore, under the section cited, abated by the death of the defendant. Judge, J., says: 'Is adultery or criminal conversation with the wife, in legal contemplation, an injury to the person of the husband? Blackstone and Chitty both declare that it is, * * * and upon this point we are not aware that there is any conflict of authority.' This case, in effect, rules that injuries to the person are not confined to physical injuries. In the case of *Delamater v. Russell*, 4 How. Prac. 234, it was held that an action for criminal conversation with the plaintiff's wife was an action for injury to the person of the plaintiff. Parker, J., says: 'Rights are divided into absolute and relative. Criminal conversation is classed under actions for injuries to the latter. This classification is related by all our elementary writers.'

As it clearly appeared that the original action in the case under consideration was brought more than two years after the right of action accrued, there was no error in sustaining the motion to dismiss the case. Judgment affirmed. All the justices concurring.

(113 Ga. 781)

LAMAR v. GARDNER et al.

(Supreme Court of Georgia. July 18, 1901.)

ERROR-DISMISSAL-ACTION BY EXECUTOR-RECOVERY OF LAND-EVIDENCE-RES JUDICATA.

1. A motion to dismiss a writ of error, upon the ground that all of the evidence was not brought up in full to this court, will not be sustained, where it appears that the judgment complained of in the bill of exceptions was the direction of a verdict based on the plaintiff's failure to introduce certain specified evidence.

2. Since the act of 1823, which requires an executor to administer the undivided as well as the devised estate of the testator, and the enlargement of that act by the adoption of the Code so as to extend its provisions to an administrator with the will annexed, it is not necessary, in an action by such executor or administrator to recover land as part of the testator's estate, for the plaintiff to introduce the will in evidence in order to show his right to recover, or to show that the land sued for was devised in the will. (a) The cases of *Sorrell v. Ham*, 9 Ga. 55, *Mays v. Killen*, 56 Ga. 527, and *Horn v. Johnson*, 18 S. E. 683, 87 Ga. 448, reviewed and overruled.

3. It not appearing that the plaintiff in the present suit, or those under whom he claims,

were parties to the former suit in regard to the land involved, it was not error to refuse to admit evidence as to what issues were passed upon in such former suit.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by T. R. Lamar against G. G. Gardner and others. Judgment for defendants, and plaintiff brings error. Reversed.

Townsend & Westmoreland, for plaintiff in error. Bower & Bower and Hawes & Hawes, for defendants in error.

SIMMONS, C. J. As administrator with the will annexed of the estate of Thomas, Lamar brought suit against G. G. Gardner and others, the heirs at law of S. E. Gardner, for the recovery of a certain lot of land in the county of Decatur. On the trial of the case the plaintiff introduced in evidence a grant by the state to Thomas, letters of administration cum testamento annexo granted by the ordinary of Hancock county to the plaintiff, and an order of the court of ordinary authorizing him to sell the lands of the estate. He offered also the record of a former suit in ejectment between the heirs of S. E. Gardner (the present defendants) and S. J. and M. A. E. Donelson. In this record was the written charge of the judge in that case. This charge was offered in evidence for the purpose of showing what issues were submitted to the jury in the former suit, the plaintiff contending that the question of title was not submitted, but simply the question of possession. The court refused to admit the charge of the judge in the former case, but admitted the remainder of the record of that case. The plaintiff then closed, and the defendants moved the court to direct a verdict in their favor, on the ground that the plaintiff had failed to introduce the will of his testator. The court granted the motion, and directed a verdict for the defendants, holding that "plaintiff could not recover in the absence of the will of his testator." The plaintiff filed a bill of exceptions, in which he alleged that the court erred in directing a verdict on the ground that the will had not been introduced, and in excluding the charge of the court in the former case.

1. When this case came on for argument in this court, the defendants in error moved to dismiss the writ of error on the ground that the plaintiff had not brought to this court all of the evidence introduced in the trial below; that the record of the former suit was not set out with sufficient fullness to enable this court to determine its weight and effect in the present case. We think, under the facts appearing in the record, that the ground is not well taken. The gist of the complaint of the plaintiff in error is the direction of a verdict against him on the ground that he cannot recover without the introduction of the will of his testator. This error is plainly and distinctly alleged in the bill of ex-

ceptions. It was therefore unnecessary for him to set out in full the evidence introduced on the trial. Such evidence would not illustrate the question made. Instead of dismissing the writ of error, we commend counsel for the plaintiff in error for adhering so strictly to the spirit of the law prescribing the mode and manner of bringing cases to this court. The record of the former suit between different parties could in no manner have aided us in deciding the real point made in the bill of exceptions. If other counsel would follow this example, it would relieve this court of many hours of needless labor. The cases cited by the defendants in error on the motion to dismiss are cases in which the complaint was of the direction of a verdict generally. In such a case it is necessary to bring up all of the evidence in order for this court to determine whether there is any view of the case in which the direction of a verdict is proper. In the present case, however, the verdict was directed upon a special ground, which presents a clean-cut question of law, on which the evidence could throw no light.

2. This question of law is whether an executor or administrator with the will annexed can, since the passage of the act of 1828 and the adoption of the Code, recover land belonging to the estate of the testator without introducing the will in evidence. When we met in consultation after this case had been argued, we found two lines of decisions made by this court with reference to the right of the executor to administer upon the undevise property of the testator. In the case of *Sorrell v. Ham*, 9 Ga. 55, it was distinctly and expressly ruled, Judge Nisbet speaking for the court, that an executor could not administer the undevise property of the testator, and that he could not recover in any suit for lands of the estate without introducing the will in evidence. In the case of *Harper v. Smith*, 9 Ga. 461, Judge Nisbet said (page 466) that there was in this state no statute authorizing an executor to administer upon the undevise property of his testator. In the case of *Dean v. Biggers*, 27 Ga. 73, Judge McDonald said that an executor was authorized to administer the entire estate of the testator, devise and undevise, and referred to the act of 1828 (Cobb, Dig. p. 327). In *Venable v. Mitchell*, 29 Ga. 566, it was held, Judge Stephens delivering the opinion, that there was no use for the appointment of an administrator upon the undevise property of one dying testate, because under the act of 1828 it was the duty of the executor to administer upon the whole estate. It is curious that so able and painstaking a judge as we know Judge Nisbet to have been should have failed to notice the act of 1828 at a time when it had been in force for more than 20 years. He was discussing, in *Sorrell v. Ham* and in *Harper v. Smith*, the powers of the executor to recover and administer upon undevise realty; and the act of 1828 especially directs executors to administer such realty, and, as

It then stood, to hold the proceeds as trustee. On the other hand, Judges McDonald and Stephens based their opinions upon that act. In order to make the decisions of this court consistent on this subject, we ordered a reargument of this case, and gave permission to the plaintiff in error to review the cases of *Sorrell v. Ham*, supra, *Mays v. Killen*, 56 Ga. 527, and *Horn v. Johnson*, 87 Ga. 448, 13 S. E. 633. The case of *Mays v. Killen* was put squarely upon the case of *Sorrell v. Ham* and the case of *Horn v. Johnson*; by two justices, upon *Sorrell v. Ham* and *Mays v. Killen*. After carefully considering the question, we think these cases should be overruled. They are evidently in conflict with the act of 1828. That act provided that an executor should administer the undevise real and personal estate of the testator, and hold it as trustee for the distributees or next of kin. See Cobb, Dig. p. 327. It will be observed, however, that the act does not apply to administrators with the will annexed, but the codifiers of the Code of 1863, seeing this lapsus in the law, changed the act so as to make it apply to both executors and administrators with the will annexed. In that Code it appeared as follows: "In every case the executor or administrator with the will annexed shall be entitled to possess and administer the entire estate, although any part thereof be undevise, holding the residuum, after payments of debts and legacies, for distribution according to the laws of this state." Code 1863, § 2414. This change put executors and administrators with the will annexed upon the same footing as to the right to administer the undevise property, and the Code also changed somewhat the disposition to be made of the proceeds of such property. This section of the Code of 1863 has been adopted in each subsequent Code, including that of 1895. Civ. Code, § 8313. An administrator with the will annexed can now, under this section of the Code, sue for and recover, not only the devise property of the testator, but the undevise property as well. If this be true, what is the necessity for compelling him to introduce the will in evidence before he can recover? Judge Nisbet said, in *Sorrell v. Ham*, that the will was the executor's title, and that he could recover no property except such as was devise in the will. If it were absolutely necessary that the will should be introduced, and should devise the property sued for, before an executor could recover, how could he ever recover undevise lands for administration? Under the ruling in *Sorrell v. Ham*, he could never recover them, yet the Code makes it his duty to administer the entire estate, including such undevise lands. The principle announced in *Sorrell v. Ham* was undoubtedly the common law, but the legislature of this state saw proper, in its wisdom, to change the law, and, instead of having an executor to administer the devise property and an administrator to administer the undevise property, placed the

administration of all the testator's property in the hands of the same personal representative. The case of *Harper v. Smith*, 9 Ga. 461, was properly decided as the law then stood. That was a suit by an administrator with the will annexed to recover land as the property of the estate. As we have seen, the act of 1828 did not give to administrators with the will annexed the powers it gave to executors. These powers were conferred upon such administrators by the adoption of the Code of 1863. The ruling in that case was law until the adoption of the Code, which changed the law as above indicated. The cases of *Sorrell v. Ham*, *Mays v. Killen*, and *Horn v. Johnson*, having been based upon the common law, and the statute having been overlooked in their decision, were wrongly decided, and are therefore now overruled.

3. The next complaint made in the bill of exceptions is that the trial judge excluded from evidence the written charge of the court in the case theretofore tried between the heirs of Gardner and S. J. and M. A. E. Donalson, concerning this same land, in which the former obtained a verdict and judgment. The doctrine of *res judicata* applies only between the same parties and their privies. While the record shows that there was a judgment in the suit between the Gardners and the Donalsons, it does not show that the present plaintiff was a party thereto or that he is a privy of any of the parties. The Donalsons may have lost the land because the Gardners had a title better than theirs, but still the judgment could not possibly bind Lamar unless he was in privity with one of the parties to it. If he has a separate and independent title, the judgment cannot bind him as to such title. The fact that he convinced the Donalsons, pending the former suit, that his was the better title, and that they surrendered possession of the land to him at a time subsequent to the rendition of the verdict in the former suit, does not, in our opinion, make him a privy of the Donalsons. Nor was he bound by the judgment because they claimed the land under his testator. See, on this subject, an able and learned discussion by the distinguished East Indian author, Hukm Chand, in his work on *Res Judicata* (page 183 et seq.). Thus, it does not appear that the record of the former suit was in any way relevant in the present case, and there was therefore no error in excluding any portion of it from evidence. Judgment reversed. All the justices concurring, except COBB, J., disqualified.

(113 Ga. 1050)

DOMESTIC COAL & WOOD CO. v. HADDEN et al.

(Supreme Court of Georgia. July 22, 1901.)

APPEAL—REVIEW—NEW TRIAL.

There was ample evidence to sustain the verdict which was rendered in favor of the plaintiff. None of the special grounds of the motion for a new trial show that any error was

committed by the trial judge, and his judgment overruling the motion is affirmed.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by Hadden & Bro. against the Domestic Coal & Wood Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

Gignilliat & Stubbs, for plaintiff in error.
Wm. P. Hardee, for defendants in error.

PER CURIAM. Affirmed.

(113 Ga. 795)

SCOTT v. MADDOX et al.

(Supreme Court of Georgia. July 18, 1901.)

LOST WILL—ESTABLISHMENT—EXECUTION—REVOCATION—EVIDENCE—ASSIGNMENTS OF ERROR.

1. While in a proceeding to establish a lost will the execution of the will must be proved by the three subscribing witnesses, as in an application for the probate of a will in solemn form, the destruction or loss of the will, and the facts necessary to rebut the presumption of revocation by the testator, may be proved by other evidence.

2. "When a will cannot be found after the death of the testator, there is a strong presumption that it was destroyed or revoked by the testator himself, and this presumption stands in the place of positive proof. He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof."

3. On the trial of an application for the probate of a copy of an alleged lost will, the declaration of an heir of the decedent to the effect that an original will had existed, and that she had destroyed the same, is not, unless the declarant be a party to the proceeding, admissible in evidence in favor of the propounders. Under such circumstances the declaration is mere hearsay. Were the heir a party, it might be admissible as an admission binding upon her.

4. An exception to a refusal to allow a witness to answer a specified question presents no assignment of error with which this court can deal, when it does not appear what answer was expected. This is essential in order that the relevancy and materiality of the question may be passed upon.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Petition by W. E. Varner for the probate of a lost will. H. E. McKee and others were made parties. On death of petitioner, Janie C. Scott and Sarah Murphy were made petitioners. Judgment denying application, and petitioners bring error. Affirmed.

J. N. Glenn, H. C. Jones, and Green & McKinney, for plaintiffs in error. Candler & Thomson, for defendant in error.

COBB, J. Varner filed a petition in the court of ordinary, alleging that Ezekiel Reeves had departed this life testate, and that his last will was destroyed subsequently to his death, and praying that a copy of the will be established and admitted to record. To this petition certain persons, describing themselves

as the heirs at law of Ezekiel Reeves, filed a caveat, setting up that at the time of the execution of the alleged will the testator was not of sound mind, that in executing the paper he acted under the undue influence of Varner, and that the failure to find the paper was due to the fact that the testator had destroyed it with the intention of revoking it. The court of ordinary refused to admit to record the paper alleged to be a copy of the will, and the case was appealed to the superior court. On the trial there, at the conclusion of the evidence introduced by the propounders, the court passed an order dismissing the appeal and sustaining the judgment of the court of ordinary. This judgment was reversed by the supreme court, and a new trial ordered. *Scott v. McKee*, 105 Ga. 256, 31 S. E. 183. While the case was pending in the supreme court, Varner died, and two of the legatees under the alleged will were made parties in this court in his place. When the case came on for trial a second time in the superior court, after the introduction of the testimony in behalf of the propounders, the court held that the evidence was insufficient to authorize the establishment of the paper as the last will of Ezekiel Reeves, and entered a judgment denying the application to probate the copy will, and refusing to allow it to be admitted to record. The case is here again upon a bill of exceptions containing assignments of error upon the ruling just referred to, and upon other rulings made during the progress of the trial.

1, 2. The Code declares: "If a will be lost or destroyed subsequent to the death, or without the consent of the testator, a copy of the same, clearly proved to be such by the subscribing witnesses and other evidence, may be admitted to probate and record in lieu of the original; but in every such case the presumption is of revocation by the testator, and that presumption must be rebutted by proof." Civ. Code, § 3289. It seems that there is nothing in this statute which is in conflict with the general rule on the subject therein dealt with, but that it is merely declaratory of the law as it stood at the time of the adoption of the Code. See *Pritch. Wills*, § 50, p. 51, note 3. In *Kitchens v. Kitchens*, 39 Ga. 168, the section of the Code just quoted was construed, and it was there held that, while the execution of the will must be proven by the three subscribing witnesses in the same manner as in the probate of a will in solemn form, the contents of the paper, the destruction or loss of the same, and the facts necessary to rebut the presumption of revocation by the testator, might be shown by any other evidence which would be sufficient to satisfy the conscience of the jury that the will was executed as testified by the subscribing witnesses, and was lost or destroyed since the death of the testator, or without his consent before his death. The rule laid down in *Kitchens v. Kitchens* was followed and approved in *Mosely v. Carr*, 70 Ga. 333. See,

also, *Burge v. Hamilton*, 72 Ga. 624; *Gillis v. Gillis*, 96 Ga. 17, 23 S. E. 107. In the present case the three subscribing witnesses to the will were produced and sworn, and their testimony was such that the jury would have been authorized to find that the testator had executed a paper which he declared to be his last will, and that he was at the time of its execution mentally capable of making a will. There was also evidence from which a jury could have found that the copy will produced at the trial was a correct copy of the paper proved by the subscribing witnesses to have been executed as a will. It was shown that the paper so executed could not be found after the death of the testator. This placed upon the propounders the burden of proving that the paper was destroyed after the death of the testator, or that, if destroyed during his life, its destruction was without his consent. The only evidence in the record which can be looked to to determine this question is in substance as follows: The will was executed by the testator, and then delivered to Varner, the nominated executor, who carried it away with him. After this the testator sent for the will, and it was returned to him by Varner. So far as the record discloses, the will was never seen by any one after its return. A few days before his death the testator told Varner that the will was in his room in a chest, which he pointed to with his finger, and said to Varner that he wanted him to see that the provisions of the will were carried out after the testator's death. The testator was in an unconscious condition for several days before he died, but the evidence does not show that he fell into this condition immediately after the statement to Varner just referred to. The paper which had been executed as a will not being in existence at the time the application for the probate of it was made, the propounders were met at the threshold of their case with the presumption that the paper had been revoked by the testator, and it was incumbent upon them to overcome this presumption by proof. The rule is thus stated by Mr. Pritchard in his work on Wills: "When a will cannot be found after the death of the testator, there is a strong presumption that it was destroyed or revoked by the testator himself, and this presumption stands in the place of positive proof. He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient for him to show that persons interested to establish intestacy had an opportunity to destroy the will. He must go further, and show by facts and circumstances that the will was actually fraudulently or accidentally lost or destroyed, against, and not in accordance with, the wishes and intention of the testator." *Pritch. Wills*, § 50, subsec. 2. Mr. Schouler says: "If a will last traced to the testator's custody cannot be found at his death, the presumption that he destroyed it for the purpose of revocation out-

weighs the probability of its fraudulent and criminal destruction by another, when unsupported by any evidence except that of opportunity, though this latter circumstance is always worthy of consideration with other proof." Schouler, Wills (3d Ed.) § 402, p. 446. See, also, 1 Jarm. Wills (6th Ed. Dig.) *126; 1 Underh. Wills, § 272; Page, Wills, § 442. Did the propounders carry the burden which the law placed upon them of showing by sufficient proof that the testator had not revoked the will, and that the failure to find it was due to its destruction subsequently to his death, or in his lifetime without his consent? It does not seem that the evidence was sufficient to overcome the presumption which arises in such cases. It not having been shown that the testator lapsed into a state of unconsciousness immediately after the declaration to Varner that he desired his will to be carried out, and that the paper would be found in a certain place, the evidence in behalf of the propounders did not preclude the possibility of the testator's having formed an intention to revoke the will, and carried such intention into effect by having the same destroyed, between the time that he made the statement to Varner and the time that he lapsed into the state of unconsciousness which preceded his death. This being so, there was no error in refusing to establish the copy offered as the last will of Ezekiel Reeves, and allow the same to be admitted to record.

3. The propounders offered to prove that a daughter of the testator had said that she had destroyed her father's will after his death. The daughter referred to was not a party to the case. The court refused to admit the testimony, and we think this ruling was clearly right. The declarations of this daughter were merely hearsay as against other persons interested in the case, and, as she was not a party to the record, they were not in the present controversy admissible under any rule of which we are aware.

4. The record contains assignments of error upon the refusal of the court to allow the propounders to ask certain witnesses different questions that are contained in the record. As it is not disclosed what answers were expected to these various questions, these assignments present no question for decision. *Railway Co. v. Bond*, 111 Ga. 15, 36 S. E. 299, and cases cited. Judgment affirmed. All the justices concurring.

(113 Ga. 1138)

GAINES v. BANKERS' ALLIANCE.
(Supreme Court of Georgia. July 23, 1901.)
PLEA TO JURISDICTION—PETITION.

1. It was error to treat as a demurrer a special plea to the jurisdiction and an amendment thereto, and to enter judgment thereon dismissing the plaintiff's petition.

2. Under the allegations of the petition and the amendment thereto, the court had jurisdiction of the cause of action.

(Syllabus by the Court.)

Error from superior court, Hart county; S. Reese, Judge.

Action by Kate E. Gaines against the Bankers' Alliance. Judgment for defendant, and plaintiff brings error. Reversed.

I. O. Van Duzer and C. P. Harris, for plaintiff in error. J. H. Skelton, for defendant in error.

LEWIS, J. Mrs. Kate E. Gaines sued the Bankers' Alliance, an insurance corporation of California, on a policy issued upon the life of her deceased husband. The plaintiff alleged, among other things: "The Bankers' Alliance is a corporation under the laws of the state of California, having an agency in said county at the time of bringing this suit, and had an agency in said county at the time the cause of action sued on accrued, and had an agency in said county at the time the contract was made out of which the cause of action in this case arose." Process issued against the "Bankers' Alliance Ins. Co." Service was made on the "Bankers' Alliance Ins. Co., by serving D. A. Thornton, the resident agent of said company in Hart county." The defendant filed a special plea to the jurisdiction, in which it alleged (1) that it had not been properly served; (2) that the superior court of Hart county was without jurisdiction, but the suit should have been brought in the superior court of Fulton county, where the principal office of the company is, and service should have been made on the general agent of the company in Atlanta; (3) that process was directed to the "Bankers' Alliance Ins. Co.," when the defendant's corporate name is the "Bankers' Alliance of California"; (4) that the sheriff's entry showed service on D. A. Thornton, resident agent of the Bankers' Alliance Insurance Company, and not the appointed attorney of the Bankers' Alliance of California, to wit, B. M. Zettler, of Atlanta, Ga.; (5) that the declaration failed to show jurisdiction of the cause of action alleged. After hearing argument on this plea, the court entered the following order: "After hearing the demurrer in the above-stated case as amended, it is ordered that the demurrer be sustained and the suit dismissed." To this judgment the plaintiff excepts.

1. It was clearly error for the court below to treat as a demurrer a document which was offered as a plea, and which contained throughout matter of plea, and not of demurrer. Had this paper been offered as a demurrer, it would have been reversible error for the court to have sustained it, for it would have been, for the most part, a speaking demurrer, introducing new averments necessary to support it, which did not appear upon the face of the petition, and as such not allowable. *Beckner v. Beckner*, 104 Ga. 219, 30 S. E. 622; *Teasley v. Bradley*, 110 Ga. 498, 35 S. E. 782 (7).

2. Under the allegations of the petition as amended, there is no doubt that the court

below had jurisdiction of the cause of action. It is provided by section 2145 of the Civil Code that "whenever any person may have any claim or demand upon any insurance company having agencies, or more than one place of doing business, it shall be lawful for such person, or persons, to institute suit against said insurance company within the county where the principal office of such company is located, or in any county where said insurance company may have an agency or place of doing business, or in any county where such agency or place of doing business was located at the time the cause of action accrued, or the contract was made out of which said cause of action arose." The following section prescribes how service shall be perfected upon nonresident insurance companies, and it appears that there was a strict compliance on the part of the plaintiff with the provisions of both these sections. It is contended, however, that service should have been perfected in accordance with section 2057 of the Civil Code. There is no conflict between this section and section 2145. Section 2057 merely requires insurance companies doing business in this state to file with the insurance commissioner a written power of attorney appointing some person who shall be authorized to acknowledge service for such company, or upon whom process may be served, and is entirely compatible with the provisions of sections 2145, 2146, referred to above. Nor is there anything in conflict with this position in the case of *Association v. Bragg*, 102 Ga. 748, 29 S. E. 706. The petition in that case alleged that the corporation "had an agent and transacted business [in the county where the suit was brought], and now has such agent and transacts such business in said county." This court drew a distinction between having an agent in the county where the suit was brought, and having an agency there, and decided that an allegation in the petition to the effect that the company sued had an agent and transacted business in the county in which it was filed was insufficient to show jurisdiction of the cause of action. The question now under consideration was squarely decided in the case of *Merritt v. Insurance Co.*, 55 Ga. 103, where this court held: "Suit may be brought against an insurance company on any claim or demand in any county where said insurance company may have an agency or place of doing business, which was located at the time the cause of action accrued, or the contract was made out of which said cause of action arose." We are not called upon to decide whether the defendant was properly served. The allegation in the defendant's special plea seeking to make this point was not verified by affidavit, nor substantiated by evidence sent up with the record. At all events, the misnomer seems to be one which can readily be cured by amendment. We send the case back for another trial because the court erred in treating the defendant's plea as a demurrer, and

dismissing the case thereon, and because the court plainly had jurisdiction to try and determine the cause of action. Judgment reversed. All the justices concurring.

(112 Ga. 681)

TIFT et al. v. WIGHT & WESLOSKEY CO.

(Supreme Court of Georgia. May 23, 1901.)

SALE—DELIVERY—STATUTE OF FRAUDS.

1. Proof that a customer of a merchant agreed to purchase a certain quantity of seed oats, then in the house of the merchant, at a given price, and that the oats were weighed, set aside, and the customer's name placed on them, and the same charged to him, under an agreement that this should be done, and that the customer should subsequently send and get them, is sufficient, in the absence of anything to the contrary, to establish a completed sale of the oats by constructive delivery. Civ. Code, § 3645; *Dunn v. State*, 8 S. E. 806, 82 Ga. 27.

2. Whether the contract was void as being within the statute of frauds cannot be considered, as no such defense was made on the trial, nor was that question passed on by the trial judge. Such a defense must be specially pleaded. *Johnson v. Latimer*, 71 Ga. 470.

(Syllabus by the Court.)

Error from superior court, Dougherty county; W. N. Spence, Judge.

Action by Wight & Weslosky Company against N. F. Tift and others. Judgment for plaintiff. Defendants bring error. Affirmed.

R. Hobbs and Wooten & Crosland, for plaintiffs in error. D. H. Pope & Son, for defendant in error.

LITTLE, J. After the record in this case was considered, the decision of the court was expressed in the foregoing headnotes. As the questions which were raised were considered plain and well established, it was not deemed necessary that the principles of law referred to in the headnotes should be elaborated. Since the delivery of the opinion of the court counsel for plaintiffs in error have submitted a motion for a rehearing, and we have given to their petition a careful consideration, and in deference to the conviction which they express in an elaborate brief, that a rehearing should be granted because this "court fell into an unconscious error," we will take occasion, in ruling on this motion, to give some of the reasons which impelled the decision sought to be reviewed. We may, however, say, in advance, that in the consideration of the case on its merits all the questions raised in the motion for a rehearing, as well as some of the authorities cited by the movants, were considered, notwithstanding they did not so fully appear on the brief for the plaintiffs in error then as they do now under the motion. Wight & Weslosky Company instituted an action, under the statute, on an open account, against the administrators of Tift, to recover the sum of \$103.25, which it was alleged the defendants' intestate was due it for one barrel of cement and a named quantity of seed oats, of the valu

alleged; a bill of particulars, giving date of the purchase and the value of the several articles, being attached to the petition. The defendants were duly served, and answered the petition, admitting that they were administrators as alleged, and denying that they were indebted to the plaintiff in the sum alleged, or in any other sum, or that any such account was due and unpaid, but said that they were not indebted to the plaintiff in manner and form as alleged, either on any account made by the intestate or by themselves. This general denial was all the defense that was pleaded in bar to the action. Briefly stated, the evidence of the plaintiff showed that the oats were sold to the defendants' intestate under a parol contract, and by agreement they were weighed up and set aside for intestate, and his name placed on them, and they were charged to him on the books of the plaintiff. The evidence for the defendants tended to show that the goods were never delivered, but that intestate bought other oats. On the presentation of the case in this court it was contended that the only legal question involved was whether, under the facts, there was a sale of the oats, and it was insisted that the contract shown was an executory contract, under which no title could pass until executed, and the question was presented in the brief under two heads: First, irrespective of the statute of frauds; and, second, as affected by that statute; and, as will be seen, each of the points so made were decided adversely to the contentions of the plaintiffs in error, this court ruling—First, that under the evidence the contract for the sale of oats was executed; and, second, that whether the contract was or was not void under the statute of frauds could not be considered, as no such defense was made, nor was that question passed on by the trial judge. The motion for review and rehearing is directed to an alleged error incorporated in the second headnote alone, and for that reason we do not again consider the question of law incorporated in the first headnote.

It is admitted that the statute, as a rule, must be specially pleaded; but it is insisted that there are certain exceptions to this rule, within one of which the case at bar comes. It is contended that, when the statute is not specially pleaded, the validity of the contract sued on may still be raised by demurrer, motion to nonsuit, objection to testimony, or request to instruct the jury; and it is contended that the bill of exceptions shows that this defense was urged on the trial of the case in such a manner as to bring it within the letter and spirit of the exception referred to. The claim that this case comes within an exception to the general rule stated is based on a recital in the bill of exceptions as follows: "After the evidence closed the said judge called upon defendants' counsel to show cause why a verdict should not be directed for plaintiff. Thereupon defendants' counsel presented to the court and argued, as reasons

why a verdict should not be directed." certain propositions of law, among them that "the contract, being only a verbal one, did not, by reason of paragraph 7 of the statute or frauds, bind the defendants, since there had been no acceptance of any part of said oats, nor any actual receipt of same, nor had there been anything in earnest or part payment to bind the bargain." After such presentation the court directed a verdict for the plaintiff. Judgment followed accordingly, and a bill of exceptions was taken, on which this court rendered the judgment now sought to be reviewed. In the brief now before us it is urged that the case of *Johnson v. Latimer*, 71 Ga. 470, does not sustain the ruling made in the second headnote. We beg to differ with counsel in this contention. It is true that the ruling made in that case does not go to the extent of holding that as the statute of frauds was not pleaded a new trial should not be granted, but it does go to the extent of holding that where the statute was not pleaded, and no question was made which invoked the ruling by the judge on that subject, a new trial would not be granted, although it appears that the contract sought to be enforced should have been in writing. We know of no reason why the facts stated in the record in this case does not bring it directly under the ruling in the *Johnson Case*. The statute certainly was not pleaded, and, as we view it, there was no question made before the judge which invoked a ruling on the subject as to whether the contract sought to be enforced came within the provisions of the statute of frauds. It is true that, when the trial judge called on counsel for the defendants verbally to show cause why a verdict should not be directed for the plaintiff, they did verbally urge that the contract was obnoxious to the statute, and it is true that, having heard counsel, he then directed a verdict. Why should he not have done so? It was the privilege of these defendants to waive the operation of the statute of frauds, if they chose to do so. Their defenses were only to be adjudged by their pleadings, and verbal statements to the court are not pleadings. I may say, for myself, that I am not at all attached to what is to us a modern doctrine, that of directing verdicts, which now seems to prevail to a great extent in this state; but I am not prepared to go to the extent of ruling that verbal reasons given to the trial judge why he should not direct a verdict in a particular manner call for a ruling on matters of defense which are not pleaded, but only stated verbally, nor that his failure to consider defenses so stated presents any question for review by this court. The only question, under such circumstances, which could be considered, is whether the court erred in directing a verdict. If the verdict which he directed was demanded by the evidence, then, no matter what reasons counsel may or may not verbally have given to the court why this should not be done, they could not have had

any effect as a defense to the action. Civ. Code, § 2693, par. 7, declares that, to make an obligation binding on the promisor, touching any contract for the sale of goods to the amount of \$50 or more, it must be in writing, etc. In the case of *Armour v. Ross*, 110 Ga. 413, 35 S. E. 787, touching the necessity of pleading the statute as a defense to a contract of the character above indicated, Mr. Justice Lewis, in rendering the opinion of this court, said: "The promisor can avail himself in such a case of a plea that, the statute of frauds requiring the contract to be in writing, the courts cannot enforce a mere oral agreement on the subject. The promisor, on the other hand, can waive this right, which was evidently intended merely as a personal privilege to him." Mr. Browne, in his work on the Statute of Frauds, § 115 (a), says: "The operation, then, which the statute has upon a contract covered by it, is that no enforcement of the contract can be had while the requirements of the statute remain unsatisfied, if the party against whom enforcement is sought choose to insist upon this defense. The statute does not make the contract illegal. A contract which was legal and actionable before the statute is legal since, notwithstanding the statute," etc. Again, in the case of *Draper v. Dry-Goods Co.*, 103 Ga. 663, 30 S. E. 566, Mr. Justice Lewis, in delivering the opinion of this court, said: "The defense of the statute of frauds, like that of a plea of usury, is in the nature of a personal privilege, of which the defendant can avail himself or not, as he sees proper."

It is urged in the brief that, where the plaintiff declares only on the common counts, the defendant is not called upon to plead the statute, but may avail himself of its protection without pleading it; and it is averred that this suit was upon the common counts, "indebted on open account," etc. In reference to this point, we have first to say that, as the statute of frauds is treated as not affecting the validity of contracts, it is a well-established general rule that, unless the privilege of requiring the statutory evidence given by it to the party resisting the enforcement of the contract is sufficiently claimed by him in some proper pleading, the court will proceed with the contract under common-law rules. *Browne, Frauds*, § 508. Mr. Wood in his work on this subject says that correct practice requires that, if a party intends to rely upon the statute of frauds as a defense, he should set it up either by plea or answer, and in most of the states he must do so, or he is treated as having waived the defect. *Wood, St. Frauds*, § 537. The exception which the movant claims is made by the record in this case is thus stated by the last-named author (section 537): "But this is the rule only in that class of actions where the declaration or

complaint sets forth the contract upon which the plaintiff seeks recovery, and has no application in actions of book account or general assumpsit, where the nature of the claim is not set forth, and does not appear until the evidence is actually put in; and in this class of cases the statute may be relied upon in defense, although not raised by any pleadings." Mr. Browne, in his work above cited, thus states the exception: "Where the plaintiff sues on the common counts, and therefore does not disclose the foundation of his case until he puts in his evidence, * * * the defendant will be allowed to insist upon this statutory privilege, although his pleading has not in terms done so." There is, therefore, no difference between the rule insisted on by counsel and that which we recognize as governing this point in the case. In our opinion, however, counsel are entirely at fault in their contention that the action brought in this case was on the "common counts." The principle is this: If the declaration or petition sets forth the contract on which the recovery is sought, then, in order to take advantage of the statute, it must be pleaded. In such a case the defendant is put upon full notice of the demand of the plaintiff, the character of the demand, and the form in which it exists. But where the declaration or petition is founded upon a "common count" (and, in using the term "common count," common-law pleading is referred to), such as assumpsit for goods sold and delivered, the nature of the claim is not exhibited, and the defendant can avail himself of the statute without formal pleading; for in that case it is not to be presumed that the defendant has notice of the character of the debt, which is not disclosed by the declaration. The common count referred to bears no resemblance to the statutory form of an action on an open account under the laws of this state. In the case under consideration the defendants were put upon notice that plaintiff claimed that defendants' intestate was due it a certain sum of money, exceeding \$50, for two articles of merchandise bought by the intestate at a particular date, and that the form of indebtedness was an open account; that is, unliquidated. To avail himself of the privilege of the statute in such a suit, the defendant must plead it, or he will be held to have waived it, because the defendant has the personal privilege to plead it or waive it, and if he does not do one he does the other. He did not plead the statute in this case, and inasmuch as the defense was not made on the trial, or necessarily passed on in a legal way by the trial judge, the question as to whether the contract was void, as being within the statute of frauds, could not properly have been considered by this court. Motion for rehearing denied. All the justices concurring.

(113 Ga. 950)

DOGGETT v. EXCHANGE BANK.

(Supreme Court of Georgia. July 20, 1901.)

HARMLESS ERROR—APPEAL.

1. Though a trial judge may erroneously refuse to allow certain specific questions to be answered by a witness, yet this is not cause for a new trial when it affirmatively appears that, in response to similar questions propounded to the witness during the course of his examination, he was subsequently permitted to testify fully with respect to the matters to which the questions first asked related.

2. The finding of the jury in the present case was not without evidence to sustain it.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Exchange Bank against A. E. Doggett. Judgment for plaintiff. Defendant brings error. Affirmed.

Mrs. Doggett made and delivered a mortgage to Simmons dated May 23, 1894, to secure a note for \$651.67 of same date as mortgage, and with interest from date thereof. Said note and mortgage were transferred after maturity to the bank. In a proceeding to foreclose the mortgage, Mrs. Doggett pleaded a failure of consideration. In her plea she alleged that Simmons induced her to make and deliver said note and mortgage by guaranteeing to recover for her in suit to be filed by him for her against one Sims \$1,600 for rents and \$300 for damages. She amended her plea, and alleged that Simmons procured said mortgage by fraudulent misrepresentations; that in 1886 she gave a mortgage to Simmons for \$400, the consideration of which was his promise as above stated, the said mortgage for \$400 being made to secure him for his proposed service as attorney; that afterwards she and Simmons agreed that in order that she might borrow money to pay off a mortgage held by one Pharr, which mortgage was superior to that given to Simmons, he (Simmons) should cancel his mortgage, and that she would make to him another for \$400, with interest, which should be a second mortgage to that proposed to be given to the lender; that pursuant to this agreement the mortgage first given to Simmons was canceled, and money borrowed to pay off the Pharr mortgage, and another mortgage, to wit, the one now sought to be foreclosed, was given to Simmons; that the last-mentioned mortgage signed by her was not read to or by her, she relying on the representations of Simmons as to its contents, which representations were false and fraudulent; that, by the terms of said agreement pursuant to which said mortgage was given, it should have been for the sum of \$400. She also pleaded a partial failure of consideration, alleging the fee for which the mortgage was given was excessive, and should not have been for more than \$200.

So much of said plea as alleged a partial failure of consideration was stricken on demurrer, and no exception was taken to that ruling. The jury found for the plaintiff, the defendant made a motion for new trial, which was overruled, and she excepted.

T. C. Battle and J. K. Hines, for plaintiff in error. Rosser & Carter, for defendant in error.

LUMPKIN, P. J. The nature of the controversy involved in this case, and of the issues upon which it was tried in the court below, is fully disclosed by the statement of facts appearing in the foregoing official report.

1. Complaint is made in the motion for a new trial that Mrs. Doggett, who was introduced as a witness in her own behalf, was not permitted to answer certain specific questions propounded to her with a view to eliciting testimony to the effect that she did not intend to give a mortgage for more than \$400 and accrued interest; that she did not think the mortgage signed by her was for a greater amount; that the understanding and agreement between herself and Simmons was that she should give a mortgage for only \$400 and interest; and that, by reason of fraudulent misrepresentations made to her by Simmons at the time of the execution of the instrument sought to be foreclosed, she was induced to believe that she was signing a mortgage drawn up in accordance with such understanding and agreement. In the order overruling the motion, his honor of the trial bench states as a reason for not regarding the complaint above referred to as meritorious that "the evidence tending to show what was the amount agreed on, etc., was at first objected to and ruled out, as set out in the motion for a new trial, in the absence of any prayer or effort to reform or correct the contract. But afterwards substantially the same questions were asked, and the evidence went in without objection, as the brief of evidence will show, and the charge submitted to the jury evidence which so went in." In the light of this explanation, and in view of the fact that the record before us discloses that Mrs. Doggett was permitted to testify fully with respect to the matters concerning which her counsel sought to interrogate her, we concur in the view of the trial judge that no real injury resulted from the rulings excepted to, even conceding that they may have been erroneous. A similar conclusion was announced in the recent case of *White v. Iron-Works Co.*, 113 Ga. 577, 38 S. E. 944, which upon its facts is closely in point.

2. As the evidence fully warranted the verdict, no good reason appears for sending the case back to the trial court for another hearing. Judgment affirmed. All the justices concurring.

(113 Ga. 791)

MALONE v. ADAMS.

(Supreme Court of Georgia. July 18, 1901.)

WILLS—DEVISAVIT VEL NON—EVIDENCE—UNDUE INFLUENCE.

1. It is, on the trial of an issue of devisavit vel non, competent for a caveatrix to support a contention that she was the next of kin of the decedent by proving declarations to that effect made by the latter while in life. This case is distinguishable from that of *Greene v. Almand*, 36 S. E. 957, 111 Ga. 735.

2. The instructions with respect to undue influence were not unwarranted, and the finding of the jury was sufficiently supported by testimony.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

T. H. Malone offered the last will of Mattie Adams for probate, and Mattie Adams, the only heir at law of decedent, filed caveat. Probate denied, and the executor brings error. Affirmed.

R. J. Jordan, for plaintiff in error. Arnold & Arnold and Abbott & Abbott, for defendant in error.

LUMPKIN, P. J. A paper purporting to be the last will and testament of Mattie Adams, deceased, was offered for probate by T. H. Malone as executor. By this instrument the greater part of the property therein mentioned was given to one Lizzie Reed, who was not related to the alleged testatrix. A caveat was filed by one Mattie Adams, who claimed to be the niece and only heir at law of the decedent. The grounds of the caveat were that at the time of the execution of the paper she did not have sufficient mental capacity to make a will, and that the execution of the paper offered for probate was procured by undue influence and duress practiced upon the decedent by the subscribing witnesses and by Lizzie Reed, the beneficiary therein named. The trial of the case on appeal resulted in a verdict finding that the paper in question was not the will of the decedent. The proponent moved for a new trial, which was denied him, and he excepted. The controlling question presented by his motion for a new trial was whether or not certain declarations of the decedent to the effect that she was related by blood to the caveatrix were admissible in evidence, the ruling of his honor of the trial bench being that they were. Such other points as are presented for our determination will be very briefly referred to after disposing of this question.

1. The substance of the declarations of the decedent which the court allowed to be proved was that the caveatrix was her niece. It was insisted that under the ruling of this court in *Greene v. Almand*, 111 Ga. 735, 36 S. E. 957, these declarations were inadmissible. It was in that case held that: "Sayings of a deceased person cannot be rendered competent evidence on a question of pedigree by merely proving that such person said he was

a kinsman or relative of the person whose pedigree is the subject-matter of the inquiry. The fact of relationship must be shown by other evidence." The question now in hand is altogether different. There was no attempt to prove that any deceased person, while in life, had declared that he or she was related by blood or marriage to Mattie Adams, the deceased, and, upon the strength of such a declaration, to introduce another and additional declaration to the effect that there also existed a relationship between her and the living Mattie Adams. The declarations sought to be proved in the present case were those of the alleged testatrix whose estate was in controversy. While she was not, of course, related to herself by blood or marriage, she certainly was a member of the family of individuals with whom she was connected by blood or affinity, and no proof was required to establish the fact that she was a member of that particular family. We are therefore of the opinion that the evidence as to her declarations was admissible under section 5177 of the Civil Code, which reads as follows: "Pedigree, including descent, relationship, birth, marriage and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence." A case peculiarly in point is that of *Wise v. Winn*, 59 Miss. 590, 42 Am. Rep. 381. One Charles Wise, who had lived in Mississippi for 40 years, and whose antecedents were entirely unknown, died intestate. His supposed heirs at law proved that they were the children of one Thomas Wise, of a named town in Amelia county, Va.; that their father had a younger brother, Charles, who left that state 40 years previously; and that nothing had been heard of him since. They then sought to introduce the testimony of two witnesses to the effect that Charles Wise, whose estate was in question, had told them that he had a brother Thomas, who lived in the town above mentioned, and that he himself had lived there. The court held that these declarations were admissible. Judge Chalmers, who delivered the opinion in that case, discusses the question so clearly and so forcibly that we cannot attempt to better express our views in regard thereto than by quoting and adopting as our own the following admirable presentation by him of the law on the subject: "The general rule undoubtedly is that, before hearsay declarations in matter of pedigree can be introduced in evidence, some proof dehors the declarations must be made that the declarant was in fact a member of the family about which he was speaking. It was unanimously so ruled by all the judges in the *Banbury Peerage Case*, 2 Selw. N. P. 764, where the petitioner sought to introduce in evidence the statements and depositions contained in a chancery litigation conducted more than one hundred and fifty years before, in which an ancestor of the petitioner

styled himself, and was styled by those who professed to belong to the family, the legitimate son of A. B. It was held that such statements were not admissible, though upon a question of pedigree, until it could be shown by proof alunde that those making these statements actually were members of the family as to which the claim was preferred. The same doctrine is announced in *Monkton v. Attorney General*, 2 Russ. & M. 147, though it may perhaps be doubted whether the conclusion reached in that case does not offend against the doctrine. But in these and many other cases of a similar character which might be cited the attempt was to set up some right derived through the declarant, and to establish that right by his own statements as to the pedigree of the family of which he claimed to be a member. It seems manifest that this cannot be done without precedent proof from other sources that he is what he claims to be, to wit, a member of the family. Thus, if Charles Wise had married here and left children, it is clear that those children could not have claimed any interest in the estate of Thomas Wise, in Virginia, by virtue alone of their father's statement that Thomas was his brother. But how is it when the case is reversed, and a plaintiff is seeking to reach the estate of the declarant by evidence of what he said with reference to his family and kindred? It is quite clear that I cannot establish my right to share in the estate of A. by proof alone of the fact that my father declared in his lifetime that A. was his brother, but may I not do so by showing that A. himself so declared? Upon this question we find a singular dearth of authorities. In *Adie v. Com.*, 25 Grat. 712,—a case strikingly like this in all its features,—testimony of this character seems to have been admitted without objection; and so, also, in *Cuddy v. Brown*, 78 Ill. 415. In *Moffit v. Witherpoon*, 10 Ired. 185, persons who claimed to be the nephews and nieces of Mrs. Donahoe, in an ejectment suit brought after her death to recover certain real estate belonging to her during her life, were permitted to prove that she had declared many years before her death that the mother of the plaintiff was her only sister, and no other proof of heirship than this seems to have been offered. In *Shields v. Boucher*, 1 De Gex & S. 40 (a case to which we have not had access, but which is referred to at length in *Whart. Ev.* § 208, note 4), Sir Knight Bruce expressed the strong conviction that in a controversy purely genealogical declarations made by a deceased person as to where he or his family came from, of what place his father was designated, and what occupation he followed, would be admissible, and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion. Independently of these or of any authorities, we think, ex necessitate rei, and as a matter of common sense, that declarations such as were offered here, and under the circumstances

here existing, should always be received in evidence. They stand to some extent upon the footing of declarations against interest, or of what Mr. Wharton calls 'self-disserving declarations.' If they be not admitted, there must be in many cases a failure of justice. No man who knew Charles Wise in Virginia ever saw him here, and no man who knew him here ever saw him in Virginia; and, if we reject his own statements as to who he was and whence he came, these inquiries must remain forever unanswered. If such be the rule of law, it must be impossible legally to establish the identity of very many travelers who die among strangers in distant lands, although in point of fact there may not be in any man's mind the slightest doubt as to who they were."

2. It was further urged before us that there was not sufficient evidence at the trial below either to warrant any instructions with regard to undue influence, or to support a verdict that the testamentary paper was a result of such influence. An examination of the record satisfies us that these contentions are not meritorious. Judgment affirmed. All the justices concurring.

(113 Ga. 799)

PENITENTIARY CO. NO. 2 v. ROUNTREE et al.

(Supreme Court of Georgia. July 18, 1901.)

CONVICTS—CONTRACTS FOR EMPLOYMENT—VALIDITY.

In view of the provisions of the act of February 25, 1876, "to regulate the leasing out of penitentiary convicts," etc., a contract entered into while that statute was of force, and contemplating that convicts should be employed in conducting a sawmill owned by a private citizen and operated on his premises, must be treated as contrary to public policy, and therefore not enforceable.

(Syllabus by the Court.)

Error from superior court, Emanuel county; B. D. Evans, Judge.

Action by Penitentiary Company No. 2 against J. E. & G. R. Rountree. Judgment for defendants, and plaintiff brings error. Affirmed.

Williams & Williams, for plaintiff in error. F. H. Saffold, for defendants in error.

LUMPKIN, P. J. The Penitentiary Company brought an action against J. E. & G. R. Rountree to recover damages alleged to have been sustained by reason of a breach on their part of a contract entered into with the plaintiff on the 15th of June, 1897. A copy of the contract declared on was attached to the plaintiff's petition. It purported to evidence an agreement whereby the Penitentiary Company obligated itself "to work from thirty-five to fifty male convicts for" J. E. & G. R. Rountree; "said convicts * * * to be worked at the sawmill" owned by them, which was located

"near Midville, in Emanuel county, Georgia." The following, which is a copy of an order passed by the trial judge, will serve to disclose the fate of the case in the court below, and the question which is presented for our determination: "The defendants having demurred to the petition of plaintiff on the ground that the contract set out in the petition is in violation of the act of 1876 providing for the lease of the convicts of the state, and for that reason plaintiff has no right to sue for a breach of the same, it is ordered that the demurrer be sustained, and the petition be dismissed, at costs of the plaintiff." After due reflection, we have reached the conclusion that this decision should be upheld.

At the time the contract in question was entered into, the act of February 25, 1876, was of force. See Acts 1876, pp. 40-45, the provisions of which are to be found in Pen. Code, § 1151 et seq. It provided that the governor should select a suitable site or place within the limits of Georgia, to "be known as the penitentiary of this state"; the expense of procuring the same and providing necessary buildings "for the safe keeping and comfort of the convicts" to be borne by the company or companies to which they might be leased. "From this prison such convicts as [were] competent to labor on roads, canals, mines, quarries, and making brick [might] be taken out and employed by" the company having charge of them, in carrying out contracts on its part to perform work of that character within the limits of the state. Such convicts as were "not engaged in working on mines, canals, roads, quarries, and making brick [were to] be kept at said place or site, known as the penitentiary, and there employed upon such works as [might be] consistent with their health, age, sex and strength," or there employed in performing "farm labor" on land owned by the lessee company. Pen. Code, § 1153. Subletting of convicts was prohibited, but provision was made that this restriction should not be held to "prevent the lessees from doing the work allowed by this act, under contract with others or through their own agents, and by convicts exclusively under their control and supervision." *Id.* § 1156. It will thus be seen that "the work allowed by this act" did not embrace labor to be performed in connection with the operation of a "sawmill" owned by private individuals, and located upon their premises. The contract under consideration contemplated that this sort of labor should be performed by the convicts under the control of the Penitentiary Company. Obviously, there was no authority of law for employing them in this class of work, as counsel for the plaintiff in error very frankly conceded. In the brief filed by them, they took the position that: "From a legal

or a moral standpoint, there is nothing wrong in such a contract. The most that can be said of such a contract is that it may be *malum prohibitum*, and not *malum in se*." To the proposition that, from a "moral standpoint, there is no wrong in such a contract," we may reply that this was a matter exclusively for legislative consideration and determination. There is even less force in the suggestion that, from a legal standpoint, such a contract is unobjectionable for the reason that "the most that can be said of [it] is that it may be *malum prohibitum*, and not *malum in se*." The law gives recognition to no such distinction. See 15 Am. & Eng. Enc. Law, 939, and cases cited in note 1. We are not, however, inclined to hold counsel down to this fallacious argument; for the act of 1876 did not in terms undertake to prohibit the making of contracts other than those therein expressly authorized, and therefore the real question presented for decision is whether or not a contract such as that declared on in this case should be held to be illegal, as being contrary to public policy. We entertain no doubt as to this point. The constitution of this state declares, "There shall be within the state of Georgia neither slavery nor involuntary servitude, save as a punishment for crime after legal conviction thereof." Civ. Code, § 5714. Accordingly, under the law as it stood on June 15, 1897, the only protection which persons associating together as a lessee company could successfully invoke, as intervening between themselves and a criminal prosecution for false imprisonment, was the enabling act of 1876 above mentioned. That is to say, this statute authorized certain things to be done which otherwise would be criminal, whereas acts not by its terms brought within its protection remained illegal, if unlawful before its passage. It follows that the legislative will as thus expressed should be regarded as declaratory of the public policy of the state at the time the agreement under discussion was made. The general assembly did not see fit to authorize "sawmill" contracts, or contracts with respect to numerous other legitimate business enterprises and useful occupations. It is not improbable that the "labor problem" had its influence, and that it may have been considered injudicious to permit "convict labor" to come in competition with "free labor" in the ordinary branches of trade. Again, the framers of the law may have been reluctant to so "leave the bars down" as to render it possible for helpless criminals to be forced against their will to engage in perilous occupations,—such, for instance, as the manufacture of powerful explosives. Really, however, the true reason is of absolutely no consequence, for the law must be enforced as written. Judgment affirmed. All the justices concurring.

(113 Ga. 881)

WRIGHT v. McCORD.

(Supreme Court of Georgia. July 19, 1901.)

ESTOPPEL IN PAIS—EXECUTION—CLAIM OF THIRD PERSON.

1. One who, for the purpose of inducing another to lend money to a third person upon land as security, represents to the person from whom the loan is sought that the land offered as security belongs to the proposed borrower, and who thus procures the loan to be made, is, in a proceeding by the lender to subject the land to his debt, estopped from thereafter denying that title to the same was in the borrower at the time the deed was executed, and asserting that title was at the time in himself.

2. Where, under such circumstances, the lender reduces his claim to judgment and reconveys the land to the borrower, and causes it to be levied upon, and the person who so procured the loan to be made files a claim, the plaintiff in execution on the trial of the issue thus made, and without special equitable pleadings, is, upon the facts being made to appear as above stated, entitled, as against the claimant, to a verdict and judgment subjecting the property to the execution.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by W. S. McCord against John A. Wright. Judgment for plaintiff. On levy of execution, W. A. Wright filed a claim. Judgment for plaintiff in execution, and claimant brings error. Affirmed.

The following is the official report: McCord obtained a judgment against Wright in 1889. Execution issued therefrom, and was levied on certain land as property of the defendant, John A. Wright, and a claim was interposed by W. A. Wright. On the trial of said claim the court directed a verdict finding the property subject. The defendant made a motion for a new trial on the ground that the verdict was contrary to law and evidence, and that the court erred in directing the verdict; the evidence not showing title in the defendant before the judgment, nor possession of the property after judgment. The motion for new trial was overruled, and the defendant excepted. On the trial the following evidence was introduced by the plaintiff, to wit: Said execution, and three deeds to the land in dispute,—one to John A. Wright, made in 1888 and recorded in 1889; one a loan deed from John A. Wright to W. S. McCord, made and recorded in 1897; and one from W. S. McCord to John A. Wright; said last-mentioned deed being made pursuant to the statute for the purpose of levy and sale. Said deed was recorded prior to the levy to which this claim was interposed. Also two bank checks, dated June, 1897, signed by Charles Whiteford Smith,—one payable to John A. Wright, and indorsed by John A. Wright and W. A. Wright; the other payable to H. M. Atkinson, and indorsed by H. M. Atkinson. Charles W. Smith testified as follows: "W. A. Wright told me that the property was his brother's, and he never intimated that the property was his until long after the loan

deed had been made, and a default in the interest. Application for the loan was brought to me by C. N. Allen and W. A. Wright. W. A. Wright told me that he represented John A. Wright, who lived in DeKalb county. The application had already been handed to me, signed up, and I supposed it had been signed by John A. Wright, as his name was signed to it. Part of the money was paid to H. M. Atkinson, who held the prior mortgage on the property. The balance going to John A. Wright was paid in a check payable to his order. I never heard of W. A. Wright claiming any interest in the property until long after the loan deed had been made, and a default in the interest." Claimant testified as follows: "When I made the application through C. N. Allen, I bought the property, and paid every dollar of the purchase price for the same. The property was vacant when I bought it, and I built all the houses on lot. I paid all taxes on same, repairs, and insurance. John A. Wright was never in possession of said property. I signed the name of John A. Wright to the application, believing that I had the right to sign it. I never told Mr. C. W. Smith that I signed it, because I did not think it necessary."

T. C. Battle and W. I. Heyward, for plaintiff in error. C. W. Smith and Arminius Wright, for defendant in error.

LITTLE, J. 1. The above report of this case clearly shows a state of facts which would estop W. A. Wright, the claimant, from denying title to the land in question to have been in John A. Wright, the defendant in *fi. fa.*, as against McCord, the plaintiff in *fi. fa.*, at the time the loan was made by McCord to John A. Wright; it appearing that W. A. Wright acted for John A. Wright in securing the loan, and represented to the lender that title to this land which was offered as security was in John A. Wright; the loan having thereby been secured as desired; McCord having taken a deed to the land from John A. Wright as security for the loan.

2. It is only claimed for the plaintiff in error that an equitable estoppel cannot be urged on the trial of a claim case unless the pleadings so authorize. We do not agree with this contention. The only issue which was raised in this case was raised by the claimant, and the only question with which he was concerned was whether, as to him, the land levied on was subject to the execution. No one else had any interest in or could be bound by the judgment rendered in the case, except the plaintiff in *fi. fa.* and the claimant. If as to the claimant the land was subject, that was an end of the case; and this we think could be shown, as was done, without any amendment to the pleadings. It is in cases where for some equitable cause a verdict is to be molded in a claim case that there must be pleadings sufficient to in-

dictate the character of the finding sought, and supported, perhaps, by a proper prayer. But where the naked question as to whether the land levied on is subject to the legal process which has seized it, and this issue is raised upon an ordinary claim proceeding, we know of no reason why there should be separate pleadings, alleging that the land is subject, because the claimant is estopped from asserting his title. Proof of such estoppel determines the issue in favor of the plaintiff. Judgment affirmed. All the justices concurring.

(113 Ga. 687)

SAVANNAH, F. & W. RY. CO. v. JORDAN.

(Supreme Court of Georgia. May 23, 1901.)

TOWNS—CITIES—STATUTES—EFFECT—CITY COURT—JURISDICTION OF SUPREME COURT.

1. A place once incorporated by an act of the general assembly as a town will not become one of the cities of this state until there is a legislative enactment expressly declaring that such place is a city, and the mere fact that in different legislative acts referring to such town it is sometimes designated as a "city" will not make it a municipal corporation of the character indicated by that term.

2. Valdosta having been incorporated as a town in 1860, and the act incorporating it as such having never been repealed, its existence as a town has not been affected by the numerous acts of the general assembly referring to it as a city.

3. This court has no jurisdiction of a writ of error sued out for the purpose of having reviewed a judgment rendered by the city court of Valdosta.

(Syllabus by the Court.)

Error from city court of Valdosta; W. H. Griffin, Judge.

Action by C. R. Jordan against the Savannah, Florida & Western Railway Company. Judgment for plaintiff. Defendant brings error. Dismissed.

Wilkinson & Crawford and D. H. Pope, for plaintiff in error. Toomer & Reynolds, J. R. Walker, and Howard Van Epps, for defendant in error.

COBB, J. The general assembly has the power under the constitution to create a court at any place in the state, and to style such a court a city court. But the general assembly has no power to create a court, and call it a city court, and provide that the errors of such court may be corrected by direct bill of exceptions to this court, unless the court is established in a city of this state. *Telegraph Co. v. Jackson*, 98 Ga. 207, 25 S. E. 264. The power to create municipal corporations and style them cities is vested in the general assembly. Without reference to the question whether the general assembly has authority to establish city courts, the judgments of which are reviewable by direct bill of exceptions to this court, in any place which they may see proper to style a city, it is absolutely certain that the general assembly cannot establish such a city court in any place which

has not by express legislative enactment been incorporated as a city. It has been distinctly ruled that the general assembly has no power to declare that a place which is incorporated as a town shall be a city for the sole purpose of establishing a city court therein, the judgments of which are reviewable in this court by direct bill of exceptions. *Wight v. Wolff*, 112 Ga. 169, 37 S. E. 395. It has also been ruled that an act establishing a city court at a place which is incorporated as a town will not have the effect of bringing such court within the class of city courts referred to in that section of the constitution which fixes the jurisdiction of this court, notwithstanding the act creating the city court refers to the place at which it is established as a city, and distinctly declares that the court shall be located at the place thus apparently recognized as an existing city. *Atkinson v. State*, 112 Ga. 402, 37 S. E. 746. It is clearly settled by the decisions just referred to that a place distinctly incorporated as a town does not become a city by reason of the fact that the general assembly, in an act in relation to the affairs of such town, refers to it as a city. In order to create a city in the first instance, it is necessary for the general assembly to expressly declare its intention that a given place shall be so designated and recognized. In order to change a town into a city, a similar express legislative declaration is essential; and, where a place has been distinctly incorporated as a town, the character of the municipal corporation thus created continues unchanged until there has been a legislative declaration, which not only, in effect, says that the place shall no longer be designated as a town, but expressly declares that it shall be classed as one of the cities of the state. The town of Valdosta was incorporated in 1860. Acts 1860, p. 107. In 1887 it was still recognized as the town of Valdosta. In that year the general assembly passed an act which was entitled "An act to amend an act incorporating the town of Valdosta, in the county of Lowndes, approved December 7, 1860." Acts 1887, p. 595. This act declared that the municipal government of "the city of Valdosta" shall be vested in a mayor and six councilmen, "who are hereby constituted a body corporate, under the name and style of the mayor and council of Valdosta." And in the same section of the act Valdosta is referred to as "said town." At various places in the act it is referred to as the "city of Valdosta," and at other places as the "town of Valdosta." There is no express declaration in the act that the "town of Valdosta" shall thereafter be known as the "city of Valdosta," and the use of the expression "city of Valdosta" will not alone have the effect of changing the character of the municipal corporation then existing, especially when the words "town" and "city" seem to be used interchangeably throughout the entire act. If there has ever been any act of

the general assembly expressly declaring that the town of Valdosta shall become a city, our attention has not been called to the same. It has been referred to as the city of Valdosta in various legislative acts, just as in the act of 1887. See Acts 1889, pp. 54, 1001; Acts 1893, p. 453; Acts 1896, p. 258; Acts 1899, p. 296; Acts 1900, pp. 469, 472. In 1897 the general assembly established the "city court of Valdosta." In the title to this act Valdosta is referred to as a city, and in the first section of the act it is provided that the city court of Valdosta shall be established "in the city of Valdosta." Acts 1897, p. 498. The general assembly had no authority to make the judgments of this court reviewable by the supreme court, and so much of the act of 1897 as attempts to accomplish this purpose is unconstitutional and void. This results from the fact that at the date of the passage of that act there had never been any express legislative enactment incorporating Valdosta as a city. Writ of error dismissed. All the justices concurring.

Application for a Rehearing.

(July 16, 1901.)

An application for a rehearing was made in this case upon two grounds: First, that the court had erroneously reached the conclusion that Valdosta had never been incorporated as a city; second, that, even if this conclusion was correct, it was in conflict with previous rulings of this court in reference to other municipalities. We are satisfied with the conclusion reached that Valdosta, according to the charter originally granted and the various acts amendatory thereof, has never been incorporated as a city; and this conclusion is to our minds satisfactorily supported by what is said in the opinion rendered in this case, and also by the decisions of this court cited in the opinion. We do not think that the ruling made in the present case is in conflict with any decision heretofore rendered; certainly not with any to which our attention has been called. While it does not appear in the decision in the case of *Cooper v. State*, 103 Ga. 405, 30 S. E. 249, that Lawrenceville had been incorporated as a city prior to the passage of the act establishing the city court which was located in that place, it is a fact that Lawrenceville had been at that time expressly incorporated as a city. Acts 1897, p. 258. It is due to counsel who asked a rehearing, and called attention to the *Cooper Case*, as one in conflict with the ruling made in the present case, to say that, after his brief had been filed, he filed an additional brief, in which he stated that his attention had not been called to the act of 1897 when his original brief was filed. It is also claimed that the ruling made in the present case is in conflict with the decision in *Heard v. State*, 113 Ga. 444, 39 S. E. 118. We have not examined critically the act incorporating Carrollton, and the various

acts amendatory of that act, for the reason that the question whether Carrollton was incorporated as a city was not raised in the record in the case just referred to. The sole question presented in that case was that, conceding for the purpose of that decision that Carrollton had been incorporated by the general assembly as a city, was it, on account of its comparatively small population, a city in which the general assembly had authority to create a city court from which a writ of error would lie direct to this court? The question whether Carrollton had in fact been incorporated as a city was not presented or decided in that case. Counsel for the accused and for the state presented the case as one in which the general assembly had created a city, and the court decided the only question that was raised on the motion to dismiss the writ of error; that is, whether the general assembly could constitutionally establish a city court in a city of the population of Carrollton. Motion for a rehearing denied. All the justices concurring.

(51 S. C. 321)

PEARSON v. MUTUAL INS. CO. OF GREENVILLE et al.

(Supreme Court of South Carolina. July 29 1901.)

MUTUAL INSURANCE—PERSONS NOT MEMBERS.

Under 22 St. at Large, pp. 640, 641, § 2, authorizing a mutual insurance company to insure places of business of its members in the state, the corporation has no authority to insure property of a husband, his wife being a member of the company.

Appeal from common pleas circuit court of Orangeburg county; Aldrich, Judge.

Action by James H. Pearson against the Mutual Insurance Company of Greenville, S. C., and Mary A. Pearson. Motion to dismiss complaint refused, and defendant company appeals. Reversed.

The order of the circuit court in passing on defendant's demurrer is as follows: "This action comes before this court upon a motion to dismiss the complaint herein upon the ground that said complaint 'fails to allege facts sufficient to constitute a cause of action, in that (1) it appears from the face of the complaint that the defendant the Mutual Insurance Company of Greenville, S. C., made its contract, not with the plaintiff, but with its co-defendant, Mary A. Pearson; (2) it appears upon the face of the complaint that the plaintiff was not a member of the defendant corporation, and under its charter the said corporation has power to insure only the property of its members.' The complaint alleges that the defendant the Mutual Insurance Company of Greenville, S. C., is a corporation existing under the laws of this state. See 21 St. at Large, p. 1120. Under its charter the corporation 'did not have the power to insure the property of any but members of the association.' *Jacobs v. Insurance Co.*

52 S. C. 112, 29 S. E. 533. What a stranger to the insurance company must do to become a member of the corporation is not clearly stated in the act. It is possible that a person may be a member but not a policy holder in the company. A policy holder, under the act, must be a member of the company. From the allegations of the complaint, and the wording of the motion to dismiss the complaint, it would seem that one must make an application for insurance, and that the company, if it wishes to do so, may issue its policy of insurance to such applicant. According to the allegations of the complaint, which, for the purpose of this motion, must be regarded as true, the defendant the insurance company did not wait for the plaintiff to apply for insurance, but approached plaintiff and solicited plaintiff to insure in the defendant company. The complaint, after alleging that the plaintiff was the owner of the property insured, alleged that W. P. McKens, 'as supervisor or agent of the defendant company,' came to plaintiff 'while absent from his house and solicited the plaintiff to insure his property in the company of the defendant'; that plaintiff consented, stating that the property belonged to him, but that he was then too busy to go to the house to attend the same, whereupon the said W. P. Pickens stated that 'the wife of plaintiff could attend to the matter as well as if plaintiff were there in person, and plaintiff assented thereto.' These allegations clearly state that the action of the plaintiff was predicated upon the representations of the agent of the defendant company. It is distinctly alleged that the agreement to insure was made by the said agent with the plaintiff, and that said agent 'stated that the wife of plaintiff could attend to the matter as well as if plaintiff was there in person.' Accordingly it is alleged in the complaint that said agent went to the house, and then 'wrote out an application for the proposed insurance, and had Mary A. Pearson, the wife of plaintiff, to sign the same.' If the agreement was not carried out, it was the fault of the agent of the defendant company, and the failure of said agent to carry out said agreement was after he had notice a second time that plaintiff was the owner of the property. Even after the second notice said agent 'had Mary A. Pearson' to sign the application. The complaint alleged that 'the policy was issued by the defendant company in the name of Mary A. Pearson, instead of the name of the plaintiff.' The next allegation in the complaint was 'that the plaintiff paid all of the advance fees, premiums, and assessments, and all of the same thereafter accruing, and performed all of the conditions precedent required to be by him performed, as the insured, by the said written policy of insurance.' It is therefore alleged that plaintiff contracted with the defendant company for insurance, and paid said company for such insurance. Defendant

company should not be permitted to take advantage of its own wrong. It should not be allowed to solicit business, sell insurance, accept pay therefor, and then refuse to comply with its agreement. I think that the views herein expressed are in accord with the law as stated in *Sparkman v. Supreme Council*, 57 S. C. 16, 35 S. E. 391, and that the case of *Jacobs v. Insurance Co.*, 52 S. C. 112, 29 S. E. 533, is not hostile thereto. Wherefore it is ordered, adjudged, and decreed that the motion to dismiss the complaint herein be, and hereby is, refused and dismissed."

The defendant insurance company appeals on following exceptions: "First. His honor erred in not sustaining appellant's motion to dismiss the complaint upon the ground that it failed to allege facts sufficient to constitute a cause of action in that (1) it appears from the face of the complaint that the defendant the Mutual Insurance Company of Greenville, S. C., made its contract, not with the plaintiff, but with its co-defendant, Mary A. Pearson; (2) it appears upon the face of the complaint that the plaintiff was not a member of the defendant corporation, and under its charter the said corporation has power to insure the property of only its members; (3) the complaint fails to allege that the plaintiff was a member of the defendant corporation, and under its charter appellant had no power to insure other than its members. Second. Error in holding: 'It is therefore alleged that plaintiff contracted with the defendant company for insurance, and paid said company for such insurance. Defendant company should not be permitted to take advantage of its own wrong. It should not be allowed to solicit business, sell insurance, accept pay therefor, and then refuse to comply with its agreement.' It being respectfully submitted that, if the company has no power to insure property of other than members, any alleged contract with any other person or persons would be ultra vires, and beyond the reach of estoppel. Third. Error in holding that the case of *Jacobs v. Insurance Co.*, 52 S. C. 112, 29 S. E. 533, is not hostile to the view expressed in the said decree. It being respectfully submitted that the said decree is directly repugnant to the doctrine of the said case, and under the authority of said case appellant's motion should have been sustained. Fourth. Error in holding: 'It is possible that a person may be a member but not a policy holder in the company.'"

Carey & McCullough, for appellant. Wm. C. Wolfe, for respondent.

POPE, J. (after stating the facts). The plaintiff brought his action against the defendant the Mutual Insurance Company of Greenville, S. C., to recover the sum of \$275 because of the loss by fire of a small dwelling house and some personal property alleged to be protected from loss by fire by the policy of insurance issued by the defendant the

Mutual Insurance Company of Greenville. At the trial before his honor Judge James Aldrich and a jury, when the complaint was read the defendant (appellant) made its demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, in this: "(1) That it appeared from the face of the complaint that the defendant insurance company made its contract, not with the plaintiff, but with its co-defendant, Mary A. Pearson; (2) the complaint failed to allege that the plaintiff was a member of defendant corporation, and under its charter the said corporation had power to insure the property of only its members." The circuit judge overruled the demurrer in an order, which the reporter will include in his report of this cause. From this order the defendant insurance company appealed, and these grounds of appeal may be set out by the reporter.

We will reproduce the complaint, omitting the first article, which merely alleges the corporate character of the defendant insurance company, as follows: "(2) That the plaintiff during the times hereinafter mentioned was the owner in fee of the following described real estate, to wit: One certain one-story frame dwelling and one two-story frame barn, with the sheds attached, all of which was appurtenant to a certain tract of land situate in said state and county. (3) That the plaintiff was likewise the owner of certain household goods, furniture, wearing apparel, etc., at the time hereinafter mentioned. (4) That about the 1st of February, 1898, one W. P. Pickens, as supervisor or agent of the defendant the Mutual Insurance Company of Greenville, S. C., came to plaintiff, where he was working in his field, some distance from his said house, and solicited the plaintiff to insure his property in the company of the defendant the Mutual Insurance Company of Greenville, S. C.; that plaintiff finally consented, stating to the said W. P. Pickens that the property belonged to him, but that he was then too busy to go to the house to attend to the same, whereupon the said W. P. Pickens stated that the wife of plaintiff could attend to the matter as well as if plaintiff was there in person, and plaintiff assented thereto. (5) That the said W. P. Pickens thereupon left plaintiff and repaired to his house, where the said W. P. Pickens wrote out an application for the proposed insurance, and had Mary A. Pearson, the wife of plaintiff, to sign the same. (6) That the defendant Mary A. Pearson distinctly informed the said W. P. Pickens that the property proposed to be insured belonged to her husband, the plaintiff herein. (7) That on the 14th February, 1898, the defendant the Mutual Insurance Company of Greenville, S. C., issued its policy, No. 3,252, by which it insured the said real property belonging to plaintiff to the amount of \$225, and the said personal property of plaintiff to the amount of \$50, against loss or damage from or by fire from

noon on February 14, 1898, until expiration of the company's charter, provided the policy was kept in force by the performance on the part of the insured of the conditions provided in the said written policy of insurance; but the policy was issued in the name of the defendant Mary A. Pearson, the wife of the plaintiff, instead of to the plaintiff in his own name. (8) That the plaintiff paid all of the advance fees, premiums, and assessments, and all of the same thereafter accruing, and performed all of the conditions precedent required to be by him performed, as the insured, by the said written policy of insurance. (9) That the defendant Mary A. Pearson in the making of the said application acted as the agent of the plaintiff; that she likewise received and held the said policy of insurance in her name as the agent of the plaintiff, for his benefit; and also that a trust thereby arose and resulted in favor of plaintiff. (10) That about February 1, 1899, the said buildings and said personal property were totally destroyed by fire, to the damage of plaintiff \$800. (11) That, although duly notified, the defendant the Mutual Insurance Company of Greenville, S. C., refuses to pay any part of the said insurance, and that the said defendant company is now liable for and owes the plaintiff the sum of \$275, with interest thereon. (12) That, although duly offered, the defendant the Mutual Insurance Company of Greenville, S. C., refuses to arbitrate the questions at issue between them and the plaintiff. (13) That the defendant Mary A. Pearson has or claims to have some interest in the said policy of insurance. Wherefore the plaintiff demands judgment: First, that the interest, if any, of the defendant Mary A. Pearson be determined by a judgment of this court; second, that the plaintiff recover against the defendant the Mutual Insurance Company of Greenville, S. C., the sum of \$275, with interest thereon from the date of said loss until paid; third, for his reasonable costs and disbursements."

There is no doubt that the conclusion of the circuit judge would have been correct, in holding that the defendant insurance company would have been estopped both in denying the contract with the plaintiff whereby the house and lot were insured in the wife's name instead of his own, because they received his money, and because, also, its agent, W. P. Pickens, took part in procuring this insurance, if the charter had not restricted its power to insure property to persons who were members of the insurance company. Section 2 of its charter, under the act of 1897 (22 St. at Large, pp. 640, 641), reads as follows: "Sec. 2. That the corporation [the Mutual Insurance Company of Greenville, S. C.] shall have the right to mutually insure the places of business, dwelling houses, barns and other buildings and property of its members in Greenville county or elsewhere in the state—such insurance to be against loss by fire, wind or lightning—upon such terms

and under such conditions as may be fixed by the by-laws of said corporation, and all policies heretofore issued by said corporation upon all kinds of property of its members are hereby validated."—approved the 2d day of March, A. D. 1897. (Italics ours.) The charter is a limitation upon the corporation itself and all of its agents. The public is bound to deal with such corporation within its chartered powers, where such chartered powers emanate from the state and are contained in the published laws of this state. When, therefore, a chartered corporation and citizens deal with each other with respect to a subject-matter covered by the charter, but at direct variance with the powers conferred by the state's charter, they do so at their peril. Such acts of the chartered corporation are ultra vires. This court, in the case of *Jacobs v. Insurance Co.*, 52 S. C., at page 119, 29 S. E. 537, has declared that: "Under the charter of the corporation, it did not have the power to insure the property of any but members of the association. She [Mrs. Jacobs] was not a member, and therefore her property could not be insured." There is no doubt but that the agent, W. P. Pickens, as the agent of the defendant insurance company, could bind his principal, both by his knowledge and his acts, within the scope of his agency, but also within the powers conferred by the charter of the insurance company, even if this is a mutual benefit insurance company. *McBryde v. Insurance Co.*, 55 S. C. 589, 33 S. E. 729, and *Sparkman v. Supreme Council*, 57 S. C. 16, 35 S. E. 391. All the conversation had by W. P. Pickens, as agent, and Mr. and Mrs. Pearson, before the application in writing was signed by Mrs. Pearson, and the policy thereon was issued to Mr. Pearson, was absorbed by and merged in the written instruments. It thus appeared that Mrs. Pearson became a member, but she did not own the house and personal property, for both of these were the property of Mr. Pearson, the plaintiff, respondent. The result is quite a hardship to this poor, deserving plaintiff, yet we are unable to wrest the law from its declared purpose. The circuit judge was in error, and his order must be reversed. It is the judgment of this court that the judgment of the circuit court be reversed, and the action be remanded to that court to sustain the demurrer to the complaint.

(61 S. C. 232)

PERRY v. JEFFERIES.

(Supreme Court of South Carolina. July 24, 1901.)

TRESPASS—COMPLAINT—EVIDENCE—HARMLESS ERROR—MALICE—DAMAGES—INSTRUCTIONS—DEFENSES.

1. A complaint in an action of trespass, alleging unlawful entry on lands of plaintiff, cutting down and removing timber therefrom, thereby injuring said lands, and fixing the value of the timber and the damages caused to the

lands separately, states but a single cause of action.

2. In an action for trespass to land, it was not error to allow plaintiff to testify that certain persons cut down her timber, without first proving that they were agents of defendant.

3. Any error in admitting instructions by landowner to his agent as to posting notices forbidding trespass on his lands is cured, where the agent thereafter testifies as to what he did.

4. Where there was sufficient evidence of loss of notices forbidding trespass on property of plaintiff, secondary evidence thereof was properly admitted.

5. Evidence of a suit between plaintiff and another party in no way connected with the existing suit was properly excluded.

6. Where parties in trespass had previously agreed on a dividing line between lands, it is competent for plaintiff, to repudiate malice and willfulness, to show that the lands trespassed on were claimed by him before location of line.

7. Where the court erroneously forbids a certain line of cross-examination, and thereafter admits his error, plaintiff should be required to restore the witnesses for cross-examination.

8. In order to determine the value of wood cut from the land in question, witnesses may base their estimate from quantity cut and measured on adjoining land.

9. Where, in an action of trespass, defendant pleads that since settlement of boundary line he has not trespassed beyond the same, plaintiff is entitled to show other acts of trespass than that sued for.

10. Any error in excluding certain evidence on cross-examination is cured by subsequently allowing another party to testify to such facts.

11. Statement of a witness to another party is inadmissible, as hearsay.

12. In an action of trespass, where the fact that the parties had agreed on a dividing line by deed is clearly established, no evidence of the true line as claimed by one of the parties is admissible.

13. An action for trespass and cutting timber may be maintained by a party in possession, whether he holds as life tenant or under conditional fee.

14. In an action for trespass in cutting down timber, a charge illustrating the method of calculation of damages to the land by such cutting is not erroneous, as a charge on the facts.

15. One entitled to immediate possession of land, though not in actual possession, can maintain trespass.

16. That a man cuts wood under a belief that it is on his own land is no defense to an action for trespassing on the land of another.

Appeal from common pleas circuit court of Cherokee county; Hudson, Special Judge.

Action by Elizabeth Perry against Samuel Jefferies. Judgment for plaintiff. Defendant appeals. Affirmed.

The following is the record as to what transpired as to the loss of notices forbidding trespassing: "Q. Mrs. Perry, you stated awhile ago in your testimony that you notified Mr. Jefferies to quit cutting the timber. Did you have these notices put up on the land? Ans. Yes, sir. I also gave Mr. Jefferies one of them. Q. What did those notices contain? (Objected to. The notices are the best evidence.) Court: That is right. Mr. Bell: This has been five years ago, and it is impossible for us to produce them. Court: You have to prove it. Mr. Hall: Mrs. Perry, can you get one of those notices? Ans. No, sir; I don't know that I can; but I have witnesses. Mr. Hall: The notices are lost.

Can we not give the substance of them? Mr. Jefferies: You have not proven that they are lost, yet. Q. Would it be possible for you to get one of those notices, Mrs. Perry? Ans. I don't know, sir. Q. You know whether any of them are in your possession or not, don't you? Ans. I don't think we have any of them. Q. Mrs. Perry, just state to the jury what was the substance of those notices? Mr. Jefferies: There has not been sufficient proof of the loss of them. She said that she don't know whether she could find them or not. She has not proven even that she has looked for them. Mr. Hall: What became of those notices, Mrs. Perry? Ans. Torn down and thrown away and lost. Q. You don't know where those notices are? Ans. No, sir. Q. Now, Mrs. Perry, give us the substance of those notices. Ans. I don't know whether I can or not; but it was to stay off, and not to trespass."

From judgment for plaintiff, defendant appeals on following exceptions: "(1) Because the court erred in allowing the witness Elizabeth Perry to testify about the cutting of timber by certain parties, without first proving that they were the agents or employes of the defendant. (2) That the court erred in allowing the witness Elizabeth Perry to testify what she told the parties who were cutting the timber on her alleged land, there being no proof that they were the agents or employes of the defendant. (3) The court erred in allowing the witness Elizabeth Perry to testify what she had told her son to do in the way of putting up notices on the land, and what he had Mr. Webster to do in the premises, the same being hearsay evidence. (4) The court erred in allowing the witness Elizabeth Perry to give the contents of written notices, it being respectfully submitted that sufficient proof of the loss of such notices had not been given. (5) The court erred in holding that the evidence of a suit previously brought by this plaintiff against the carpet mill for damages amounting to \$1,500 to this same tract of land had nothing to do with the present suit; the error complained of being that anything that might go to show the litigious character of this plaintiff, or the value of the land injured, would be competent to argue to the jury in this case. (6) That the court erred in not allowing defendant's attorney to cross-examine the witness R. O. Sams fully as to the boundary and lines of survey made by him; the error complained of being that the defendant was precluded and prevented from showing that the line up to which he had cut was really his own land, although he may have subsequently given it up to the plaintiff in order to avoid litigation. (7) That his honor erred in not allowing the defendant to show by the evidence of the witness R. O. Sams that the land cut over was really at the time of the cutting his own land, or the land of any other person than that of the plaintiff; the error complained of being that this was a suit for

willful and malicious trespass, the title of the plaintiff being denied by the answer of the defendant, and the effect of such ruling being to preclude the defendant even from showing mitigation of damages; and it being the rule, it is respectfully submitted to this court, that the defendant would have the right to prove the title to the land at the time of the cutting, in himself or any other person than the plaintiff, notwithstanding the fact he may subsequently have surrendered the land to the possession of the plaintiff by way of compromise, in order to avoid litigation. (8) That the court erred in refusing to allow the defendant to ask the witness R. O. Sams the question as to whether or not the line of Samuel Jefferies' land as contained in the deed from H. G. Gaffney to Samuel Jefferies and others called for the line on the land of the plaintiff as first surveyed by him, and up to which the defendant claimed to have cut; the error being that, even if the land over which the cutting was done should be proven to be the plaintiff's land, still the defendant might show peaceable possession thereof, in mitigation of damages. (9) The circuit judge erred in refusing to allow the defendant to prove the boundary of defendant's land adjacent to plaintiff's by the witness R. O. Sams; the error complained of being that this was a cross-examination, and defendant should be allowed to make out his whole case, if possible, by plaintiff's witnesses. (10) That the circuit judge erred in ruling out the deed from H. G. Gaffney and others to Samuel Jefferies, offered in evidence and proven by the witness R. O. Sams, to show the true line, in mitigation of damage; the error committed being that defendant might show by any competent evidence location and possession, in mitigation of damages. (11) That the court erred, after modifying his rulings to some extent, in not requiring the plaintiff to put up the witness R. O. Sams, that he might be cross-examined by the defendant. The error complained of being that his honor forced the defendant to use witness R. O. Sams as his own witness, when all of the evidence could have been procured by cross-examination of said witness. (12) That his honor erred in allowing the witness T. J. Stacy to testify how much timber there was on the land alleged to have been cut over, forming his opinion from the timber which grew on adjacent lands, and not on the land itself; the error complained of being (a) that his opinion is inadmissible; (b) if admissible at all, it should be given upon the timber which grew on the land alleged to have been cut over, and not from that of adjacent land. (13) Because the court erred in allowing the witness D. W. Cooper to testify the amount of the timber cut off of the land in dispute, forming his idea from 'ordinary lands,' and not from the land in question; the error complained of being (a) that it would be a mere matter of opinion, which, it is respectfully submitted, was not competent;

(b) if the witness should give his opinion at all, it should be from the facts and circumstances and knowledge he had of the timber growing on the land in question, and not that on 'ordinary lands'; (c) especially is this true when the witness did not know whether or not the land pointed out to him was the land in question. (14) The judge erred in allowing the witness George Moss to testify he 'supposed it was the plaintiff's land now,' over the objection of defendant's counsel; the error complained of being that the witness was merely giving his opinion or supposition of the ownership of land, when the deed proving the location of the land was already in evidence. (15) The court erred in allowing the witness George Moss to testify what was said to him by the son of the plaintiff, without ever connecting him previously or subsequently with any agency from the plaintiff, and saying which son it was that gave him the notice; the error complained of being that it was hearsay evidence. (16) The court erred in allowing witness Ed. McDonald to testify, over the objection of defendant's attorney, as to wood which he cut in 1893; the error complained of being that it was before the time alleged in the complaint at which the cutting was done, and against which, if alleged, the statute of limitation could have been pleaded. (17) Because the judge allowed the witness W. H. Perry to testify for the plaintiff, over the objection of the defendant, as to other acts of trespass than those alleged in the complaint; the error complained of being that such evidence would unjustly influence the jury in giving a verdict against the defendant for the trespass alleged in the complaint, and would prejudice and bias the jury against the defendant. (18) Because the court erred in refusing to allow defendant's attorney to ask the witness M. C. Perry the question whether or not the defendant in this action, Samuel Jefferies, was not a witness for the carpet mill in the suit between this witness and the carpet mill; the object of the question being to show the motive of the bringing of this suit against this defendant, and to discredit his testimony. (19) Because his honor erred in not granting defendant's motion for a nonsuit, it being respectfully submitted to this court that, under a proper construction of the deed by which the plaintiff held, that she had only a life estate in the property, and that all of the injury proven was injury done by the cutting of timber on the place over which she had no control, and which in no wise injured her possession, and there being no proof of damage or injury to her possession before the court. (20) Because the court erred in not allowing the witness Mrs. M. K. Aders to testify as to a conversation had with a son of the plaintiff before that son had been put upon the stand, when he had allowed the plaintiff to testify as to statements made by the plaintiff to hands and laborers of the defendant before proving or showing any agen-

cy or connection between the defendant and his alleged said hands and employees. (21) Because his honor erred in ruling, when R. O. Sams was put up as a witness for defendant, that he could only testify as to where the lines had been run, and in not ruling that the defendant could prove that all of the land cut over was really his; the error complained of being, it is respectfully submitted to this court, that the defendant had a right to prove the ownership of the land which he cut over, in himself, notwithstanding the fact he may have subsequently given up the land to the plaintiff in order to avoid litigation. And especially is this true inasmuch as the defendant admits that under the compromise the land is the property of the plaintiff, but it is further respectfully submitted to this court that he had a right to show the true ownership of the land at the time that he committed the alleged trespass. (22) Because the court erred in ruling that when the question was asked of the witness R. O. Sams, 'Is that, or not, the plat of the entire piece of Mrs. Perry's land?' (being objected to by the plaintiff), 'You cannot ask the witness a question that will go to invalidate the compromise line that has been run,' it being respectfully submitted to this court that the question asked this witness did not tend to invalidate the compromise line as run, but merely to show where the true line was at the time of the cutting or alleged trespass, going to show the defendant's right to do the cutting. (23) Because the court erred in overruling the following question propounded to witness Samuel Jefferies: 'That compromise line that was run, did it, or not, settle all differences between you and Mrs. Perry?' The error complained of being that it is set up in the answer that it was a settlement of all such differences, and, there being no reply to the answer, the defendant had the right to prove the allegations of his answer. (24) Because his honor erred in charging the jury as follows: 'That boundary line the parties are bound by,—bound by as the line between them,—because they have writing binding them;' the error complained of being, it is respectfully submitted, because it precluded from the mind of the jury the original right of the defendant to cut timber from the land as his own land, or as land in which he was in lawful possession by reason of the first survey. (25) Because the court erred in charging the plaintiff's fourth request, as follows: 'It is not necessary for a plaintiff to show that he was in actual and exclusive possession of the lands in question, where trespass is alleged at the time of the trespass, but it is sufficient if he proves that he was entitled to possession then;' the error complained of being (a) that the plaintiff should be in actual possession; (b) that such a charge is a practical admission to the jury that the plaintiff has shown a right of possession, notwithstanding the fact the defendant had been precluded from showing such

right of possession; (c) if such charge should be correct, then, it is respectfully submitted to the court, all the previous rulings of his honor refusing to allow the defendant to show the original, true, and correct line as between the plaintiff and defendant are incorrect. (26) Because his honor erred in not charging the defendant's first request, as follows: 'The deed under which plaintiff in this action holds gives her only a life estate, and, in considering the question of damages, she could recover only such damages as have been caused to her life estate;' the error complained of being that his honor should have construed the deed under which plaintiff held, and charged the jury that she could recover only so much damages as her interest would entitle her to. (27) Because his honor erred in refusing to charge defendant's fourth request, as follows: 'If the defendant should be in possession, although he might be under a mistaken belief that it was his property, this will prevent a recovery.' (28) Because his honor erred in refusing to charge defendant's sixth request, as follows: 'The plaintiff in this action holds only a life estate under her deed, and could not cut the timber from the property herself, only for the purpose of protecting or preserving the property, and can, therefore, recover only such damages as she proves to her possession;' the error complained of being, the deed under which plaintiff held really gave her only a life estate, and that his honor should have construed the deed as requested. (29) Because his honor erred in refusing to charge the defendant's seventh request, as follows: 'The plaintiff in this action, having only a life estate in the land, can recover no damages for any permanent injury to the land, unless it was an injury to her possession; and, if it should be an injury to her possession, then the measure of damage would be actual injury or damage to her possession;' the error complained of being that, under a proper construction of the deed by which the plaintiff held, she had only a life estate in the property, and by refusing to charge the request his honor left it open for the jury to recover the entire injury to the property, as if plaintiff held in fee simple. (30) Because the court erred in refusing to charge defendant's tenth request, as follows: 'If the court should hold that the deed under which plaintiff claims gives her an interest in the land equal to that of her children, then the defendant requests the court to charge the jury that the plaintiff can recover no more damages than would be her pro rata share in the land, and the measure of damages would be the value of the trees cut from the land, unless the cutting was done in a willful and malicious manner, without regard to the right of the plaintiff;' the error complained of being that, under a proper construction of the deed under which plaintiff held, that she could at least have no greater interest in the land than that of a

co-tenant with her children, and as such co-tenant she could not recover the entire amount of damages sustained to the land itself in favor of this plaintiff. (31) Because the court erred in refusing to charge defendant's eleventh request, as follows: 'If the court should hold that the deed under which plaintiff claims gives her a fee-simple title to the property, then the defendant requests the court to charge, 'The measure of damages would be the value of the trees cut from the land, unless such was done in a willful and malicious manner and without regard to the rights of the plaintiff;' the error complained of being that in refusing to charge this request the court left it open for the jury to give a greater damage than the value of the trees cut, whether the cutting was done willfully, maliciously, or not. (32) Because his honor erred in charging the jury as follows: 'Well, her title has been introduced here by a deed upon the construction of which there is a question,—a life tenant under the deed, or a joint tenant with the children, or a tenant in fee. For the purpose of this case, I charge you that, whether a life tenant or a tenant in fee, she has a right to bring this action, and to recover of the defendant such damages as she proves, of the character alleged in the complaint; that is, the cutting and carrying off of the timber. She has the right to bring action, and she has the right to recover whatever amount of damages—whatever trespass—she has established against the defendant;' the error complained of being that in failing and neglecting to construe the deed under which the plaintiff held, and in failing to charge the jury the interest and right of the plaintiff under the said deed, the plaintiff asking for the entire value of the property injured, his honor left it open for the jury to give to this plaintiff the entire damage to the premises caused by the cutting of the trees, the same as if she were the owner in fee, whereas, it is respectfully submitted to this court that the law makes a distinction as to the rights of a tenant for life and tenant in common, or an owner in fee, to recover in such an action as this, and his honor erred in not making such a distinction in his charge, and stating to the jury the respective rights of each party or parties in the said class or classes. (33) Because his honor erred in charging the jury as follows: 'Therefore you must value it as if it were there before removal, or value it as it stood there before it was cut, because that was the plaintiff's property;' the error complained of being that this was a charge upon the facts. (34) Because the court erred in overruling defendant's motion to require plaintiff to elect, and in not requiring the plaintiff to elect, which cause of action she would go to trial on."

J. C. Jefferies, for appellant. Duncan, Sanders, Hall, Hart & Bell, for respondent.

POPE, J. (after stating the facts). This action came on for trial at the special term of the court of common pleas for Cherokee county on the 13th day of November, 1900, before the Honorable J. H. Hudson, sitting as special judge, and a jury. A verdict was rendered for the plaintiff for the sum of \$75. After entry of judgment thereon, the defendant appealed therefrom on 34 grounds. The report of the case will set out these grounds of appeal. We will, in passing upon the grounds of appeal, classify the same.

First, that the circuit judge erred, as pointed out by the thirty-fourth ground of appeal, in not requiring the plaintiff to elect which cause of action she would go to trial upon; the appellant claiming that the complaint set up two causes of action. In her complaint, in the first article thereof, the plaintiff alleged that she was the owner of a certain tract of land, containing about 60 acres, which was separated from lands owned by the defendant by an agreed boundary, under the hands and seals of the plaintiff and defendant, which agreement was set out by a copy thereof attached to the complaint. The second article is as follows: "(2) that during the months of August, September, October, November, and December, 1894, and the months of January, February, March, April, and May, 1895, and especially during the winter and spring of 1895, the defendant willfully, unlawfully, and maliciously, and against the express protest and wish of the plaintiff, and after notice from the plaintiff not to do so, entered upon the lands of the plaintiff hereinbefore described, and cut or had cut therefrom a large quantity of timber, of oak, poplar, and other valuable varieties, of the aggregate value, as plaintiff is informed and believes, of \$500, and sold, used, destroyed, or otherwise disposed of the same, without paying to the plaintiff the value thereof, notwithstanding the plaintiff had repeatedly notified and requested the defendant to desist from said trespass, thereby greatly injuring said land of plaintiff, to her loss and damage in the sum of \$800." The third article names the persons who were in the employ of the defendant when the alleged trespasses were committed. We agree with the circuit judge that the cause of action alleged by the plaintiff to exist as against the defendant is only one, and therefore overrule this ground of appeal.

The next group of exceptions complain that improper testimony was admitted against the defendant's objection: (a) That Mrs. Elizabeth Perry, as complained in the first exception, was allowed to testify that certain parties cut her timber, without first proving that they were agents of the defendant. Of course, if this testimony was not afterwards connected by proof of the agency of such parties for the defendant, it would not have been competent. But it was afterwards fully connected with the defendant. Therefore

there was no error. The first exception is overruled. (b) That Mrs. Perry, the plaintiff, testified as to what she told these agents of defendant while they were cutting timber on her land. There was no error here, because Mrs. Perry had the right to testify as to what she told these witnesses, for the knowledge of the agent was the knowledge of the principal, and, to have this knowledge, plaintiff had to speak, or had the right to speak. So the second exception is overruled. (c) That Mrs. Perry had no right to testify what she told her son, as her agent, to do as to putting up certain notices, and what he had Mr. Webster to do. This was without harm to the defendant, for the son afterwards stated what he did as to the notices under his mother's direction and as her agent. The third exception is overruled. (d) That Mrs. Elizabeth Perry had no right to testify as to the contents of written notices, because insufficient proof was given as to their loss. We think that the proof of the loss of the notices was necessary before their contents could be given by way of secondary evidence. But the loss of these written notices was established; hence secondary proof as to the contents of such written notices was competent. The fourth exception must be overruled.

The next exception (the fifth) relates to the refusal of the circuit judge to allow any evidence as to a suit between the plaintiff against the carpet mill for damages to be given in evidence in the cause at bar. We are at loss to conceive what connection a suit for damages for coloring the waters in a branch on plaintiff's land by the carpet mill could have with the cause at bar. To admit such testimony would open the door to the retrial of the suit of Mrs. Elizabeth Perry against the carpet mill. Such testimony was inadmissible. Let the fifth exception be overruled.

We will next consider the sixth, seventh, ninth, tenth, and eleventh exceptions relating as they do to the witness R. O. Sams. It seems that Mr. Sams was a surveyor, and as such had not only run the dividing line between the plaintiff's and defendant's lands, but had also run a previous line betwixt them. The circuit judge was in earnest to keep out of the testimony in this cause any statements by witnesses as to what differences had been settled by the plaintiff and the defendant by a deed signed, sealed, and delivered by them some time in May, 1895. The deed must speak for itself. The following is a copy of such instrument: "State of South Carolina, Spartanburg County. Articles of agreement made this, the thirtieth day of May, in the year of our Lord one thousand and eight hundred and ninety-five, between Mrs. Elizabeth Perry, wife of A. J. Perry, party of the first part, and Samuel Jefferies, party of the second part, both of Gaffney City, state and county aforesaid,

witnesseth, that whereas a difference of opinion has arisen between the party of the first part and the party of the second part as to the boundary line of the lands of said parties, and between said parties, said lands lying in or near the incorporate limits of said town, Gaffney City; and whereas, said parties are desirous of deciding upon and establishing a permanent line between themselves, their heirs, executors, administrators, and assigns, and thus avoid any litigation respecting the same: Now, know all men by these presents, that in consideration of the matters and things hereinbefore expressed, and in order to settle in a friendly manner all existing differences respecting said line, it is mutually covenanted and agreed by and between said parties that the following described line shall forever hereafter be taken, accepted, known, and established as the boundary line separating the said lands of said parties: Said line beginning * * *. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties hereto. In witness whereof, the parties to these presents have hereunto set their hands and seals at Gaffney City, S. C., the day and year first above written. Elizabeth Perry. [Seal.] Sam'l Jefferies. [Seal.] Signed, sealed, and delivered in the presence of J. D. Jones, J. E. Webster, B. S. Lipscomb." The parties plaintiff and defendant having thus solemnly settled what was the dividing line between their respective adjoining lands, it was very natural for the trial judge to hold the parties to their own deed, and it was altogether proper. But there was one standpoint from which testimony as to the lands butting upon this dividing line might be pertinent, and that was because the plaintiff in her complaint had charged the defendant with a malicious and willful disregard of her rights as affecting lands adjoining this dividing line. Therefore, to negative this allegation of wanton, malicious, and willful disregard of plaintiff's right, the defendant might show that up to 25th day of May, 1895, he had claimed the lands trespassed upon as his own. The trial judge saw this distinction after he had ruled this testimony incompetent, and on coming into court after recess, and on the same day, he announced that the defendant was entitled to have Mr. Sams testify as to the possession of these lands, so far as negating malice, etc. But on the reassembling of the court the illness of defendant was announced, and the trial was postponed until a future day in the same week. When, on Friday, the trial was resumed, the plaintiff declined to restore the witness R. O. Sams for a new cross-examination, and subsequently the defendant had to place him on the stand as his own witness, when he was allowed to testify fully as to this matter. These excep-

tions suggest error as follows: "(6) That the witness R. O. Sams should have been allowed to testify fully as to boundary and lines of survey made by him, as defendant wished to show that the line up to which he had cut timber was really his own land, although he may have subsequently given it up to plaintiff." We do not think this exception correctly points out the difficulty as to this testimony. It was not competent to show anything that would tend to weaken this boundary line. The solemn deed of the parties as to this boundary line shut off all inquiry except as we have heretofore pointed out. All this witness could have been allowed to testify on this point was as to the claim of defendant, under his own deed and prior to 26th May, 1895. (7) This exception is just about, in effect, what we have just stated to be the purport of 6. (8) This exception is practically the same as 6 and 7. (9) This exception is very nearly akin to 6, 7, and 8. (10) This exception is about the same as the others. We think the afterthought of the trial judge was more in consonance with justice than his first ruling. But inasmuch as he corrected his error, in the main way he did, in the afternoon of the day of his first ruling, he thereby corrected any error. The eleventh exception complains that the witness R. O. Sams was not restored to the witness stand as plaintiff's witness, so that the defendant could have had the benefit of his testimony on a cross-examination of such witness. We think the defendant is right in his contention that this witness should have been restored to the witness stand as plaintiff's witness. The error by which a cross-examination was denied the defendant was that of the trial judge. The trial judge had control of the machinery of his court. It was therefore in his power to have had the plaintiff recall this witness as his own for the purpose of a cross-examination by the defendant. And, if it had been so that the cross-examination of this witness would have negated all proof as to the locus in quo of the trespass, a nonsuit might have been the result. But there are two reasons why this exception cannot stand. (1) The witness was restored for full examination by the defendant, and he thus obtained the full benefit of his testimony; (2) there was other proof as to the dividing line and the trespasses of the defendant. No nonsuit could, therefore, have followed. This exception is overruled.

The next group of exceptions embrace the twelfth, thirteenth, fourteenth, and fifteenth grounds of appeal. These relate to the giving of opinion as to the amount of the wood cut by the agents of the defendant upon the land of plaintiff. The defendant errs in supposing that the testimony objected to was the giving of an opinion by these witnesses. Each one spoke of his own knowledge of the land and the timber growing thereon at the

time of the alleged trespass. Their estimate of the amount of the timber actually cut was from a comparison of the yield of cords on contiguous acres, which were cut and measured by cords with the timber cut down on plaintiff's lands which was not actually measured by the witnesses. There is nothing to complain of in allowing these witnesses to make this estimate by comparing the cords actually made with what the same timber on adjoining lands yielded in cords. It is seldom that mathematical accuracy can be reached in such matters. As near to this as human intelligence can come in estimates is the next best method in such cases. So far as the opinion of the witness Moss, when asked as to whose lands he cut and hauled timber from, that the lands belonged to the plaintiff, is concerned, there could be no objection to his statement that such lands were on the side of the agreed line admitted to be on Mrs. Perry's side of the said line. These exceptions are overruled.

As to the sixteenth exception, relating as it does to the testimony of the witness Ed. McDonald, who stated that he cut the timber in the year 1893, it cannot avail the defendant. The matter of dates is difficult, after the lapse of years, to speak of with accuracy. The fact of cutting the timber and by whose direction was the object. The correct date could be given by this witness or by any other witnesses "who knew the exact date." This exception is overruled.

The seventeenth exception relates to an alleged error of the trial judge in permitting the witness W. H. Perry to testify to other acts of trespass than those set up in the complaint. When it is remembered that the answer of the defendant distinctly set up "that since the said boundary line had been established defendant has duly recognized the same, and has never gone beyond the same," this testimony was material. This exception is overruled.

As to the eighteenth exception, relating as it does to the alleged error of the trial judge in declining to allow the defendant to ask plaintiff's witness M. C. Perry whether the defendant was not a witness for the carpet mill in the suit brought by the plaintiff against it, if error at all, was harmless error, for the reason that the defendant, Samuel Jefferies, was allowed to state the fact. The exception is overruled.

As to the twentieth exception, which complains that one of defendant's witnesses was not allowed to testify as to the answer given by one of the sons of plaintiff in a conversation with the said son, it may be stated that it was not offered to contradict such son as a witness. It was therefore purely hearsay, and on that account was not admissible. The exception is overruled.

We will next dispose of the twenty-first and twenty-second exceptions, relating as they do to the witness R. O. Sams. It seems

that the defendant, in his cross-examination of this witness, sought to obtain his testimony on the matter of his survey of the lands of the plaintiff, so as to reach the established boundary between her lands and those of the defendant. The court ruled that, as between the plaintiff and defendant, their deed was conclusive between them. In this matter the trial judge was right, for that solemn instrument between these parties settled the matter between them. These exceptions are overruled.

Exception 19 complains that the trial judge erred in not granting a nonsuit; "it being respectfully submitted to this court that, under a proper construction of the deed by which the plaintiff held, she had only a life estate in the property, and that all of the injury proven was injury done by the cutting of timber on the place over which she had no control, and which in no wise injured her possession, there being no proof of damage or injury to her possession before the court." This deed thus in controversy was as follows: "Know all men by these presents, that I, Marion Amos, of the county of Spartanburg, in the state aforesaid, in consideration of the natural love and affection which I have for my daughter, Elizabeth Perry, wife of A. J. Perry, of Madison county, in the state of Georgia, have granted, given, and released, and by these presents do grant, give, and release, unto the said Elizabeth Perry, all of that piece or parcel of land [here describing land in dispute]. Said land is estimated by me at \$400, and is considered as an advancement to her for that amount, to be deducted out of her part of my estate in its final settlement after my decease, together with, all and singular, the rights, hereditaments, and appurtenances to the said premises belonging or in any wise incident or appertaining. To have and to hold, all and singular, the premises before mentioned unto the said Elizabeth Perry, and her children after her, forever. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises unto the said Elizabeth Perry, and her children after her, against me and my heirs, and all others lawfully claiming or to claim a part, forever." The trial judge denied the motion, but did not enter into an extended construction of the deed. He certainly reached the conclusion that Mrs. Perry and her children were not made tenants in common, but that Mrs. Perry was by the terms of the deed certainly entitled to the full and complete possession of said lands, as a tenant for life, or in fee conditional, or in fee simple. He did not say which, nor will we. The trial judge certainly held that, if the defendant interfered with the plaintiff's possession of that land covered by the deed, the plaintiff had a right of action therefor. Her children were only to have said lands "after her."

We agree with the trial judge, but we might as well remark just here that the only construction of this deed to which the defendant was entitled was as to the plaintiff's right of possession. As to these matters we may have more to say hereinafter. This exception is overruled.

The next group of exceptions comprise the twenty-fourth, the thirty-second, and the thirty-third grounds of appeal. (a) The twenty-fourth complains that the trial judge, in charging the jury, said: "That boundary line the parties are bound by,—bound by as the line between them, because they have a writing binding them,"—and thus shuts out of the minds of the jury "the original right of the defendant to cut timber from the land as his own land, or as land of which he was in lawful possession by reason of the first survey." The trial judge had, at defendant's request, charged the jury: "Possession or ownership of another portion of a tract of land is not sufficient to maintain this action, unless ownership of the particular portion sued upon is shown." He had also charged the fifth request: "If the defendant was in actual possession, and was under the honest belief that it was his property, the jury cannot find punitive damages against him." With these distinct charges to the jury, we cannot say that there was any error in the language of the charge as covered by this exception. It is overruled. (b) This exception (32) quotes certain language of the trial judge as to the deed under which the plaintiff held her land, wherein he charged the jury that the plaintiff, whether as life tenant or tenant in fee, has the right to bring this action, etc., and then alleges that the trial judge erred in not construing the deed so that it might be learned if the trial judge meant to charge the jury whether the plaintiff could recover the entire damages resulting from cutting the timber and hauling it away, or only a part, and, if a part, what proportion of the whole damages. It is evident that the trial judge meant, in his charge to the jury, to say that the plaintiff, under the deed, was entitled to recover, not a part, but the whole, of the damages resulting from cutting and hauling away the timber from the land in controversy. We have before, in treating of the nonsuit, considered the deed. This exception is overruled. (c) The thirty-third ground of appeal complains that the trial judge charged upon the facts when he stated to the jury: "Therefore you must value it as if it were there before removal, or value it as it stood there before it was cut, because that was the plaintiff's property." This court has frequently called attention to the danger of injustice to the trial judge in extracting only a part of the charge. Counsel do not mean to do this, but probably in the hurry of the preparation of exceptions this is made the result. So we will give the charge itself on this point. "It is necessary

by the preponderance of the evidence to your satisfaction that she develops the fact that she is the owner of the land trespassed upon; that the defendant did trespass upon it; did cut and carry off the timber therefrom; and she must satisfy you by the preponderance of the testimony, also, as to the question of trespass, and the value of the timber cut and carried from it. Now, gentlemen, you must—In estimating that, you must estimate the value of that timber as it was cut, the year it was cut, what was the value of it. If you view it as cord wood, why you must find the net value of it; the number of cords; the value as the timber lay upon the ground; because she is seeking to recover the value of timber cut and carried away. The value would be as it was cut. Now, what expense she would necessarily incur in reducing it to cord wood would have to be taken into consideration as the value, if your finding is on that score. Therefore you must value it as if it were there before removal, or value it as it stood there before it was cut, because that was the plaintiff's property. For instance, take the standing timber; then you would have to estimate from the evidence the part cut and the value standing, or the trees felled; then you must ascertain the part cut, and the value of those cut. Now, to illustrate what I mean from that, if you should find, for instance,—if you should find that there were ten cords, trees cut enough to make ten cords, or twenty cords, or any special number of cords of wood, on an acre of land cut up, then you would have to estimate the net value of those cords, value of the cords of wood, as if she had them cut and hauled off and sold. I believe, gentlemen, that is about the mode, manner, to reach the actual value of timber cut and hauled away. If you find that they were logs, saw logs, you will estimate what kind of timber—the number of feet of timber—those logs would make. Estimate the amount of transporting them to the mill and converting them into planks. I think that is the proper mode. So if you find that the defendant trespassed (whether he did or not is the question) on the lands of the plaintiff— If he did, you must ascertain to what extent,—just how much timber he cut and carried away, and the value of it as it was there in its unconverted shape." It is thus apparent from the context of this part of the charge of the trial judge that he was laying down to the jury the methods by which they must be governed in doing exact justice to these parties. No charge upon the facts was had. The words excepted to were a part of the rule for estimating damages. This exception is also overruled.

The next group of exceptions embrace the twenty-fifth exception, where error is alleged in charging one of plaintiff's requests, to wit: "It is not necessary for a plaintiff that he was in the actual possession of the lands

in question, when trespass is alleged, at the time of the trespass, but it is sufficient if he proves that he was entitled to possession." This charge of the circuit judge is sound law, for otherwise fee-simple ownership might result or avail in nothing as against a bare trespasser. This exception is overruled.

The next group of exceptions relate to the requests to charge presented by the defendant, and which were declined by the circuit judge. They embrace the twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first. We will pass upon them in their order. (a) The request was: "The deed under which plaintiff in this action holds gives her only a life estate, and, in considering the question of damages, she could recover only such damages as have been caused to her life estate." The deed showed that plaintiff was certainly entitled to the possession of her lands during her life. This being so, as against third persons she had the right to maintain her right of possession as against the world. Whenever any one trespassed upon these lands by cutting down or removing timber therefrom, the supposed life tenant had a right of action against such trespasser. The appellant possibly confounds the rights of third persons as to life tenants with the rights of remainder-men as to life tenants. The latter can restrain waste, but they cannot recover from the life tenant the property itself. This exception is overruled. (b) The twenty-seventh exception complains that the trial judge should have charged the jury as per fourth request: "If the defendant should be in possession, although he might be under a mistaken belief that it was his property, this would prevent a recovery." The circuit judge was right in refusing this request to charge. It is not sound law that a mistaken belief as to ownership in a trespasser will entitle him to go unharmed by the law for an actual invasion of the property rights of another. When the title and right of possession of land is in one man, any other man must at his peril invade such lands, no matter what he honestly believes. This exception is overruled. (c) The twenty-eighth exception is covered by what we have held as to the twenty-sixth exception, and is overruled for the ground therein given. (d) The twenty-ninth exception is already covered in this opinion, and is overruled. (e) The thirtieth exception is covered by the views we have already announced as to the effect of plaintiff's deed, and is overruled. (f) The thirty-first exception is overruled. The court did not err. He had already charged the rule as to actual damages, and also as to vindictive damages, and he had already charged that, to recover damages, it was not necessary for plaintiff, under her deed to the land, to be held as the owner in fee simple. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(61 S. C. 338)

DRAKEFORD v. SUPREME CONCLAVE, KNIGHTS OF DAMON.

(Supreme Court of South Carolina. Aug. 8, 1901.)

APPEAL—REVIEW—RECORD—ACTION ON CONTRACT—INSTRUCTIONS—APPLICATION FOR INSURANCE—FALSE STATEMENTS—QUESTIONS FOR JURY.

1. An exception to a refusal of new trial will not be considered on appeal where the record does not show that the grounds alleged were urged on the motion before the trial judge.

2. In an action on a contract, an instruction, "If you find there was such a contract," etc., is harmless error as to defendant, where the execution of the contract was not questioned.

3. Where the court instructed the jury that an application for insurance was a part of the contract, the fact that he afterwards stated, "If you find this application was a part of the contract," in a subsequent instruction, was harmless error.

4. It is a matter of fraud where applicant for insurance made misstatements to the physician examining him, and concealed facts, in order to induce the insurance company to issue a certificate.

5. In an application for insurance, the expression "serious illness" means an illness that permanently impairs the health of the applicant.

6. An exception that the court erred in not charging a request of defendant will not be considered for failing to specify wherein there was error.

7. In an action on an insurance policy, the question whether the occasional use of intoxicating liquors or an occasional case of excess renders a person of intemperate habits is for the court, but whether the use is occasional or habitual is for the jury.

Appeal from common pleas circuit court of Kershaw county; Townsend, Judge.

Action by Kate Drakeford, by her guardian ad litem, against the Supreme Conclave, Knights of Damon. Judgment for plaintiff. Defendant appeals. Affirmed.

O. J. Wimberly and W. M. Shannon, for appellant. W. D. Trantham and J. T. Hay, for respondent.

GARY, A. J. The appellant's attorney precedes his argument with the following statement of the case: "This is an action by the beneficiary to collect the amount of a certificate of insurance issued on the life of John R. Drakeford by the defendant, an insurance association. Payment of the certificate is resisted by the defendant on the grounds—First, of misrepresentation and concealment in the application of insurance; and, second, on account of the continuous and excessive intemperate habits of the insured, both before and after the certificate was issued, by which habits his health was seriously impaired. The case was tried before judge and jury at September term of court for Kershaw county, and a verdict rendered for plaintiff for the full amount sued for. A motion for a new trial was made on the minutes of the court, and the motion was refused by the presiding judge. This case comes up to this court on appeal from the verdict and from the refusal of the cir-

cuit judge to grant a new trial. Two grounds of appeal are presented to this court: First, that the jury ignored the charge and instructions of the presiding judge; and, second, that the judge in certain particulars erred in his charge, by which he confused or misled the jury. The first nine exceptions of the defendant refer to matters in which the charge of the judge was ignored by the jury. The circuit judge charged the jury that they must decide this case by the preponderance of the evidence. Under this instruction the jury was directed to consider this case, to take the testimony laid before them in the case, and decide it by the preponderance of the evidence. If the jury failed to so consider and decide the case, then they disregarded and ignored the charge, and the judge should have set the verdict aside and ordered a new trial. The question here is not whether there was sufficient evidence to sustain the verdict of the jury. That would be a matter which this court would not consider, as it is in the discretion of the circuit judge to determine it. But the question made by this appeal is whether the jury has not disregarded the charge of the circuit judge; whether they have not refused to accept the law as given them by the court. If they have, then the presiding judge should have set the verdict aside, and if this court concludes that the jury did disregard and ignore the charge of the circuit judge, then it must follow that he erred, as matter of law, in not setting the verdict aside and ordering a new trial."

1. The first nine exceptions assign error because his honor the presiding judge erred, as matter of law, in refusing defendant's motion for a new trial; the jury having ignored his charge and instructions in the particulars therein mentioned, contrary to the testimony. The order refusing the motion for a new trial is as follows: "The jury having rendered a verdict for the plaintiff in this action, and the defendant having made a motion for a new trial on the minutes of the court, and after hearing argument of counsel on the motion, and duly considering the same, it is adjudged and ordered that a new trial be, and the same is hereby, refused, and the motion dismissed." The exceptions cannot be considered by this court, for the following reasons: (1) The record fails to disclose the fact that the grounds set forth in said exceptions were made the basis for the motion for a new trial; (2) the record does not show that the jury ignored the charge and instructions of the presiding judge, and, as this is a case involving legal issues, this court is inhibited by the constitution from determining the fact from the testimony.

2. The tenth exception is as follows: "That his honor erred in his charge to the jury in saying to them, 'If you find there was such a contract,' the execution of the contract between John R. Drakeford and the defend-

used in charging the defendant's tenth request, which was as follows: "If the jury should believe that the health of the deceased, John R. Drakeford, became substantially impaired from the use of alcoholic liquors, then the plaintiff cannot recover, although he may not have indulged in strong drink so long or so frequently as to become habitually intemperate." His honor said: "I charge you that, under the terms of the contract, if you find there was such a contract, you will see it says 'substantially impaired,' the very words I used a while ago. Probably I said 'materially impaired.' It says here 'substantially impaired,' which means the same thing." The execution of the contract was not in issue, and the passing remark was harmless error. If it had any effect, it was prejudicial to the plaintiff, and not the defendant, as she could not recover unless there was such a contract.

3. The eleventh exception is as follows: "That his honor erred in his charge to the jury, in saying to them, 'If you find his application was part of the contract,' it being the duty of the court to determine whether the application was a part of the contract, and his honor having previously stated to the jury that the application or petition for membership was a part of the contract." This question does not seem to have been contested, and, as the exception shows that his honor told the jury that the application for membership was a part of the contract, there was no prejudicial error. The twelfth exception is as follows: "That his honor erred in his charge to the jury in using the expressions, 'If you find there was such a contract,' and 'If you find his application was part of the contract,' as these expressions tended to confuse and mislead the jury." This is disposed of by what was said in considering the eleventh exception.

4. The thirteenth exception is as follows: "That his honor erred in his charge to the jury in saying to them in reference to the third request of defendant, 'because it would be a matter of fraud if he made his misstatements and concealed facts in order to induce the company to do these things,' as this expression tended to mislead and confuse the jury." The third request of the defendant was as follows: "If the jury believes that John R. Drakeford made untrue statements in his statements to medical examiners, to induce this order to enter into this contract of insurance, then plaintiff cannot recover." His honor said: "I charge you that, because it would be a matter of fraud if he made misstatements and concealed facts in order to induce the company to do these things. That would be a fraud upon the company." If the deceased made misstatements and concealed facts in order to induce the company to enter into the contract, we cannot conceive how any other inference could be drawn than that it was a fraud upon the rights of the defendant.

5. The fourteenth exception is as follows: "That his honor erred in his charge to the jury, in reference to the seventh request of defendant, in saying, 'Sickness may be very bad and very sad, and yet not serious,' as this expression tended to confuse and mislead the jury, and it was a question for the jury to decide whether a very bad and very sad sickness was a serious sickness." The defendant's seventh request was as follows: "That, if the jury believed that John R. Drakeford had been confined to his bed with any serious illness at any time within a period of five years just preceding this application of insurance, then plaintiff cannot recover." The presiding judge said: "I charge you that, with this qualification: That serious illness does not mean any insignificant illness. Serious illness, as I understand and construe it, means something that injures him permanently. A sickness may be very bad and very sad, and yet not serious. Any permanent impairment or material impairment of health, that is what I understand the law to mean when it says 'serious illness.'" The presiding judge used these words in construing the terms of the contract, and not for the purpose of commenting on the facts of the case.

6. The fifteenth exception is as follows: "This his honor erred in not charging the defendant's eleventh request to charge in the form it was presented." His honor commented on this request at considerable length. The exception does not specify wherein there was error, and it cannot be considered. The sixteenth exception is as follows: "That his honor erred in charging the plaintiff's second request to charge." The presiding judge likewise commented on this request at great length, and, as the exception fails to point out the specific error, it cannot be considered.

7. The seventeenth exception is as follows: "That his honor erred in charging the jury in reference to plaintiff's third request to charge, 'That has been decided by the United States court,' and 'although the law has been so decided,' for in so charging the jury he indirectly charged on the fact, and thereby invaded the province of the jury." The third request was as follows: "That, in a question as to the habits of the insured, the occasional use of intoxicating liquors does not render the insured a man of intemperate habits, nor would an occasional case of excess justify the application of this character to him." His honor said: "That has been decided by the United States court. Our constitution forbids me to charge on the facts. I will not charge that as it is, although that law has been so decided. If I charge you what would constitute intemperate habit, that would be charging on the facts. Therefore I will say to you the supreme court says, in a case of adultery, what constitutes adultery, the habitual intercourse, means more than the occasional intercourse, but it is for the

jury to say how frequent to make habitual. I will not say what amount must be taken to make him intemperate. You must hear the facts of the case, and then say whether the man was intemperate or not. Therefore I will not charge that as it is." Although the presiding judge did not charge the said request, he might very properly have done so, as it embodies a sound proposition of law. It is a question of law whether the occasional use of intoxicating liquors or an occasional case of excess renders a person of intemperate habits, but it is for the jury to determine whether the use or excess is occasional or habitual in a particular case. It is the judgment of this court that the judgment of the circuit court be affirmed.

(61 S. C. 315)

CO-OPERATIVE PUB. CO. v. WALKER
et al.

(Supreme Court of South Carolina. July 24, 1901.)

COUNTERCLAIM—PLEADING—SUFFICIENCY OF CLAIM.

1. As there is no statute or rule of court prescribing any particular form for allegation of facts by a counterclaim, an objection that the facts were not separately and specifically stated is without merit.

2. In an action on a written contract for the purchase of books on account, an answer alleging that defendant did not purchase such books, but only acted as agent of the plaintiff on a guaranteed salary, and setting up as a counterclaim a balance due on such salary in excess of the amount claimed to be due by plaintiff, is valid, the complaint and counterclaim arising out of the same transaction.

Appeal from common pleas circuit court of Barnwell county; Gage, Judge.

Action by the Co-operative Publishing Company against W. E. Walker and J. P. Walker. Judgment for defendants on counterclaim, and plaintiff appeals. Affirmed.

J. O. Patterson, for appellant. J. J. Brown, for respondents.

POPE, J. The following is the statement in "case" for appeal: "This is an action on account, and was commenced by the service of the summons and complaint on the 21st day of December, A. D. 1899. The defendants answered, and the cause was tried before his honor Judge G. W. Gage and a jury at the March term, A. D. 1900, for Barnwell county. The plaintiff at the trial demurred to the defendant's counterclaim, and the said demurrer was overruled, and the cause ordered on to trial. The jury returned a verdict for defendant for the sum of \$100, upon which judgment was entered. The plaintiff moved for a new trial, which was refused." This appeal was then taken. The sole questions raised by the appeal relate to the alleged error of the circuit judge in overruling the demurrer as to the alleged counterclaim set up by the defendant, and this alleged error is made the basis for the motion for a

new trial after verdict for the defendant. Under these circumstances, we have deemed it best, in order that the pleadings may be considered with reference to defendant's counterclaim, to set out both the complaint and the answer. The complaint reads, as follows: "The complaint of the above-named plaintiff respectfully shows unto the court: (1) That the plaintiff, the Co-operative Publishing Company, is a corporation duly organized and created under the laws of the state of Nebraska, and was such corporation at the times hereinafter mentioned. (2) That the defendant W. E. Walker became indebted to the plaintiff in the sum of \$72.99 for goods and merchandise sold and delivered to the defendant on the 21st day of April, A. D. 1898, and divers other days thereafter up to and including the 4th day of October, A. D. 1898, an itemized statement of which is hereto attached; that said goods and merchandise were sold and delivered to the defendant as above stated at his request, and for which he promised to pay. (3) That no part of said indebtedness has been paid, except the sum of \$40.05, as appears by the account hereto attached, and that said defendant is now justly due and owing to the plaintiff the sum of \$132.94, with interest from the 1st day of January, A. D. 1899. (4) That the defendant J. P. Walker did on the 6th day of September, A. D. 1898, agree in writing to become responsible to plaintiff for the payment of all bills of goods ordered by the said W. E. Walker from the plaintiff, and that the said goods and merchandise sold and delivered to the defendant W. E. Walker as above stated, and for which the defendant is now due to the plaintiff the said sum of \$132.94, were sold and delivered to said defendant under the agreement of the said defendant J. P. Walker, and plaintiff relied upon the surety of the said J. P. Walker, and the statements in the said written guaranty of the said J. P. Walker, surety, a copy of which is hereto appended. Whereupon plaintiff prays for judgment against the defendants for the sum of \$132.94, and for the costs of this action." The answer was as follows: "The defendant W. E. Walker, answering the complaint herein, for a first defense: (1) Denies each and every allegation in said complaint contained. For a second defense: That on the 2d February, 1898, the plaintiff company, after many urgent requests, induced the defendant to enter into an agreement whereby the defendant was to become the agent of the said plaintiff company for the sale of certain books therein named, the said books being furnished the defendant by plaintiff company at a discount of fifty per cent; and this defendant agreed to devote eight hours per day during the period mentioned in said agreement to the work of selling said books, making reports of sales, remitting money, and many other conditions and stipulations set forth in said agreement, a copy of which is hereto attached, and made

part and parcel of this answer. (2) The defendant admits that he received books from plaintiff company amounting in value to \$172.90, as stated in said complaint. That immediately upon receiving said books he began the work of daily canvassing and soliciting orders, devoting not only eight hours per day, but frequently much more time, to the work, sometimes working at night and sometimes on Sunday. That he succeeded in selling sufficient books to amount to \$80.10, one-half of which amount he remitted to plaintiff company, and he would have sold the remainder of the books, but for the fact that the prices of cotton and other crops were very low, and people wishing to purchase the books had no money to pay for them, of which fact plaintiff company was informed by this defendant. (3) That at the expiration of the time for which said agreement was run, to wit, 15th November, 1898, this defendant offered to return in good order the books he had failed to sell, and the same offer was made through defendant's attorney to said plaintiff company, but no answer received from them. That this defendant never regarded himself as a purchaser of the books, but simply the agent of plaintiff, selling their books on commission and guaranty; and any such claim or claims for any specific time for payment was waived by plaintiff company shipping books to defendant from April to October, 1898. That the chief consideration and inducement for this defendant to enter into said agreement with plaintiff company was the guaranty of plaintiff company that if defendant devoted the full time as stipulated to the work of canvassing and soliciting orders, and his commissions did not amount to \$400, that plaintiff company would pay the defendant in cash the difference between the sum total of said commissions and the said \$400. That defendant has fully discharged his duties and obligations as set forth in said agreement. That plaintiff company has hitherto refused to receive from this defendant, in good order, the books left on his hands, valued by plaintiff company at \$132.94, and for which they ask judgment against this defendant. That with the commissions received by this defendant, amounting to \$40.05, and the value of the books now in the hands of defendant, \$132.94, making together \$172.90, the plaintiff company would still be indebted to defendant, under the terms of said agreement, and the guaranty therein set forth, the sum of \$227.01, which said amount the defendant claims the right to counterclaim, recoup, and set off against plaintiff company's demand to the extent thereof, and demands judgment against said plaintiff company for the sum of \$227.01, or so much as he may be entitled to over and above plaintiff's demand." The following is a copy of the oral demurrer: "The plaintiff demurs to the counterclaim attempted to be set up by the defendant W. E. Walker in the second defense

contained in his answer, upon the ground that it is not separately and specifically stated and set up as a counterclaim or cross action, and does not state facts sufficient to constitute a counterclaim." And the following are the exceptions: "The defendant appeals from the judgment entered herein in this case upon the following grounds and exceptions: (1) Because his honor erred in overruling the oral demurrer of plaintiff to the counterclaim set up by defendant W. E. Walker in his answer, whereas his honor should have held that the counterclaim did not state facts sufficient to constitute a counterclaim or cross action against the plaintiff; (2) because his honor erred in refusing to set aside the verdict of the jury; (3) because the facts constituting the said counterclaim were not separately and specifically stated as a counterclaim."

1. We will now consider these grounds of appeal. So far as the third ground of appeal is concerned, raising the question, as it does, that the counterclaim was fatally defective, in that the facts were not separately and specifically stated, we cannot see how this can be so held by us, inasmuch as there is no statute or rule of court prescribing any particular form for the allegation of facts by a counterclaim. The defendant pleads his allegations of fact as a counterclaim, and those allegations of fact seem to us separately and specifically stated. This ground of appeal is overruled.

2. As to the first ground of appeal, it seems to us that the complaint and the counterclaim arose out of the same business transaction between the plaintiff and defendant. These parties seem to have taken different views of such business transactions, for the plaintiff evidently thought (for it so alleges) that it made an outright sale of books to the defendant, but it does not set out in the complaint the written agreement made between the parties, although it is careful to set out the agreement it made with J. P. Walker in September, after the contract to become a guarantee for W. E. Walker, while, on the other hand, the defendant produces his exact contract in writing with the plaintiff. It seems to us that this case falls under subdivision 1 of section 171 of the Code of Procedure, which is as follows: "The counterclaim mentioned in the last section [section 170, providing, "The answer of the defendant must contain * * * (2) a statement of any new matter constituting a defense by counterclaim in ordinary and concise language without repetition"] must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set out in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." The plaintiff, in its complaint hav-

ing alleged that W. E. Walker had received books from it for which only partial payment had been made, in effect placed the defendant W. E. Walker as having books for which he had not paid, and therefore the plaintiff was entitled to judgment therefor. The counterclaim of defendant alleges that any claim plaintiff holds against him is subject to the set-off or counterclaim under the contract he produces. This being so, we see no error here. It is therefore the judgment of this court that the judgment of the circuit court be affirmed.

(61 S. C. 329)

DENT et al. v. SOUTH-BOUND R. CO.
(Supreme Court of South Carolina. July 30, 1901.)

RAILROADS—FIRES SET BY LOCOMOTIVE—
LIABILITIES—PLEADING—EVIDENCE
—DAMAGES—AMENDMENT.

1. Rev. St. § 1688, provides that every railroad corporation shall be liable to any person for injuries by fire communicated by its engines or originating on its right of way. *Held* to render a railroad company liable for damages to land by destruction, by fire from its locomotives, of timber, growing trees, and turpentine boxes.

2. Where a complaint containing irrelevant allegations was not objected to, evidence responsive to the issue raised thereby was admissible.

3. Where trees, turpentine boxes, and undergrowth were destroyed by fire set by locomotive, the damages may be shown by proof of the value of such trees and other property, showing the difference in value of the land before and after the fire.

4. Witnesses who have knowledge of the facts may give their opinion as to damages to land by fire.

5. An amendment in an action to recover for fire set by defendant's locomotive, changing the date of the fire from March 31st, as laid, to May 31st, was properly allowed, where defendant was not misled thereby to his prejudice.

Appeal from common pleas circuit court of Richland county; Townsend, Judge.

Action by Rebecca A. Dent and others against the South-Bound Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Wm. H. Lyles, for appellant. John P. Thomas, Jr., and Hunter A. Gibbes, for respondents.

GARY, A. J. The appeal herein is from a judgment entered up in favor of the plaintiffs in two actions consolidated by order of the court. The complaint in the first action was for damages by fire to a tract of land known as the "Ramsey Tract" and the "Home Place." The complaint in the second action was also for damages by another fire to a tract of land known as the "Douglas Tract" or "Doss Flat Tract." Each of the complaints set forth two causes of action,—one under section 1688 of the Revised Statutes, and one at common law. Both tracts are situated along the right of way of the defendant in Richland county. The answers

of the defendant in both cases were general denials. The defendant appealed upon the following exceptions: "(1) Because, this being an action for the recovery of damages caused to land by burning over the same by sparks from defendant's engines, his honor, against the objection of the defendant, allowed the witness S. H. Dent to reply to the question, 'Taking into consideration the value of this land prior to the burning, taking into consideration the land since the burning, taking into consideration the value of the trees and wood and his turpentine trees, and taking into consideration the value of the litter destroyed, what would be your opinion as to the total amount of damages on these two tracts of land?' the said question tending to bring before the jury irrelevant matters of the value of the turpentine trees and the value of the turpentine contained therein, and the value of the litter upon the land, when it is respectfully submitted that the inquiry was limited to the value of the trees, land and all, as land, before the fire, and to its value immediately after the fire, and should not have extended the inquiry as to the value of the turpentine or litter. (2) Because, against the objection of the defendant, his honor allowed the witness S. H. Dent to answer the question, 'Q. Taking into consideration the injury done to the timber and to the litter, and in view of the condition of it since the fire, as affected by the fire, what, in your opinion, is the total amount on both of these tracts?' when the witness had testified that he had not examined both of the tracts, and when the question brought into the consideration of the jury an irrelevant matter, to wit, the value of the litter, as litter, which was destroyed by the fire. (3) Because, against the objection of the defendant, the court allowed the witness W. H. Frost to testify as to his opinion as to the damages done, taking into consideration the value of the litter upon the land, and also as to the value of the turpentine destroyed, when it is respectfully submitted that question was irrelevant and incompetent. (4) Because, against the objection of defendant, his honor allowed the witness George Taylor to testify as an expert as to his opinion as to the damage done to saw timber on lands in dispute, when it was shown that the said George Taylor had no special knowledge. (5) Because, against the objection of the defendant, the plaintiff W. H. Dent was allowed to testify in response to the question, 'What damage has been caused by this fire to your timber and the land?' when it is respectfully submitted that the inquiry was limited to the damages done to the land, as land, with the timber standing on it, and that said question was irrelevant and incompetent. (6) Because, against the objection of the defendant, and during the progress of the trial, the plaintiffs were allowed to amend one of their complaints so as to charge the fire as having occurred on the 31st day of May, when it

was alleged to have occurred on the 31st day of March, and the defendant was misled and not prepared with proof as to a fire which had occurred on the 31st day of May. (7) Because his honor the presiding judge, having allowed the amendment, refused to allow the defendant further time for the preparation of its case, and to ascertain and establish the facts with reference to the fire which occurred on the 31st day of May, 1900. (8) Because his honor charged the jury as follows, to wit: 'I do not think the true measure of damage is the market value. I think the plaintiffs are entitled to the property as it stood before the fire, and, if you will ascertain the value of the property before it was burned, that is the measure of the value, as I understand it. You are to consider the location, the contour of the land, its location, the location of the trees. Trees may be useful in one place, and more or less useful in another place. You are to consider all these matters, and say what it is worth, how much the plaintiff has been damaged,'—when it is respectfully submitted that the question of the difference between the market value of the land before and after the fire was the real question for consideration by the jury, and the instruction was calculated to make the jury believe that they might take into consideration fanciful estimates as to the value of the lands."

The appellant's attorney in his argument thus succinctly states the question presented by five of the exceptions, to wit: "The first, second, third, fifth, and eighth may be classed under one head, and that is that it was error for his honor the circuit judge to admit the testimony as to the value of turpentine trees, the value of turpentine in the boxes thereon, and the value of litter upon the land, irrespective of their connection with the freehold, and in not limiting the jury in their estimate of the difference in value of the realty, considered as such, before and after the fire."

1. The allegations of the first cause of action set forth in the first of the complaints, which are material in considering the question presented by these exceptions, are contained in the third paragraph, which is as follows: "(3) That on or about the 22d day of March, 1900, a fire was communicated by or from the defendant's locomotive to the said tract of land, and burned over fifty acres of the same, destroying much valuable timber, many growing trees, including a large number of turpentine boxes, and all of the vegetable matter, undergrowth, straw, and leaves which had accumulated for years thereon, and upon which the value and fertility of said land to a large extent depended, to the damage of the plaintiffs \$1,200, which the defendant is required to pay by the act of the general assembly in such case made and provided, which act is embodied in section 1688 of the Revised Statutes of 1893." The allegations of the second cause of action

in said complaint which are material are set forth in the third paragraph, which is as follows: "(3) That on or about the 22d day of March, 1900, the defendant carelessly and negligently omitted to use proper appliances to prevent the emission of sparks from its locomotives, and on said day, in running its locomotive through the said tract of land, negligently permitted said locomotive to emit and let out sparks and fire into the dry grass and combustible material in and along its right of way, whereby the same was ignited, and the fire spread to the said tract of land and burned over about fifty acres of the same, destroying much valuable timber, many growing trees, including a large number of turpentine boxes, and all the vegetable matter, undergrowth, straw, and leaves which had accumulated for years thereon, and upon which the value and fertility of the said land to a large extent depended, to the damage of the plaintiffs \$1,200." The allegations of the first and second causes of action in the second of the complaints are similar to the foregoing, except as to dates, description of the land, and amount of damages. The respondents' attorney makes the following preliminary objection to the consideration of the first, second, third, and fifth exceptions, to wit: (1) That the question propounded to the witness in the first exception was not answered, and therefore the exception has no foundation in fact; (2) that the grounds of objection to the testimony set out in the other exceptions were not stated, and therefore cannot be considered by this court,—and relies upon the following cases to sustain the second objection: *Allen v. Cooley*, 53 S. C. 80, 30 S. E. 721; *Norris v. Clinkscapes*, 59 S. C. 243, 37 S. E. 821; *Youngeblood v. Railroad Co.*, 60 S. C. 13, 38 S. E. 232. But, waiving these objections, the exceptions cannot be sustained. Section 1688 of the Revised Statutes is as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent; and it shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf." In construing this section, Mr. Justice Jones, delivering the opinion of the court in *Dean v. Railway Co.*, 55 S. C. 504, 35 S. E. 579, says: "The language of the first clause of this statute is sufficiently comprehensive to enforce any kind of property, real or personal, that may be injured by fire,"—thus showing that damages are recoverable under the statute for injury to such property as is described in the complaint; while the case

of *Hunter v. Railroad Co.*, 41 S. C. 86, 19 S. E. 197, decides that damages are recoverable at common law upon such facts as are alleged in the second cause of action.

2. Again, the object of pleadings is to frame issues so that the parties to the action may know how to shape their testimony. The testimony to which the appellants' attorney made objection was responsive to the issue under the pleadings, and was therefore admissible. In the case of *Ragsdale v. Railway Co.*, 60 S. C. 381, 38 S. E. 609, the court says: "The next question argued by the appellant's attorney is that his honor the presiding judge erred in charging that the plaintiffs could recover the rental value of the store occupied by plaintiffs' tenant, to the extent that rental value had been diminished by competition. The charge was responsive to the issues made by the pleadings. Section 181 of the Code provides: 'If relevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby.' Mr. Pomeroy, in section 552 of his *Remedies and Remedial Rights*, says, 'The rule is established by the unanimous decisions of the courts, as well as by the provision found in the Codes, that the proper and only method of objecting to and correcting redundant, immaterial, or irrelevant allegations in a pleading is a motion to strike out the unnecessary matter, and not a demurrer nor an exclusion of evidence at the trial. The new procedure thus furnishes by means of these motions, in case of insufficiency, redundancy, or irrelevancy, a speedy and certain mode of enforcing the fundamental doctrines of pleading' [evidently intended for 'establishing'] 'what it has established' [evidently intended for 'pleaded'], 'and of causing the complaints or petitions and answers to present single, clear, and well-defined issues.' * * * In section 561 he says: 'An allegation is irrelevant when the issue formed by its denial can have no connection with, nor effect upon, the cause of action.'" This language was quoted with approval in *Smith v. Smith*, 60 S. C. 67, 27 S. E. 545.

3. There is still another reason why the exception cannot be sustained. The property destroyed was part and parcel of the freehold, and testimony as to damages sustained by its destruction was introduced for the purpose of showing the difference in the value of the realty, considered as such, before and after the fire. The rulings and charge of his honor the presiding judge were to the effect that the measure of damages was the difference in the value of the land before and after the fire. Testimony as to the property pertaining to the freehold was competent for the purpose of showing the difference in the value of the realty before and after the fire, and, as we have stated, it was only for this difference that the jury were allowed to give damages. These exceptions are overruled.

4. We will next consider the fourth excep-

tion. The question raised by this exception arose in the following manner: "Mr. Thomas: I will ask a preliminary question. Q. Have you had any experience in timber lands that would enable you to know the value of them? A. In handling timber? Q. Yes. A. Yes; some little. I have handled wood. I have not handled any sawed timber or turpentine business, but I have handled wood right smart. Q. You have had sufficient experience to familiarize yourself with the value of timber land? Mr. Lyles: He has just answered what he had, and it is for the jury to say. The Court: He can tell what experience he has had. Mr. Lyles: He has just testified to that,—that his only experience is in selling wood. Mr. Thomas: I will withdraw the question altogether, and ask the witness to give me his opinion of the damages he saw, leaving out the lower tract? Mr. Lyles: We object. He cannot testify to anything more than the damage to the wood, according to his own testimony as to his experience. The Court: He is not asked as an expert, but is asked for an opinion. Mr. Lyles: Opinion testimony can only be given on the basis of peculiar knowledge. The Court: What he sees. It makes no difference whether he is an expert or not, if he sees anything. Mr. Lyles: But his experience does not go to the extent of knowing the value of such things. We submit, he can't testify to it, and he has said he has had no experience in saw timber and turpentine timber. By Mr. Thomas: Answer the question. A. What the tract was worth or what the damages were on the tract I saw? Q. Yes. A. About \$1,700, I think." The witness based his opinion upon facts within his own knowledge, which it would have been difficult fully to reproduce and make palpable before the jury. The case of *Easler v. Railway Co.*, 59 S. C. 311, 37 S. E. 938, shows that opinion evidence is based on necessity, and is admissible when the facts cannot be reproduced before the jury in such manner as to show the condition of things upon which the opinion of the witness was based. It was necessary for the plaintiffs to prove a pecuniary loss of a definite amount, which could not be left to the supposed knowledge of the jury of such matters. *Waldrop v. Railroad Co.*, 28 S. C. 157, 5 S. E. 471. And this fact could be established by any witness basing his testimony upon facts within his own knowledge. *Bridger v. Railroad Co.*, 25 S. C. 24. This exception is overruled.

5. We proceed to a consideration of the sixth exception. The order allowing the amendment is as follows: "It appearing that the above two cases, which by agreement of counsel were consolidated and ordered to be tried together, were for the recovery of damages caused by two fires to plaintiffs' lands, and it further appearing that by a clerical error the date of the fire set forth in the second case was laid on March 31st,

instead of May 31st, and that the defendant has not been misled to his prejudice in maintaining his defense upon the merits thereby, it is, on motion of John P. Thomas, Jr., plaintiffs' attorney, ordered that paragraphs 3 of the first and second causes of action in the case second above set forth be, and the same are hereby, amended, in furtherance of justice, by striking out the word 'March' in the first line in the said two paragraphs, and inserting in lieu thereof the word 'May.'" The reasons set forth in said order show that it was properly granted, and this exception is overruled.

The last exception to be considered is the seventh. The foregoing order also shows that the circuit judge properly refused the appellant's request for further time. This exception is likewise overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(61 S. C. 265)

KUKER v. JARROTT et al.

(Supreme Court of South Carolina. July 22, 1901.)

FRAUD OF TRUSTEE—CONVEYANCE—MORTGAGE—NOTICE OF FRAUD.

A trustee had power under a deed to sell for reinvestment on the written request of the life beneficiary. He obtained such written consent from his wife, who was the beneficiary, and conveyed to his son, and thereafter procured the son to borrow certain money on the land on a mortgage, and pay the proceeds thereof to him; and he testified that the mortgagee, at the time of making the loan, which was for \$275, knew that this transaction was illegal. The mortgagee, who was a business man of wealth, denied positively that he had any such knowledge; and so, also, did the agent of the trustee, who negotiated the loan. *Held*, that the evidence was insufficient to establish its invalidity.

Appeal from common pleas circuit court of Florence county; Gage, Judge.

Action by John Kuker against J. H. Jarrott and others. From a decree for plaintiff, all the defendants except two appeal. Affirmed.

George Galletley, for appellants. Wilcox & Wilcox and J. F. Stackley, for respondent.

POPE, J. From the "case for appeal" it appears that Charles E. Jarrott, Jr., on the 30th day of April, 1892, made his bond, whereby he agreed to pay to John Kuker the sum of \$275, 12 months thereafter, with interest after maturity at the rate of 8 per cent. annually until paid, which bond was secured by a mortgage on a house and lot in the town of Florence, in this state. This debt was for the sum of \$275 in cash loaned by John Kuker to Charles E. Jarrott, Jr.; and, not having been paid in whole or in part, an action for foreclosure of mortgage was instituted on the 5th day of December, 1896, and ripened into judgment by default on the 6th day of February, 1897, for the sum of \$387.23. This included costs. Although advertisement for sale was made in

the year 1897, it was postponed at the urgent solicitation of defendant's father. The defendant died in the year 1897, leaving no widow or lineal descendants. When the plaintiff, John Kuker, advertised this house and lot for sale on the first Monday in February, 1899, he was met by a petition, dated 31st January, 1899, made by all the brothers and sisters of the said Charles E. Jarrott, Jr., deceased, and addressed to the court of common pleas for Florence county, wherein it was sought to obtain an order to restrain the sale under the decree in foreclosure. The petition was as follows: "The petition of J. H. Jarrott, John B. Jarrott, Helen A. Jarrott, Mary M. Jarrott, Pierce B. Jarrott, and Theodore E. Jarrott, in the above-entitled case, shows to the court: (1) That Charles E. Jarrott, Sr., held the land described in the complaint, under the provisions of a deed duly executed, for the following purposes and trusts only, to wit: 'To the sole and separate use and behoof of my wife, Emma E. Jarrott [wife of the said C. E. Jarrott, Sr.], for and during the term of her natural life, and to pay over to her, on her separate receipt in writing, all the income, rents, profits, and accretions of the said property, and, from and after the death of my said wife, then to the use of such of the children of the said marriage, share and share alike.' And for the following uses and trusts: That, upon the written request of his said wife, the said trustee may sell and convey any portion of the said estate and property, and reinvest the proceeds of said sale, to be subject to the same trusts and limitations as the original trust property. (2) That on or about the 30th April, 1892, the said Charles E. Jarrott, Sr., made application to the plaintiff, John Kuker, for the loan of a sum of money, and said Kuker agreed to make the said loan on the said Jarrott securing him for the same. That the said parties, finding from the said trust deed that the said Jarrott could not execute a valid mortgage on said trust property, procured and suffered the said Jarrott, trustee, to make a pretensive conveyance of the land described in the complaint to Charles E. Jarrott, Jr., by the said trustee, and which was without consideration; and thereupon the said Charles E. Jarrott, Jr., executed the mortgage described in the complaint, and for the sole purpose of securing the money loaned by said Kuker to the said Jarrott, Sr., and for the purpose of defeating the terms and intent of said trust. (3) That the said Charles E. Jarrott, Jr., has never been in the possession of the said land, but the same has ever since remained a part of the said trust estate. That the said Kuker has commenced this action for the purpose of foreclosing the said pretended mortgage, without making the petitioners parties thereto; has in said suit procured a judgment by default against the said C. E. Jarrott, Jr., and an order for the sale of the said premises by the sheriff of

the county of Florence; and, pursuant to said order, the said sheriff has advertised said land for sale on sales day in February, 1899, and, if the said sale is allowed to be made, a cloud will be thrown on the title and rights of the petitioners. (4) The petitioners are informed that subsequently the said C. E. Jarrott, Jr., executed a mortgage on the premises to J. F. Stackley, of the city of Florence, but the said Stackley has not been made a party to this action. (5) That all of said petitioners, except J. H. and John B. Jarrott, are infants. (6) That the petitioners are the children of said marriage, to wit, of the said C. E. Jarrott, Sr., and Emma E. Jarrott, and are remainder-men under the said trust deed. Wherefore the petitioners pray that said decree of sale be opened; that they, by order of this court, be made parties to this action; that the said Stackley be made a party; and that the said sale be enjoined until the rights of the petitioners be adjudicated." This petition came on to be heard before his honor Judge Aldrich on the 4th day of February, 1899, and on the 6th day of February, 1899, Judge Aldrich filed his order thereon, by which he enjoined the sale of the house and lot until the further order of the court; that the judgment and sale be opened; and further required that the plaintiff amend his summons and complaint by making petitioners and J. F. Stackley parties to the action, and such other parties as he may be advised, and that said new parties have 20 days to answer. The complaint was duly amended by making the parties named in the petition defendants. The petitioning defendants answered, setting up the facts of their petition by appropriate allegations in their answer. The defendant J. F. Stackley in his answer denied all the matters therein, and asked that his mortgage on the house and lot be also foreclosed.

By an order of court, S. W. G. Shipp, Esq., was made referee, and as such directed to take the testimony and report the same to the court. When the hearing was had thereon and the pleadings before his honor Judge Gage, he made the following decree: "This was an action to foreclose a mortgage made by Charles E. Jarrott, Jr., to John Kuker. It was begun on the 5th December, 1896, default made, and decree for foreclosure on 6th February, 1897. The sale was delayed from time to time, but was finally advertised to occur on sales day in February, 1899. * * * It is alleged that these last-named Jarrotts, to wit, Mary, Pierce, and Theodore, are infants. C. E. Jarrott is now dead, and left no lineal descendants and no widow. The date of his death is about 1897. Stackley is a second mortgagee. The defense rests on the terms of a deed of trust, to be found in *Salinas v. Pearsall*, 24 S. C. 180, and a breach thereof by plaintiff and Jarrott, Sr. It is not denied by the Jarrott defendants that the deed from Charles E. Jarrott, Sr., to Charles E. Jarrott, Jr., is regular in form

and that the written request thereon of the wife, Emma E., is in legal form. But the allegation is that Charles E. Jarrott, Sr., made the deed to Charles E., Jr., without consideration; that Kuker knew it; that the loan by Kuker was in fact a loan to Charles E., Sr., and the whole transaction was with the intent on the part of Charles E., Sr., and Kuker to avoid the terms of the trust deed. This is the issue, and it is one of fact. If it be so, the deed and mortgage are invalid. I cannot sustain the contention. In the first place, I am satisfied that Theodore is the only one of the defendants now under twenty-one years of age, and he is nineteen years old. Mrs. Jarrott, who testified to their ages, admitted on cross-examination that the family Bible was burned, and she was not positive about their ages. But she did fix their ages by a petition in the probate court in 1891. She fixed the ages of Pierce and Theodore then at thirteen and eleven, respectively; and John, Helen, and Mary fixed their ages then at twenty, eighteen, and sixteen, respectively. In the second place, the defense is actively made by Charles E. Jarrott, Sr., and his wife, Emma E., and by none of the children. It is true, the verified petition to open the judgment was made by John B. and Helen A., but without that the judgment could not have been opened. The defense depends upon the testimony of Charles E. Jarrott, Sr., and his wife. I shall consider them in an inverse order. In this transaction the plaintiff was represented by Mr. De Jongh, an attorney of the Florence bar. Mrs. Jarrott testified: 'Mr. De Jongh came to the house on one occasion with some one else, I think, and stated that Mr. Jarrott wanted to borrow some money from Mr. Kuker, and he could arrange it if I would sign the papers. He explained, but I did not exactly understand. He wanted me to have a deed made to my son C. E. Jarrott, Jr. Q. You signed on various occasions requests on deeds for Mr. Jarrott, as trustee, to convey property, did you not? A. To convey property I knew nothing about. He requested me to sign papers on several occasions, which I did. Q. When Mr. De Jongh went up to have the paper in question signed, did you sign it right then? A. I don't remember. Q. Do you remember signing it at any time? A. I remember signing some papers. I don't know the papers you allude to. Q. I allude to the paper which conveyed the property to C. E. Jarrott, Jr. A. I did not read it, and do not remember signing any particular paper. I suppose I must have signed it. Mr. De Jongh did say something about signing papers to my son. He said there would be a risk giving a deed to a stranger, and that if I would sign a deed to my son there would be no risk.' Standing alone, with no other testimony on the subject, this testimony is not sufficiently accurate, positive, and intelligent to overturn a transaction like that in issue. A careful consideration of the tes-

timony of C. E. Jarrott, Sr., satisfies me that he thought when the money was borrowed from Kuker the transaction was of doubtful character, and that he took the money, if he be credited, which he had a questionable right to. But the pith and point of his testimony is that De Jongh, as attorney for Kuker, concocted the scheme, and therefore was charged with a knowledge of a breach of the trust. The cross-examination shows that Jarrott was altogether familiar with obligations of the trust, about which there had been litigation before. Candidly, the testimony of Jarrott impresses me with the fact he is not a sincere man, and that, where he is flatly contradicted by a witness whose integrity has not been impeached, he cannot be relied on. Mr. De Jongh is not personally known to me, but he has not been impeached, and he unequivocally denies the testimony of Mr. Jarrott. Again, C. E. Jarrott, Jr., died after judgment for foreclosure. He was twenty-seven years old. He took no steps to defend the suit, nor did the others in his lifetime, nor did C. E. Jarrott, Sr. Testimony like this could defeat any claim. The next matter for consideration is the Stackley mortgage. It was made two years after that to Kuker. There is no evidence to impeach it, if Stackley is to be believed. I am therefore of the opinion that the plaintiff is entitled to have formal judgment for foreclosure and sale, providing for the payment of his debt and that due to Stackley, and I reserve jurisdiction of the case to sign judgment when it shall be presented." Judgment was afterwards signed by Judge Gage.

From the judgment the petitioning defendants now appeal to this court on the following grounds: "The circuit court erred (as to the Kuker mortgage): (1) In directing that a judgment be entered in favor of plaintiff for \$476.44, with interest, and directing a sale of the land described in the complaint to satisfy same; but the said court should have held that the plaintiff was not entitled to a judgment for any sum, and that the complaint be dismissed: (a) The court should have found from the testimony that the mortgage was really intended to secure a loan by the plaintiff to C. E. Jarrott, Sr.; (b) that the deed from the trustee to C. E. Jarrott, Jr., was without consideration, a breach of the trust, and was made for the purpose of raising money on the trust estate by way of mortgage; (c) that the mortgage to plaintiff was taken to secure the loan actually made to C. E. Jarrott, Sr., was in breach of the trust, and was an attempt by indirection to mortgage the trust property; (d) that the plaintiff or his agent, De Jongh, knew of the attempted breach of trust, or had sufficient information to have put him on an inquiry that would have led to such knowledge. (2) That, in any event, from the plaintiff's own testimony and that of his agent, De Jongh, the plaintiff was informed, at and before the loan, that the said Jarrott, Jr., had acquired a deed of con-

veyance to the said property by a breach of trust, in that said conveyance was alleged to have been made on a credit for a large portion of the purchase money, and the plaintiff's agent, from his own testimony, had no confidence in any statement of fact alleged to have been made to him by the trustee. (3) The court erred in finding as to both mortgages that the defense is actually made by Charles E. Jarrott, Sr., and his wife, Emma E., when there is not a particle of testimony to support such finding, but, on the contrary, the court should have found that the said parties are not parties to the action; that they have no interest therein; that they are only witnesses used by the defendants; that the judgment was opened by the sworn petition of the children; that the sworn answer was put in by said children for themselves, and by J. R. McCown as guardian ad litem for the infants; and that the cause is actually conducted by the counsel for the children. (4) The court erred in holding that the defense depends on the testimony of Charles E. Jarrott, Sr., and his wife. The court should have held that the testimony of C. E. Jarrott, Sr., which the court held was sufficient, if true, to invalidate plaintiff's mortgage, was corroborated by the testimony of Mrs. Jarrott to the effect that the agent of plaintiff told her that her husband wished to borrow some money from Mr. Kuker, that he (De Jongh) would arrange it if she (Mrs. Jarrott) would sign some papers to her son, that it would be a risk to give deed to a stranger, and that if she would sign deed to her son there would be no risk, all of which is utterly inconsistent with the view that plaintiff's agent did not have knowledge of the attempted breach of trust. That said testimony is further corroborated by the following facts and circumstances: By the subsequent conduct of plaintiff in looking to C. E. Jarrott, Sr., both before and after the death of his son, as the party to repay the loan; in dunning C. E. Jarrott, Sr., repeatedly, for the money, and threatening him with foreclosure if the demand was not complied with; that plaintiff had been in the habit of loaning money to C. E. Jarrott, Sr., under circumstances necessarily involving breaches of this trust deed, to wit, the loan on the Tarrh mortgage, the loan on the security of a conveyance to Mrs. Louisa Kuker, wife of plaintiff, and the mortgage of C. E. Jarrott, trustee, referred to in Exhibit H. (As to the Stackley mortgage): (5) In directing that judgment be entered for the sum of \$414.63, with interest, and directing a sale of the land to pay the same; but the court should have held that the defendant Stackley was not entitled to judgment for any sum, or for a sale of the premises. The court should have found that Stackley knew of the breach of trust, or had sufficient information to have put him on inquiry as to the consideration and in breach of the trust, to wit, inter alia, from the relationship of the parties; that the

mortgage was offered to him to secure an account for goods sold to the trustee; the fact that C. E. Jarrott, Jr., was never in possession of this property. (6) The court erred in holding that there was no evidence to impeach the Stackley mortgage, 'if Stackley is to be believed,' and in ordering a foreclosure of the same; but the court should have held that Stackley had knowledge of the breach of trust, or sufficient information to put him on the inquiry; that Stackley was not a bona fide purchaser or holder for value, or without notice of said mortgage; that the mortgage was given to secure an existing debt; that, in any event, the mortgage was invalid to the amount of \$145, the portion of the account admittedly contracted before execution of the mortgage."

We will now dispose of this appeal. The first four exceptions may be considered together. The decree is satisfactory, and we only add a few words. None of the parties to the record question that if the plaintiff, Kuker, either himself or by his agent, De Jongh, knew of the fraud involved in the sale by C. E. Jarrott, Sr., as trustee to C. E. Jarrott, Jr., of the house and lot which belonged to the trust estate of Mrs. Emma Jarrott and her children, for the purpose of raising money for the trustee, Jarrott, Sr., or Jarrott, Jr., as an individual, it would upset the bond and mortgage held by Kuker, but the contention relates to the facts. The children of Jarrott, Sr., and his wife took no active part in the lawsuit. Jarrott, Sr., and his wife, Mrs. Emma Jarrott, were the only witnesses to the alleged fraud introduced for the purpose of establishing the same. Jarrott, Sr., says in his testimony he consulted with his children about the lawsuit, and talked with the lawyer of his children. It is apparent from the record that the testimony of Jarrott, Sr., is in utter disregard to the memory of his dead son, Charles, when he attempts, as he says, to lay bare the facts attending the sale by him, as trustee, of the house and lot to his said son Charles, and of the subsequent mortgage of said house and lot executed by his said son Charles to John Kuker, to secure the loan of \$275 by Kuker to his said son Charles. The testimony shows that the trust estate is a large one, and that the value of the house and lot is only \$1,000. By the terms of the trust deed, the said son Charles was owner, along with his brothers and sisters, of the fee in all the trust estate, which fee, in its enjoyment, was only postponed during the lifetime of their mother, Mrs. Emma Jarrott. By the testimony of Jarrott, Sr., he alone enjoyed the \$275 borrowed by his son Charles of John Kuker. Thus it is seen that Jarrott, Sr., has a curious regard for the character for probity of his dead son, Charles, who, from Jarrott's own testimony, only did what he is alleged to have done to help his father, and, it is to be supposed, his father's family, which seems to have had large landed estates, but no money.

The son Charles seems to us to have belonged to that class of men whose life and substance is given up for the benefit of others, and not for the advancement of his own fortunes, and to be subjected to the humiliating condition of receiving no thanks for sacrifices for others, but who, when life is closed, has his memory aspersed for the very sacrifices he has made. To earn grateful appreciation by labors for others is pleasant, but the consciousness of having done all in his power to soften the hardships of others is often the only consolation for such labor. But did Jarrott, Sr., tell the truth in his testimony? It requires very great charity to say he was only mistaken when he testified as he did in this case. To suppose that the pitiful sum of 8 per cent. annual interest on \$275 would tempt a successful business man like John Kuker to risk the loss of such interest and the principal, \$275, and his own good name for upright dealings, is more than we can do, especially as John Kuker and De Jongh both swear positively that it is not true. It is far more natural to suppose that when Jarrott, Sr., wanted his son Charles to pay the \$250 still due on the purchase money of the house and lot he, as trustee, had conveyed to his said son, having sounded De Jongh, as the agent of John Kuker, as to his willingness to make the loan of \$275 to his son Charles, and having ascertained that the loan would be made on the terms proposed, the son Charles signed the note and mortgage, received the money, and immediately paid it over to Jarrott, Sr. Mrs. Jarrott in her testimony is not exact and definite, and hence her testimony adds nothing to the theory of Jarrott, Sr. We therefore overrule these exceptions.

Now, as to the fifth and sixth exceptions, which relate to Stackley's mortgage: This mortgage was accepted by Stackley more than two years after the deed to the land by Jarrott, Sr., as trustee, on the written request of Mrs. Jarrott, as required by the deed of trust, to his son Charles, had been placed on record. Jarrott, Sr., says he told Stackley that John Kuker's mortgage was not valid, and therefore Stackley had notice of the invalidity of Charles E. Jarrott's deed, or certainly enough information to put him on inquiry. It was in proof that Stackley was a successful man of business in the city of Florence, and no man rises up to impugn his testimony. He denies under oath that Jarrott, Sr., ever told him any such thing. We believe Stackley. We cannot appreciate the argument on the consideration of the mortgage of Charles Jarrott to Stackley because, forsooth, some of the debt of his mother was already past due. As between Charles Jarrott and Stackley, and with no creditors of Charles Jarrott, Jr., before us, we hold that the consideration was all that the law requires. These exceptions are overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(61 S. C. 276)

SUDDUTH et al. v. SUMERAL.

(Supreme Court of South Carolina. July 24, 1901.)

INSTRUCTIONS—CHARGE ON FACTS—REQUEST—OUSTER OF CO-TENANTS.

1. In an action for partition, where defendant claimed under a deed, an instruction as to the character of the estate which passed under the deed, but leaving to the jury to determine what lands the deed conveyed, was not erroneous as a charge on the facts.

2. A request to charge the jury as to ouster does not require the court to charge that limitations do not run against tenants in common unless there has been an ouster.

3. Where, under a deed from tenant in common purporting to convey the entire fee, the grantee goes into possession after recording the deed, and holds the lands adversely as his own, it amounts to an ouster of the other tenants in common, and gives such holder, after 10 years, title by adverse possession against the tenants in common.

Appeal from common pleas circuit court of Greenville county; Aldrich, Judge.

Action in partition by S. Davis Sudduth and others against Louisa Sumeral. Judgment for defendant, and plaintiffs appeal. Affirmed.

So much of the charge as is questioned by the exceptions is as follows:

"Now, we will proceed to the second defense, and that is that Mrs. Sumeral alleges that on November 22, 1879, she went into possession of that tract of land; that she is now living on it; and that ever since then she has been in open, notorious possession of the said land, claiming the same all of the time as her own; and she charges that the statute of limitations is a complete bar to the plaintiffs' claim. Now, the statute of limitations is sometimes called a 'statute of repose,'—a statute to quiet possession. A statute of limitations does not originate in the idea of its being a title, but it is in law a trespass, begins as a trespass; and if one goes and takes possession of real estate and holds it openly and notoriously, and the true owner fails to assert his rights, then the law says that you are barred, you have slept on your rights and on your title, and you cannot bring this action, if he has held it for the statutory period, and the defendant would be entitled to possession. Now, just there, the defendants have requested me to charge you:

"(1) It is for the jury to determine whether the possession of J. A. David under the deed from Martha Loveland and others was, after the death of Mrs. Stall and Mrs. Sudduth, adverse to their heirs and exclusive of their interest. The Court: I so charge you.

"(2) The deed from J. A. David to W. L. Sumeral purports to convey the entire estate in the lands described in the complaint. It is for the jury to say whether W. L. Sumeral entered under said deed, and whether his possession was adverse to and exclusive of the plaintiffs' claim. (No comment.)

"(3) The deed from W. L. Sumeral to

Louisa Sumeral, the defendant herein, purports to convey the entire estate in the lands described in the complaint. It is for the jury to say whether she entered into possession of said land under said deed, and whether the subsequent possession was adverse to and exclusive of the plaintiffs' claim. The Court: That is correct, and I so charge you, with this one qualification,—if the deeds convey the lands described in the complaint; and, with that one qualification, I charge you that that is correct. Whether the land described in a particular deed is the same land described in a complaint or some other paper is a question of fact for your consideration, and I cannot tell you whether both papers cover the same land.

"Now, I have told you what the statute of limitations is. An important point is as to the length of time, if the statute of limitations is applicable to this case,—is it the ten or twenty year statute? The twenty-year statute prevailed from 1870 to the latter part of 1873, and since then the ten-year statute has prevailed; and I charge you that the statute of limitations in force at the time one goes into possession of land adversely and hostilely begins to run in his favor, and against the real owner of the land, if at the time the real owner of the land is capable of bringing his action, and is not laboring under any disability which would prevent his bringing the action. When the trespasser commits the trespass, that is the time that you must say the statute begins to run against him. So, here, if the trespass began in 1873, the twenty-year law would be in force; but, if it began after 1873, then the ten-year law would be in force. Now, who is disqualified, such as would stay the running of the statute of limitations? First, under the law, prior to the constitution of 1868, a married woman labored under that disability, and if her husband sold her land the statute did not begin to run until the disability was removed by the death of her husband. The disability being in force in 1864, the making of the constitution of 1868 did not remove her disability, because her husband's interest in her land became vested under the old law. It could not change his right that had vested under the old law, and, no matter how long her husband may have survived the constitution of 1868, when her husband died, if he conveyed the land away any time previous, during the coverture, the statute would not run against the wife until his death. Now, the statute of limitations cannot run, it does not run, against an infant; and after he became of age, between 1870 and 1873, he had twenty years in which to assert his rights, but since that time he has ten years in which to do so; and if an infant does nothing to recover his real estate or his interest, but stands by, and some one holds that land adversely for the full statutory period, then the infant's rights are gone, and he is barred from bringing his action. Now, in

regard to lands held in common, so far as the statute of limitations is concerned, the law says the possession of one tenant is the possession of all tenants, as a general rule, and, if the minority of one tenant in common exists, then his minority will accrue and save the running of the statute against his adult co-tenants, because the trespasser cannot be in adverse possession against the minor; and if the minor is possessed in common with the others, and the adverse possession cannot be completed as against the minor, then his rights would redound to save the rights of the adults. If that is the case, then when the youngest of the tenants becomes of age, twenty-one years, the statute begins to run then against him; and if it runs for ten or twenty years, as the case may be, against all of the tenants in common, and none of them are laboring under the disabilities which stop the statute of limitations, then the party in possession can interpose the pleas of the statute of limitations and bar the claim of the plaintiff, and the verdict would have to be for the defendant, who stands upon his adverse possession. Now, there may be various trespassers who go upon the same land. For instance, if you find that Mr. David in 1864 went upon the land as a trespasser, and took and held the land adversely, that would be a trespass on the part of Mr. David. If you find that at another time Mr. Sumeral went upon the land as a trespasser, and held possession of the land adversely, then Mr. Sumeral would be a trespasser. If you find that Mrs. Sumeral entered upon the land as a trespasser, then that would be trespass on her part. The rule is this: You cannot tack the possession of the parties to make out the statute of limitations, but the same person must hold for the whole and continuous period, to make out the possession under the statute of limitations, except where a person dies and a title descends to his heirs; but we are not speaking of that here. But where Mr. David, for instance, was a trespasser, and Mr. Sumeral and Mrs. Sumeral were trespassers after that, you cannot tack, but it must be continued in the same person for the full statutory period. Now, then, under that view of the law, I will read to you the defendant's fourth request:

"4. If you should conclude that Louisa Sumeral entered into possession under the deed from W. L. Sumeral in 1879, and held it until February, 1900, adversely to the plaintiffs, then this would constitute a valid defense to this action, and your verdict should be for the defendant, unless during this period some of the plaintiffs were infants; and, in case you find that any of the plaintiffs were infants during this period, I charge you that the period of such infancy must be deducted from the period of such adverse possession, and if there then remain ten years during which the defendant held this land adversely to the plaintiffs, and exclusive of their interest, this would be a good defense to

this action, and your verdict must be for the defendant. *Gray v. Bates*, 3 Strob. 508; *Garratt v. Weinberg*, 48 S. C. 28, 26 S. E. 3; *Odum v. Weathersbee*, 26 S. C. 247, 1 S. E. 890; *Dikemann v. Parrish*, 47 Am. Dec. 455. The Court: That is correct, and I so charge you.

"Now, going back, I will read to you from the Code. (Court read section 101.) The Court: Well, that applies to trespass and actions committed since '73. Prior to '73 that would have read twenty instead of ten years,—between '71 and '73. Now, section 102 reads (read section 102). Now, I read that because adverse possession may be founded on what we sometimes call a 'color of title,' as, for instance, a deed of conveyance or a decree of the court. Now, a party may go into possession of land under a written instrument, a deed, or decree of the court, and hold it adversely, or he may enter it without any paper at all; and the law is (read sections 103, 104, and 105 of the Code). Now, then, if you find that this defendant, Mrs. Sumeral, entered into the possession of the land described in the complaint, taking the conveyance to it and going in under a written conveyance, and that she went into possession, took possession adversely to these plaintiffs, and went into possession openly, adversely, continuously, and notoriously for the full period provided by the statute, and has held it, and if any of the tenants were minors, and has held it for the full statutory period since the minor became of age, I charge you that your verdict should be for the defendant, for a full period has been made out.

"Mr. Ansel requests the court to charge the jury as to ouster. The Court: 'Ouster' means putting one out of possession of land, and depriving him of the use of the freehold,—putting him out,—and it is a question of fact for you to determine; and, being a question of fact, if a tenant in common ousts his co-tenant, and you are satisfied that he did oust him, and then if he held it against his co-tenant openly, notoriously, continuously, and adversely for the full period, that ouster would, if held for the full time, bar any action which would deprive him of his rights to retain the property. There is no rule by which you can say what measure of proof is sufficient to prove ouster, being a fact. A man may be ousted in various ways. If you have to resort to ouster as a presumption, it has been held that where one co-tenant disposes of all the land, and that has to be shown by a presumption, and you want to presume title by lapse of time, then it would have to be the twenty-year period to make out the presumption. If one tenant in common undertakes to convey the entire fee in all of the property held in common and he puts his vendee in possession, and that vendee reconveys it to a stranger, and he goes and takes possession of the land, and if under such state of facts, and nothing else ap-

pears, then the statute of adverse possession would commence to run in favor of the person who went in under the deed, because if you found that he held it as his own, and exercised rights of dominion over it openly and notoriously, he could plead the bar of the statute of limitations, and such an ouster gives every tenant in common the right to bring this action, and, if all of the tenants in common could bring the action, the adverse possession would begin to run as soon after the ouster as the youngest co-tenant became of age.

"Now, the form of your verdict will be as follows: If you find for the plaintiff, you will say: 'We find for the plaintiff an undivided four-ninth interest in the land described in the complaint.' You need not put any damages in your verdict, because no damages have been proved. If your verdict is for the defendant, you will say: 'We find for the defendant.'

"Now, there are two deeds here. I have already referred to the deed from Loveland to David; and now here is a deed from David to W. L. Sumeral, and also a deed from W. L. Sumeral to Louisa Sumeral. They purport to convey the land, and I need not read them over to you. You need not consider the fourth or fifth separate defenses.

"After being out about twenty minutes, the jury returned to the court room. The Foreman: We desire to know whether the twenty or ten year question is applicable here. The Court: I can only charge you in a general way, because I am not allowed to express any opinion as to a question of fact. The title by adverse possession is what is called an 'affirmative defense.' It must be set up in the answer. Now, the adverse possession alleged in the answer is the adverse possession of the defendant, Mrs. Sumeral, and the allegations of the answer are that on November 22, 1879, she went into possession of the land described in the complaint, under the deed purporting to be fee simple (read answer to the jury). Now, that affirmative defense is set up there, and the allegation is that that adverse possession began on November 22, 1879; and, as a matter of fact, if you find that that is supported by the proof, then the ten-year law would be applicable; and if she held it ten years after any disabilities under which any of the plaintiffs labored, or may have labored, then, if she held it for ten years after the plaintiffs became of age,—all of them,—and if it was adverse possession against an infant, his infancy would be protected by the statute; but if the adverse possession started to run on November 22, 1879, and you find that Mrs. Sumeral held for ten years after the infant became of age, and that infant stood by and allowed the adverse possession to run, then the defendant would be entitled to a verdict."

The jury rendered a verdict for the defendant, and judgment was duly entered thereon. From this plaintiffs appeal on the following

exceptions: "(1) The court erred in charging the jury with respect to matters of fact, by charging defendant's second and third requests to charge, because the court therein says that the deeds from J. A. David to W. L. Sumeral and from W. L. Sumeral to Louisa Sumeral purport 'to convey the entire estate in the lands described in the complaint,' and later on in his charge the judge committed a similar error in reference to these same deeds by saying: 'They purport to convey the land.' (2) The court erred in charging the jury that the statute of limitations governs this case, and that, if the defendant held the land described in the complaint adversely for ten years after all the plaintiffs became of age, 'then the defendant would be entitled to a verdict.' (3) The court erred in not charging the jury that the statute of limitations does not run in favor of one tenant in common and against another unless there has been an ouster, the possession of one being the possession of all. (4) The court erred in not charging the jury that where there has been no actual ouster, where one co-tenant has the entire possession of the common property and received the entire rents and profits thereof, this of itself will not constitute ouster, and ouster will not be presumed short of twenty years' adverse possession, and it must be twenty years after the co-tenant, against whom the presumption of ouster is claimed, becomes twenty-one years of age. (5) The court erred in charging defendant's fourth request to charge, which was as follows: 'If you should conclude that Louisa Sumeral entered into possession under the deed from W. L. Sumeral in 1879, and held it until February, 1900, adversely to the plaintiffs, then this would constitute a valid defense to this action, and your verdict should be for the defendant, unless during this period some of the plaintiffs were infants; and, in case you find that any of the plaintiffs were infants during this period, I charge you that the period of such infancy must be deducted from the period of adverse possession, and, if there remain then ten years during which the defendant held this land adversely to the plaintiffs and exclusive of their interest, this would be a good defense to this action, and your verdict must be for the defendant.' Whereas he should have charged as follows: 'If you should conclude that Louisa Sumeral entered into possession under the deed from W. L. Sumeral in 1879, and held it until February, 1900, adversely to the plaintiffs, then this would constitute a valid defense to this action, and your verdict should be for the defendant, unless during this period some of the plaintiffs were infants; and, in case you find that any of the plaintiffs were infants during this period, I charge you that the period of such infancy must be deducted from the period of such adverse possession, and, if there then remain twenty years during which the defendant held this land adversely to the plaintiffs and

exclusive of their interest, it would then be presumed that the defendant had ousted the plaintiffs, and your verdict must be for the defendant, otherwise your verdict should be for the plaintiff.'"

Adam C. Welborn and Ansel, Cothran & Cothran, for appellants. Haynesworth, Parker & Patterson, for respondent.

McIVER, C. J. The plaintiffs brought this action for the partition of a tract of land, alleging that they were entitled to four undivided ninths of the land, and that the defendant was entitled to the remaining five-ninths. The defendant by her answer set up several defenses: First, a general denial of all the allegations in the complaint; second and third, a denial that plaintiffs, or either of them, have any title to or interest in the land described in the complaint, and, on the contrary, alleges that she is the sole owner of said lands, having derived title thereto under a deed executed the 22d November, 1879, purporting to convey the same to her in fee simple, under which she has ever since said date been in the open, notorious, adverse, and exclusive possession of the said land, claiming the same as her own, and claiming that plaintiffs' action is thereby barred under the provisions of the statute of limitations.

The following are the undisputed facts as developed by the testimony in the case: The land originally belonged to one Roger Loveland, who died on the 30th of January, 1857, intestate, leaving as his heirs at law his widow, Martha Loveland, and his son, Isaac Newton Loveland, who died on the 12th of February, 1859, childless and unmarried, and his daughter, Isabella J., who intermarried with P. F. Sudduth on the 16th of June, 1858, and died on the 14th of June, 1878, leaving as her heirs at law the said P. F. Sudduth, her husband, and her two children, S. Davis Sudduth and Mary C. Cunningham, two of the plaintiffs in this case, and also another daughter, Drusilla A., who intermarried with one Thomas H. Stall on the 1st June, 1858, and died on the 1st July, 1864, leaving as her heirs at law her said husband and her daughter, Cora B., now the wife of one Terry, who is the other plaintiff in the case. On the 9th of February, 1864, Martha Loveland, P. F. Sudduth, Isabella J. Sudduth, Thomas H. Stall, and Drusilla A. Stall executed a deed conveying the land in question to one J. A. David, who went into possession of said land under said deed, claiming it as his own, and remained in such possession until the 8d of November, 1879, when he conveyed the same to William Sumeral, who went into possession, claiming it as his own, and retained such possession until the 22d of November, 1879, when he conveyed said land to his wife, Louisa Sumeral, the defendant herein, who went into possession, claiming it as her own, and has ever since retained such possession. All these deeds were recorded in the proper

office in the county of Greenville, where the land lies. In the "case" we find the following statement in regard to these deeds: "The deeds introduced in evidence contained general warranties, and purported to convey the entire interest in the land therein described." It appears, however, that though Mrs. Sudduth and Mrs. Stall joined in the deed of 9th of February, 1864, to J. A. David, they did not renounce their inheritance in the manner prescribed by the act of 1795, then in force; and hence the plaintiffs claim that upon the death of Mrs. Sudduth and Mrs. Stall, respectively, their heirs at law became entitled to their shares of the land, respectively, though they admit that the surviving husbands of each of these married ladies are estopped by their deed of 9th of February, 1864, from making any claim as one of the heirs at law of their respective wives, and hence they only claim the shares of the plaintiffs herein, to wit: four-ninths of the land. Inasmuch as the plaintiffs claim that they are protected from the plea of the statute of limitations by the disability arising from infancy, it will be necessary to state the ages of the parties. It appears from the testimony in the case that the plaintiff S. Davis Sudduth was born on the 1st day of March, 1866, and hence he did not attain his majority until the day before the 1st day of March, 1887; that Mrs. Cunningham was born on the 18th of March, 1859, and hence did not attain her majority until the 17th of March, 1880; and that the other plaintiff, Mrs. Terry, was born on the 16th of September, 1839, and hence did not attain her majority until the 15th of September, 1880. Now, as this action was commenced on the 20th of February, 1900, it follows that S. Davis Sudduth had been of age very nearly 13 years, Mrs. Cunningham very nearly 20 years, and Mrs. Terry nearly 20 years, when this action was commenced. After hearing the evidence and the charge of the judge, the jury rendered a verdict in favor of the defendant, and from the judgment entered thereon the plaintiffs have taken an appeal to this court, basing their appeal upon the several exceptions set out in the record. For a full understanding of the questions presented, the charge of the circuit judge, together with the exceptions thereto, will be reported.

The first exception imputes error in charging on the facts, because the judge charged on the facts in saying to the jury that the deeds therein referred to "purport to convey the entire estate in the lands described in the complaint." The point of this exception lies in the fact that the judge, in so charging, assumed as a fact that the land described in those deeds was the same as that "described in the complaint." But when it is seen that the judge expressly qualified those requests referred to in the exception by adding the words "If the deeds convey the land described in the complaint," it is manifest that the exception is without foundation. The only possible question of fact which could arise

out of the requests was whether the land described in the deeds was the same as that described in the complaint, and that question the judge expressly left to the jury by his qualification of the requests. Whether those deeds purported to convey the entire or any lesser estate in the land described in the deeds was a question of law, and not a question of fact; for it is settled law that it is the province of the judge, and not of the jury, to construe the terms of a deed when offered in evidence. The first exception must therefore be overruled.

The second exception is taken under a misconception of the judge's charge, for we do not understand him as instructing the jury "that the statute of limitations governs this case," though he did charge the jury (and, as we think, correctly) that, if the defendant held the land in dispute adversely for 10 years after all the plaintiffs became of age, she would be entitled to a verdict, but he left it to the jury to say whether the defendant did hold the land adversely for the time stated, and in this there was no error. The second exception must be overruled.

The third exception imputes error to the circuit judge in not charging the jury that the statute of limitations did not run in favor of one tenant in common against another unless there has been an ouster. In the first place, it does not appear that any request was made to charge any such proposition. All that we find in the "case" as to that matter is this, "Mr. Ansel [one of the counsel for plaintiff] requests the court to charge the jury as to ouster," and the judge did proceed to instruct the jury as to ouster, in terms to which no exception appears to have been taken. There was no request to charge any particular proposition as to the law of ouster. It was simply a general request "to charge the jury as to ouster," and that request was complied with. The third exception must therefore be overruled.

The fourth and fifth exceptions are open to the same objection, as there were no requests to charge either of the propositions which appellants claim by these exceptions ought to have been charged, and this would be sufficient to dispose of both of these exceptions. But as the appellant in the fifth exception complains of error in charging the defendant's fourth request, which is set out in that exception, we will not decline to consider that exception. Without repeating that request in terms, it is sufficient to say that it amounted to this: If the jury should conclude that the defendants went into possession under the deed from W. L. Sumeral on the 22d November, 1879, and held it adversely to the plaintiffs until the commencement of this action on the 20th of February, 1900, then such possession would constitute a valid defense to this action, unless during this period some one or more of the plaintiffs were infants, and, if so, then the period of such infancy must be deducted from the period of

adverse possession; and if there then (after such deduction) remained 10 years during which the defendant held this land adversely to the plaintiffs, and exclusive of their interest, this would be a good defense to this action. In this there was no error of law, for when the judge instructed the jury that, to make this possession on the part of the defendant a good defense to the action, it must have been taken under the deed of 22d of November, 1879, which upon its face purported to convey to her an absolute and exclusive title to the land, and when he emphasized this by saying that such possession must be adverse to the plaintiffs, and re-enforced such emphasis by saying that such possession must not only be adverse to the plaintiffs, but also exclusive of their interest, he absolutely negated the idea that such possession, if taken and held as a tenant in common with plaintiffs, would be a good defense to the action, as appellants seem disposed to construe the charge. It is quite true that, if a person goes into possession of a tract of land as a tenant in common with another, no length of such possession can give him a title by the statute of limitations against his co-tenant, for the very obvious reason that his possession cannot be adverse to his co-tenant until an ouster is established. But where, in this case, a person goes into possession of land under a deed from a third person which purports on its face to convey to him an absolute and exclusive title to the entire interest in the land, and such deed is spread upon the public records, this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement. Of course, such adverse possession cannot avail him against one laboring under any legal disability,—such, for example, as infancy,—until his possession continues for the prescribed time after the removal of such disability. This view is sustained by the case of *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3. In that case the plaintiffs brought the action to recover possession of lands in the possession of the defendant, claiming that they, as heirs at law of one Thomas Garrett, were tenants in common of said land with E. W. Moise and those claiming under him; he having acquired the interest of one of the heirs at law (Mrs. Moore) of Thomas Garrett, who was the widow of said Thomas Garrett, and had contracted a second marriage with one John S. Moore. It appeared that John S. Moore and his wife had joined in a deed for the lands in dispute to E. W. Moise, executed on the 13th of April, 1871, under which deed the defendants claimed. In delivering the opinion of the court, Mr. Justice Gary, in speaking of this deed, used the following language, which is quite appropriate to the present case: "If the deed, which was recorded, should be construed as a conveyance of all the land, and Edwin W. Moise entered into possession thereunder

without recognizing any other claim, then such entry would constitute ouster." Counsel for appellants in the argument here suggest that the learned justice "could not have meant it was actual ouster, but presumption of ouster, which could only operate against an infant after the expiration of twenty years, deducting the period of minority." The reason given by counsel for such a suggestion is that Mr. Justice Gary in a subsequent portion of his opinion held that though Marion Moise, the grantee of E. W. Moise, held possession of the land for more than 10 years after John Norton, one of the plaintiffs, had attained the age of 21 years, yet he held that John Norton was not barred, because, as counsel says, "The opinion as a whole shows that it would have taken twenty years after John Norton reached his majority to have perfected a presumption of ouster against him." This view of counsel for appellant is based upon an entire misconception of the opinion of Mr. Justice Gary, in which not a word can be found justifying the inference that he held that John Norton was not barred because the period of 20 years had not elapsed after John Norton had attained the age of 21 years; and, on the contrary, the opinion clearly shows that John Norton, as well as some of the other plaintiffs, was not barred by the statute of limitations for a much better reason, to wit, the minority of some of the other co-tenants, plaintiffs in the case. There is no warrant, therefore, for the suggestion of counsel that Mr. Justice Gary could not have meant what he said; for it was unquestionable good law, and is sustained by the cases of *Sumner v. Murphy*, 2 Hill, 488, 27 Am. Dec. 397; *Gray v. Bates*, 3 Strob., at page 502; where O'Neill, J., in delivering the opinion of the court, uses this language: "That Bordeaux was tenant in common with Smith and Muckelrath of the large grant of which the land in dispute was part is true. That each tenant in common had the right to the possession of the whole or part of the land is also true. But it by no means follows that a purchaser from one of the co-tenants [Bordeaux] of a part of the tract, without reference to the title of the other co-tenants, would necessarily become tenant in common, so as to prevent him from perfecting his title by adverse possession under our act of limitations. To constitute an adverse possession, it is only necessary it should be held as 'one's own.'" See, also, *Odum v. Weathersbee*, 26 S. O., where, at page 247 (1 S. E. 892), Mr. Justice McGowan, in delivering the opinion of the court, uses this language: "It is true that the children and their mother were tenants in common, and that one tenant in common cannot, at law, sue his co-tenant unless there has been an actual ouster. But when one tenant in common conveys to a stranger, who sets up title to the whole, and denies that the other tenant has any interest, there is ouster, and the stranger may be sued in an action

at law." From this it follows that exceptions 4 and 5 must likewise be overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

(61 S. C. 393)

SUBER v. RICHARDS.

(Supreme Court of South Carolina. Aug. 20, 1901.)

PLEADING—STATUTE OF FRAUDS—PROBATE PRACTICE—SALE OF LANDS—PAROL EVIDENCE—LIMITATIONS—NEW PROMISE—INTEREST.

1. The statute of frauds is not available as a defense unless pleaded.

2. Where land was sold, under a consent order obtained in the probate court, in aid of assets, before judgment on the merits, and part of the purchase money was paid, and the purchaser was in possession under a sheriff's deed, parol evidence is admissible to establish the agreement under which the consent order and sale were had.

3. A letter written by a debtor to his creditor, referring to an indebtedness upon which a certain payment had been made, with an unqualified promise to pay the balance of the debt, is an acknowledgment sufficient to take the case out of the statute of limitations.

4. Where a debtor by his letter promises to pay the balance of a debt due, though barred by limitations, the identity of the debt sued for with the debt thus promised in writing to be paid is for the jury.

5. Where an original debt is barred, but thereafter is acknowledged by a promise in writing, interest will be recovered on the debt from the time it was first due.

Appeal from common pleas circuit court of Newberry county; Buchanan, Judge.

Action by Leila Suber against J. B. Richards. Judgment for plaintiff. Defendant appeals. Affirmed.

Munro, Duncan & Sanders and O. L. Schumpert, for appellant. Johnstone & Welch, for respondent.

JONES, J. The action herein was upon the following complaint: "(1) That heretofore she sold to John C. Richards, to wit, in January of the year 1878, the interest that she had in the real estate of her late father, Berry Richards, at and for the sum of \$750; that thereafter, on the 6th of February, 1878, the said John C. Richards paid her on the said debt the sum of \$200. (2) That the defendant, J. Berry Richards, has been duly appointed the administrator of the estate of the said John C. Richards, who since the times hereinbefore mentioned had died intestate. (3) That no part of the balance of \$550 left owing her, as above stated, has ever been paid, but is still due and owing to her. (4) That since the times hereinbefore mentioned, and within the last six years, she received from the said John C. Richards letters in which he acknowledged the validity of the debt herein sued on." (Demand for judgment.) This complaint was amended informally on the trial by agreement, so as to specify the mode of sale referred in the first paragraph, as follows: "Heretofore sold; that

is to say, she did so and so; judgment recovered, and plaintiff was about to move to set aside judgment, and agreement was, if they would refrain from interfering to set aside the judgment, and allow the land to go to sale, and John C. Richards would purchase and pay the plaintiff so much." The answer was a general denial and a plea of the statute of limitations. The jury found a verdict for the plaintiff for \$1,839.14, and the defendant now appeals from the judgment thereon.

The first question to be considered is as to the applicability of the statute of frauds, which is raised by exceptions to admission of testimony and exceptions to the charge, the circuit court holding that the statute was not applicable. It appears by the records of the probate court put in evidence that Berry Richards, Sr., died on the 26th day of March, 1865, testate, and that his widow, Elizabeth Richards, procured letters of administration with the will annexed in November, 1865. By this will the testator devised a tract of land consisting of about 600 acres, one half to his said widow, Elizabeth, and the remaining half to his two daughters, Eliza T., who afterwards married James Lou Henderson, and Leila H., who afterwards married Jacob H. Suber. The will also directed that the estate be kept together until all his debts should be paid, and after that as long as his wife remained unmarried, or until his eldest daughter should marry or arrive at age. In endeavoring to carry out this direction of the will, the administratrix continued to farm the lands, and was assisted therein by John C. Richards, defendant's intestate, who made advances in supplies, etc. But the plan was not successful. The old debts were not paid, and new ones were contracted. In April, 1875, John C. Richards, who was the brother of Berry Richards, Sr., commenced proceedings in the probate court for Newberry county to sell said lands in aid of assets, he claiming to be a large creditor of the estate. The testator's daughters, Eliza T. Henderson and Leila H. Suber, resisted said sale, denying the alleged indebtedness, pleading the statute of limitations, demanding a strict accounting by the administratrix, and charging collusion between the administratrix and John C. Richards and another to defraud the children of their rights under the will. On November 11, 1875, an order was made calling in creditors to establish their demands. On the 15th December, 1877, there was a consent order that the land described therein (being the 600-acre tract referred to above) be sold on the first Monday in January, 1878. The sale was made on the day named by the sheriff under said consent order, and John C. Richards became the purchaser at his bid of \$2,500, and he received the sheriff's deed therefor and went into possession. At that time the probate court had made no decree establishing claims against the estate, and adjudging as to the necessity to sell the real

estate in aid of assets. Such a judgment was not made until February 1, 1879. The sale was made pursuant to agreement of the parties under the following instrument: "State of South Carolina, County of Newberry, Court of Probate. John C. Richards, Individually and as Survivor, etc., Plaintiff, against Elizabeth Richards, as Administratrix with the Will Annexed, etc., and Others, Defendants. We, the undersigned, Elizabeth Richards, the widow and heretofore administratrix of the will of Berry Richards, deceased, and Eliza T. Henderson and Leila H. Suber, the daughters of the said deceased, and all three defendants in the above-stated action, do hereby consent and request that his honor the judge of probate for the said county shall order the lands described in the complaint in this action, of which the said Berry Richards died seised, to be sold at auction at Newberry Court House, in the said county and state, on the first Monday in January, A. D. 1878, or the first convenient sales day thereafter, on such terms as to the said judge may seem proper,—the proceeds of such sale to be disposed of in such manner as the said court shall hereafter adjudge. And we desire that such said sale shall be made clear of all claim of dower, or the rights of any of us under the will of the said Berry Richards, or under the laws of this state relating to inheritance. Eliza T. Henderson, Leila H. Suber, E. Richards. Witness as to E. T. Henderson and L. H. Suber. Witness as to Elizabeth Richards. Robert Macbeth."

The parol testimony objected to tended to show that previous to said sale the plaintiff agreed that the lands be sold upon John C. Richards agreeing to pay the plaintiff \$750 for her interest therein, to be paid when she got ready to go to Texas, which she was then contemplating. Plaintiff moved to Texas on the 7th or 8th of February, 1878, and, the day before going, John C. Richards paid plaintiff \$200 of said sum and promised to send balance later. After this, plaintiff introduced in evidence a letter written by John C. Richards to plaintiff in response to a letter by the plaintiff to John C. Richards, which contained much irrelevant matter, and is too long to insert in full. We extract therefrom the following, the letter being dated February 8, 1891: "I did not see much of Lizzie [meaning Elizabeth, the widow of Berry Richards, Sr.]. She took up most of her time in Newberry, consulting a lawyer. I have understood since Berry told me a good deal about her mission to this county. She is certainly a wonderful woman, trying to stir up some more strife about the old place. It has already cost me three times as much as it is worth. * * * The very idea of Tudie [meaning Elizabeth T. Henderson, sister of plaintiff, to whom, according to the parol testimony, he had also promised to pay \$750 for her interest in the land] talking about her interest in the land! She got enough out of me already to pay for the whole land.

* * * I am not afraid of them ever getting any more out of that old place. If they should go into a lawsuit, the lawyers will gobble it up, what they may get. * * * I am glad you had nothing to do with this foolishness of Lizzie. * * * You have taken the right view of matters, and you will never lose anything by it. * * * I don't remember how much money I gave you when you left. I thought it was \$300, but Lizzie said \$200 the day I saw her at Maybinton. I am going to pay you the other. Do you remember what was said about this? I remember very distinctly what I said, but Berry tells me his mother has it all changed to suit her. Said I promised to give Tudie land, and ought to have done it, in place of money and helping Jim Pou." We agree with the circuit court that the statute of frauds does not apply. In the first place, the statute of frauds is not available unless specially pleaded, and it was not pleaded in this case. It is true that in the case of Poag v. Sandifer, 5 Rich. Eq. 170, it was held that to a bill to enforce an agreement in relation to land the defendant need not plead the statute of frauds, if he deny the agreement in his answer. That decision, however, was made in 1852, under the former system of pleading. We think it accords better with the Code system that the adverse party and the trial court be advised by the pleadings whether the statute will be interposed as a bar to the action. A parol contract for the sale of land is not void at common law, nor does the statute make such contract void. The protection afforded by the statute is a personal privilege of the parties to the agreement, and may be waived by them. Finley v. Moore, 55 S. C. 198, 33 S. E. 362. It is worthy of note that the cases cited in Poag v. Sandifer, supra, from New York (Cozine v. Graham, 2 Paige, 177; Ontario Bank v. Root, 3 Paige, 478), have been overruled since the adoption of the Code, and that the settled rule in that state is that the statute must be specially pleaded. Crane v. Powell (N. Y. App.) 34 N. E. 913. The case of Groce v. Jenkins, 28 S. C. 172, 5 S. E. 352, does not conflict with this view, for the point there decided was merely that it is not necessary to allege in the complaint that an agreement as to lands is in writing, since such agreement will be presumed to be in writing until the contrary appears. Nor does the case of Hillhouse v. Jennings, 60 S. C. 373, 38 S. E. 599, present any irreconcilable conflict with this view. In that case the complaint alleged an oral agreement, and, while the defendant did not plead the statute in his answer, the court regarded his motion, under which defendant sought the bar of the statute, as in effect an oral demurrer based upon the statute, which was in reality pleading the statute under a demurrer. It is proper practice to demur when the pleading states a contract to be verbal, when the statute requires such contract to be in writing. Mendelsohn v. Banov, 57 S. C. 150, 35 S. E.

499. There is much conflict in the decisions on this subject, as shown by the citations in 9 Enc. Pl. & Prac. 705, but the better rule is stated to be that the party seeking the protection of the statute should plead it.

We might well rest the question here; but we will add that, assuming that the objection under the statute is available without being pleaded, the case is taken out of the statute by performance of her part of the agreement by the plaintiff, possession of the land by the defendant's intestate, and part payment of the agreed price. The sale when made by the probate court was not pursuant to any judgment requiring such sale in aid of assets, but under the written consent and request of the parties in interest. Under such circumstances, the deed of the sheriff to the defendant's intestate was the stipulated conduit by which the interest of the plaintiff in the land was to be conveyed to the purchaser. If the purchaser's possession was taken under the sheriff's deed, the deed depended upon the consent order, and was the method of conveyance agreed upon. The letter of John C. Richards to plaintiff shows that he recognized that he was still indebted to plaintiff upon an agreement in reference to the purchase of this land, upon which he had made a payment of \$200. This action, then, is not to enforce a parol executory agreement for the sale of land, but for the price claimed to be due upon an executed contract for the sale of land, consummated by a deed of conveyance to the purchaser. In such a case the statute does not apply. *Wood v. Gee*, 3 McCord, 421.

We next notice the exceptions relating to the statute of limitations. The action was commenced on the 6th day of February, 1897, within six years from the date of the letter of February 8, 1891, which was relied on to show a new promise to pay the alleged original indebtedness of 1878. It is excepted that there was error in allowing the letter of February 8, 1891, in evidence, because said letter is not sufficiently definite and certain, in that it does not (1) state any amount due, or (2) when it was to be paid, or (3) for what the promise was made, or (4) whether it was a debt due to the plaintiff or not. Error is also assigned to the refusal of the motion for nonsuit (1) because the original promise was shown to have been made in 1878 and was barred; (2) because the letter introduced in evidence does not contain a new promise, in that it does not state the amount due, nor refer to anything from which the amount can be computed. There are also exceptions to the modifications made by the circuit court in responding to certain requests to charge, as to which it will be sufficient to state the fourth and fifth requests to charge and the response of the trial court thereto, as follows: "(4) Where a debt is barred by the statute of limitations, and it is alleged that such debt has been revived by a new promise writing, such new promise must be a clear

and explicit promise to pay the particular debt sued on, or such an unqualified and unequivocal admission that the particular debt sued on is still due as will imply a promise to pay such debt, otherwise such new promise will be insufficient to justify a recovery.' I cannot charge you that it must be in its terms so specific and so particular as to identify by name or by other circumstances or matters of description a particular agreement, but it is enough if it refers to and identifies an antecedent agreement so as to carry conviction to your mind that it was intended in the mind of the person who made it to be an acknowledgment of that particular debt, and none other; and with that modification I charge you that. '(5) Where a new promise is relied on to recover a debt which is barred by the statute of limitations, such new promise must be a clear and explicit promise to pay the debt sued on, or such an unqualified and unequivocal admission that this particular debt is still due as will imply a promise to pay such debt, otherwise such new promise will be insufficient to warrant a recovery of such debt.' Well, gentlemen, with what I have already charged you, I charge you that. I charge you that, because I have practically charged that, or a modification of it, heretofore; and with that understanding, with that modification, I charge you that. The term there, 'explicit,' does not mean, as I have tried to indicate to you, that in its language, the renewal, the written instrument reviving it, continuing the contract, or, rather, to be more accurate, barring the statute of limitations, must explicitly, in its terms, in its language, and in its words, refer to the contract. If it does refer to it so as to identify that contract heretofore made as the only contract heretofore, and as that contract alone, and none other contract, then it would be enough." The letter was properly admitted in evidence on proof that it was signed by the defendant's intestate and addressed to the plaintiff. It plainly referred to an indebtedness by defendant's intestate to the plaintiff upon which a payment of \$200 was made when plaintiff "left," and contained an unqualified promise to pay "the other" or balance of that indebtedness. The rule laid down in *Lockhart v. Eaves*, Dnd. 321, and approved in *Robbins v. Farley*, 2 Strob. 352, is that acknowledgment of promises to obviate the statute of limitations are not sufficient unless they specify or plainly refer to some particular cause of action. As we construe this letter, it meets the requirement by plainly referring to a particular indebtedness credited with \$200, with an express promise to pay the balance, and is a sufficient compliance with section 131 of the Code to take that particular debt out of the statute of limitations. The identity of the debt, which defendant thus promised in writing to pay, with the debt sued for, was a matter properly left to the jury. *Hill v. Hill*, 51 S. C. 142, 28 S. E. 309. And for the pur-

pose of such identification, even though it involved proof of the amount of the debt, oral evidence was admissible. The general rule is thus stated in *Manchester v. Braedner*, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 831: "It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted (*Kincaid v. Archibald*, 73 N. Y. 189; *Lechmere v. Fletcher*, 3 Tyrw. 450; *Bird v. Gammon*, 3 Bing. N. C. 883), or to explain ambiguities (1 Smith, Lead. Cas. 960, and cases cited)." The rulings and charge excepted to were consistent with the views above stated, and the exceptions thereto must be overruled.

We next notice the exceptions to the charge in reference to interest. The court instructed the jury: "If you find that there was so much due at the time mentioned in the complaint, and that the plaintiff has been kept out of it ever since, and the amount was liquidated and certain (that is to say, there was a set amount), then you may give plaintiff interest on it from the date it was due and ought to have been paid up to the time of the recovery,—up to the time the complaint was served." The specifications of error are: "(1) In leaving the jury free to allow interest from the date of the alleged original promise in 1878, whereas, it is respectfully submitted, the jury should have been instructed: (a) If there was a promise to pay money, interest could not be allowed, if it was uncertain when the money was to be paid; (b) if no time was specified when a debt is to be paid, then interest could not be allowed until after demand for payment was made; or else (c) that no interest could be collected for a longer time than six years prior to the commencement of the action." Interest is for the detention of money due. Inasmuch as there was competent evidence tending to show that the debt sued for was due when plaintiff left Newberry for Texas, when the \$200 were paid, which was the 7th or 8th of February, 1878, we see no error in the charge of which appellant could complain.

We have not deemed it necessary or useful to consider the numerous exceptions in detail. The foregoing views practically dispose of the appeal. All the exceptions are overruled. The judgment of the circuit court is affirmed.

GARY, A. J. (concurring in the result). Before the adoption of the Code, the rule that unquestionably prevailed in this state was that it was not necessary that the question whether the agreement was void under

the statute of frauds should be raised by the pleadings. *Givens v. Calder*, 2 Desaus. 171, 2 Am. Dec. 686; *Poag v. Sandifer*, 5 Rich. Eq. 170. The case of *Grove v. Jenkins*, 28 S. C. 172, 5 S. E. 352, shows that this rule is still of force. I cannot, therefore, concur in so much of the opinion of Mr. Justice JONES as holds that the statute of frauds is not available unless specially pleaded.

POPE, J., being disqualified by reason of having been an attorney in the original cause, did not sit.

(61 S. C. 345)

COOPER v. GEORGIA, C. & N. RY. CO.
(Supreme Court of South Carolina. Aug. 5, 1901.)

CARRIERS—INJURY TO PASSENGER—QUESTION FOR JURY—NEGLIGENCE—PLEADING.

1. In an action to recover for injuries received in alighting from a train in motion, where there is evidence that plaintiff was invited by the conductor to get ready to get off, and went with him to car step, and the train slowed up, and upon its beginning to run faster he jumped, while the conductor was present, and was injured, a nonsuit was properly refused.

2. The negligence on the part of a passenger that would defeat a recovery and relieve the carrier of liability must be such negligence as shows itself to have been the immediate cause of the injury or a concurring proximate cause.

3. There is a presumption of negligence arising from the fact that the passenger was injured while on defendant's train.

4. An instruction that the invitation of a conductor, when nearing a station, to the passenger, to "get ready to get off," was too remote a cause of an injury received from alighting from the moving train at a station, is properly refused as a charge on the facts.

5. The questions whether defendant railroad company stopped its train at a station, and as to how many feet beyond the usual stopping place it could go before coming to a standstill, were for the jury.

6. Where plaintiff alleged failure of defendant to stop its train at a station, whereby plaintiff was injured, it authorized submission to the jury of the question whether plaintiff was injured by reason of such failure, where the evidence tended to show that he was injured when the train first slowed up at the depot, and on its commencing to go faster he stepped off.

Appeal from common pleas circuit court of Newberry county; Benet, Judge.

Action by Monroe Cooper against the Georgia, Carolina & Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. W. Perrin and T. P. Cothran, for appellant. Johnstone & Welch, for respondent.

GARY, A. J. The action herein is for damages in the sum of \$10,000, alleged to have been sustained by the plaintiff at Whitmire, S. C., 14th November, 1897, by reason of the defendant's negligence. The jury rendered a verdict in favor of the plaintiff for \$1,500. The allegations of the complaint that are material to the consideration of the questions raised by the exceptions are: "(2) That the

plaintiff, on the 14th day of November, 1897, purchased a ticket of the defendant at Carlisle, a station upon the railroad of the said defendant, said state aforesaid, which ticket was for passage to Whitmire, another station upon the said railroad. * * * (4) When the last station between the stations of Carlisle and Whitmire was passed, the said conductor reminded the plaintiff that the next station was Whitmire, and when the train neared Whitmire, and after the signal for the station had been blown, the conductor came and ordered him (the plaintiff) to get ready and get off. (5) That as the said train slowed up he (the said plaintiff) got up from his seat and followed immediately behind the conductor to the door of the car in which he was riding, and that the said conductor opened the door of the said car, and was followed out of it, to his knowledge, by the said plaintiff, and both he and said conductor were standing on the platform of the said car as the station of Whitmire was being passed. That the said train slowed up as if to stop, but failed to do so, and on the other hand it began to go faster and faster, until the plaintiff despaired of stopping, and obeyed the order and instructions aforementioned that he should prepare and get off, and accepting the invitation of the said defendant to dismount, in the presence of the said conductor and to the full knowledge of said defendant, the plaintiff jumped from the train and was struck by passing steps thereof, which caused him to fall, so that his foot was passed over by some of the wheels of the said train and mangled most painfully and seriously,—in fact, to such an extent that amputation became necessary and his leg was taken off. * * * (8) That as a result of the negligence on the part of the defendant—First, in its failure to stop the said train at Whitmire; second, in ordering and inviting the said plaintiff to dismount from the train while in motion; third, in permitting the said plaintiff, when its train was in motion, and while the plaintiff was in the presence of the said conductor and to the knowledge of said defendant, to jump off of its train, after having ordered and invited said plaintiff to get off,—that by reason of all and each of said acts of negligence and carelessness aforesaid on the part of said defendant, the plaintiff was wounded and injured as aforesaid."

The defendant appealed upon exceptions, the first of which assigns error on the part of his honor, the presiding judge, in refusing the motion for a nonsuit. The grounds of the motion were as follows: "First. The plaintiff has failed to offer any evidence tending to establish facts from which negligence on the part of the defendant as alleged in the complaint may be reasonably inferred. Second. The plaintiff has failed to offer any evidence tending to establish the fact that the injury received by the plaintiff was the proximate result of the negligence of the defendant as alleged in the complaint. Third. The evi-

dence does not tend to establish the fact that the defendant negligently failed to stop its train at Whitmire. Fourth. The evidence shows that the plaintiff's injury was the result of his attempt to alight from a moving train without the invitation, express or implied, of the defendant's agent, and the alleged failure to stop the train at Whitmire cannot be deemed in law a direct, proximate, or natural cause of his injury. Fifth. The evidence does not tend to establish the fact alleged that the plaintiff alighted from a moving train by order or invitation of the defendant or any of its agents or servants. Sixth. The evidence does not tend to establish the fact that the conductor was present when the plaintiff attempted to alight from the moving train, had knowledge of or permitted him to do so, after he had ordered or invited him so to alight. Seventh. The evidence shows a state of facts from which only one inference can, reasonably be drawn, and that is that the plaintiff's injuries were received in consequence of his own negligence. Eighth. The evidence shows that the alleged negligence on the part of the defendant was not the sole proximate cause of the plaintiff's injuries." In refusing the motion for a nonsuit, the presiding judge said: "Of course, a motion for a nonsuit should not be granted if there is any evidence to go to the jury such as might justify them in inferring from the testimony that the plaintiff was entitled to a verdict, or even to discuss whether or not he is entitled to a verdict if there is any evidence going to sustain the allegations of the complaint,—the main allegations which go to the jury. The able argument of counsel referred to numbers of cases. It is always very difficult, however, to find a case as an authority which will exactly apply to the case in point, and I was struck by the difference between the case now at the bar of this court and the cases referred to. There were numerous cases cited of the train overshooting the station or stopping place, and even the announcement of the near approach of the stopping place; but I do not think that any one of them mentioned a case in which the conductor ordered or invited or commanded the passenger to prepare to alight or to get off. Now, that in this case is a distinct allegation in the complaint. The three main grounds of the plaintiff's case are: First, the failure of the railway company to stop the train at Whitmire; second, ordering and inviting the said plaintiff to dismount from the train while in motion; and, third, in permitting said plaintiff, while the train was in motion and while the plaintiff was in the presence of the said conductor, to jump off the train, after having ordered and invited the said plaintiff to get off. Now, there is evidence tending to show that the train did not stop at Whitmire; there is evidence tending to show that the conductor ordered and invited the plaintiff to dismount from the train while in motion; there is evidence tending to show that he was pres-

ent, which does not mean on the same step of the platform or on the same car. 'Present' means near enough to see, and there is evidence tending to show that he was on the same train and near enough to see. There is evidence tending to show that he told them to get up and get ready to get off, and went ahead of them, they following him, and that he stood on the platform of the car, they on the other platform, and that he went into the other car. So there is evidence tending to show that all three of the grounds assumed by the plaintiff may be proved. It is not for the court to say whether they are proved or not, but there is evidence tending in that direction. As to the question of proximate cause, even if it were proper at this stage, which I doubt, because contributory negligence is a defense, that would be asking the court to weigh the negligence on the part of the defendant and the contributory negligence on the part of the plaintiff, and say which is the proximate cause. If there is evidence of negligence on the part of the railway, and also evidence of negligence on the part of the plaintiff, the jury must decide. The court cannot assume to decide that question at this stage. Therefore, I need not take up any time by discussion whether there was an intervening efficient cause. It is sufficient, if there is evidence tending to show that the railway company was negligent, as alleged by the plaintiff in his complaint. There is no doubt that it is not negligence per se on the part of a passenger under certain circumstances to jump off a moving train, if the train is going slowly enough and the place where he expects to alight is smooth enough, and he is in possession of all his powers and faculties of locomotion, especially if the conductor has invited him to get off. It is for the jury to say whether it was negligence on the part of the railway company to order or invite a passenger, through its conductor, to get off a train in motion, and then not stop and give him a chance to get off. As to whether the plaintiff understood that invitation to include to wait until the train stopped is a question for the jury. Even if the plaintiff so understood it at first, that that was the intention of the conductor not to get off until it stopped, he might have changed his mind when the train did not stop, and come to the conclusion that he made a mistake, and that the conductor intended him to get off while the train was in motion. So that, under all these aspects of the case, I think it very clear that the motion for a nonsuit should not be granted." The reasons assigned by the presiding judge in overruling the motion are satisfactory to this court.

The second exception is as follows: "The presiding judge erred in modifying defendant's fourth request, which was as follows: 'That plaintiff cannot recover from defendant unless the injury was caused by the negligence of the defendant; not even then, if the plaintiff has so far contributed to the

injury by want of ordinary care that but for the plaintiff's want of ordinary care the accident would not have occurred.' Said modification being to the effect that the contributory negligence of the plaintiff must have been a proximate cause of the accident. The error consisting in this: Contributory negligence to any extent will defeat a recovery, and it means such negligence as has some share or agency in producing the result complained of, not that it was the immediate or proximate cause of the injury." In disposing of the foregoing request the presiding judge used this language: "That is good law so far as it goes, but it is not sufficiently clear as to what is meant by contributing to the injury; and before passing from it I had better make plain to you, if I can, what is meant by contributory negligence, and on that subject we have the light thrown upon this case by our supreme court when the case was taken up on appeal before. The supreme court says this: 'The best definition of contributory negligence we have seen is the following,'—and then he quotes from a book. 'Now, gentlemen, endeavor to catch the meaning of this: 'Contributory negligence is a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.' Now, here is our supreme court announcing solemnly that this is the best definition they have found in all the books. I trust it conveys to you a clear idea, yet I doubt it. It is so difficult to convey in few words what is meant by contributory negligence; but there is one thing that I point out to you here in this definition, that contributory negligence must have in it the element of being a proximate cause,—not a remote cause, but a proximate cause from which the accident or injury, in whole or in part, directly and immediately resulted, and but for which, either by itself or by the presence of the negligence of the defendant, the injury would not have occurred. The supreme court goes on to say: 'It is thus seen that contributory negligence by the plaintiff can never exist except when the injury has resulted from the negligence of the defendant as a concurring proximate cause.' That phrase 'concurring proximate cause' conveys this idea: that the negligence of both—the joint negligence—is the proximate cause. The negligence of the plaintiff and defendant, too, is the proximate cause, the two concurring as a concurring proximate cause. In view of this, our supreme court goes on to say: 'And on the well-established rule that contributory negligence to any extent will always defeat a recovery, it was error to instruct the jury as above,' by the judge who presided at the last trial. I repeat that again, where they say contributory negligence, speaking of it as a well-established rule, to any extent, will

always defeat a recovery. But they have said before that this best definition they can find shows that contributory negligence is itself a proximate cause; so that, when it says 'contributory negligence to any extent,' it does not mean any negligence that is not a proximate cause or a concurring proximate cause. For example, there is a house going up,—building up in your town. There are workmen handling heavy timbers or masonry with dangerous machinery. A man goes in to look at the work. He stands there, and while standing there, looking on, he is injured,—injured by the workmen, it may be, who are endeavoring to move a mass of masonry or hoist a heavy piece of lumber. It may be that the man's being in the building at all was on his part negligence. If he had not been there, he would not have been hurt; but if it be shown that by the exercise of due care on the part of the workmen he would not have been hurt, that his being there by itself was not a proximate cause, but that the injury was due directly and naturally to the carelessness of the workmen, then his being there might be a cause, because if he was not there he would not have been hurt; but it would be a remote cause. It could not be regarded as a proximate cause, and, therefore, it would not be regarded as contributory negligence. There is another opinion of the supreme court—indeed, there are many opinions or our supreme court—in which they have touched upon this subject of contributory negligence; but I shall not trouble you with more than this one, where they have held as follows, and I ask your close attention: 'If the defendant was guilty of such negligence as was the proximate and immediate cause of the injury, the plaintiff would be entitled to a recovery, even though he was also guilty of negligence, provided his negligence was not a proximate and immediate cause of the injury.' You heard this case referred to as the 'Farley Case,' a Charleston case. The supreme court held that to be the law, again intimating here that the negligence which is properly called contributory negligence, which would defeat a recovery, is such negligence as was a proximate and immediate cause of the injury,—the same doctrine as in the new case of Cooper against the railway company. They go on to say in the Farley Case: 'If the plaintiff was guilty of negligence which was not the proximate cause of the injury, and the proximate cause of the injury was the failure of the defendant to exercise reasonable care and prudence to avoid the injury, the plaintiff would be entitled to a recovery.' Even, you see, if the plaintiff was guilty of negligence, but the negligence on the part of the plaintiff that would defeat a recovery and relieve a defendant of liability must not simply be any negligence, but it must be such negligence as shows itself to have been a proximate or immediate cause of the injury, or a concurring proximate cause;

otherwise, it would not be properly called contributory negligence. It might be negligence, but not contributory negligence. With that explanation, I charge you the fourth request." The authorities cited by the presiding judge are conclusive of this question, and sustain his ruling. Furthermore, there was a presumption of negligence, arising alone from the fact that the plaintiff was injured while a passenger on defendant's train of cars. *Steele v. Railroad Co.*, 55 S. C. 339, 33 S. E. 509; *Doolittle v. Railway Co.* (recently filed) 40 S. E. —.

The third exception is as follows: "The presiding judge erred in charging as follows: 'A plaintiff may himself be careless, and be injured by the carelessness of a defendant; and unless his own negligence was a proximate cause, that does not relieve defendant of liability, if the defendant's carelessness was a proximate cause of the injury.' The error being same as exception next above." This exception is disposed of by what was said in considering the second exception.

The fourth exception is as follows: "The presiding judge erred in refusing the defendant's seventh request to charge, which was as follows: 'If the testimony satisfies the jury that the plaintiff did not under the circumstances of the situation exercise ordinary care, and that this want of ordinary care on his part contributed to the injury, in the sense of having some share or agency in bringing it about, then a case of contributory negligence would be made out, and the jury must find for the defendant. *Modification*, it is not necessary that the negligence of the plaintiff shall be the proximate or immediate cause of the injury. It is sufficient to exculpate the defendant, if the plaintiff's negligence contributes to or has some share or agency in producing the result.' The error being the same as stated in the two exceptions next preceding." The word "modification," which we have italicized, was inserted in the exception by mistake, as it does not appear in the request to charge. The sentence, therefore, should commence with a capital I. In disposing of this request, the presiding judge said: "I cannot charge you that, because it contains that statement that it is not necessary that the negligence of the plaintiff shall be the proximate or immediate cause of the injury. The supreme court has held differently. Before it can be held properly as contributory negligence, it must be shown that it was a proximate cause of the injury. It need not have been the sole proximate cause. It may have been a concurring proximate cause, but it must have the element of being a proximate cause of the injury; otherwise, it is not contributory negligence." For the reasons stated by the circuit judge, which are in accord with the decisions of this court, there was no error in refusing the request.

The fifth exception is as follows: "The presiding judge erred in charging as follows:

'You will bear in mind what I have explained to you is meant by contributory negligence. It does not mean that negligence of plaintiff to any extent will defeat a recovery, but such contributory negligence as I have endeavored to explain to you, namely, such negligence as may be justly regarded as being a proximate, immediate cause of the injury, or a concurring proximate cause of the injury,' whereas he should have charged that 'contributory negligence to any extent will defeat a recovery, and it means such negligence as has some share or agency in producing the result complained of, not that it must be an immediate and proximate, or a concurring proximate, cause of the injury.'" This exception is disposed of by what was said in considering the other exceptions.

The sixth exception is as follows: "The presiding judge erred in refusing defendant's eighteenth request to charge, which was as follows: 'The invitation to get ready and get off is too remote a cause to excuse or justify a passenger in taking the risk to life and limb by jumping from a moving train, unless the jury conclude that such an act as jumping was in contemplation of the conductor at the time it is alleged to have been given.' The error consisting in this: The only invitation or order testified to by the plaintiff was that, before the station was reached, the conductor told him, 'This is Whitmire. Get ready and get off.' The construction of this invitation was a matter of law for the court, and it was error not to charge, as requested, 'that it could not amount to an invitation to alight from a moving train, unless such an act was in contemplation of the conductor at the time it was given'; that the circuit judge erred in holding that he was not allowed to charge as requested." The presiding judge said: "That would be good law, if it did not ask me to charge you what would be a remote cause. The court cannot tell you that an invitation 'to get ready and get off,' if that is in evidence, amounts to so and so. I am not allowed to say to you what the effect of that would be. I must keep my hands off that, and that makes this request fatal. I cannot charge it." This exception alleges error on the part of the presiding judge in refusing to charge as matter of law that the invitation or order, "This is Whitmire; get ready and get off," was too remote a cause of the injury. He could not have so charged without violating the constitutional provision that "judges shall not charge juries in respect to matters of fact." *Pickens v. Railroad Co.*, 54 S. C. 498, 32 S. E. 567.

The seventh exception is as follows: "The presiding judge erred in refusing the defendant's nineteenth request, which is as follows: 'A railroad company is not by law required to stop its trains at any particular place. A few feet variation cannot make any difference. If the train stopped within the station yard, a convenient distance from the

station house, it is sufficient.' The error being in this: The request contains a correct principle of law applicable to the case, and it was error to hold that it would invade the province of the jury to give the same." The presiding judge said: "That, again, rather asks the court to pass upon the sufficiency of the evidence. It is good law, so far as it goes; but, if it is intended to indicate to the jury that a few feet in this case would make no difference, I cannot so charge you. If it is upon a hypothetical case, a supposed case, I would say that might be the law, or would be the law; but I cannot charge in this case, if the evidence shows that the train was moved a few feet beyond the ordinary stopping place, that that would not make any difference. I cannot charge that to you, because that would be invading the province of the jury in passing upon the effect of the testimony, which the law does not allow me to do." It was the duty of the defendant to stop its train at the station. The question whether it so stopped was to be determined by the jury, and the presiding judge could not have charged them how many feet past the usual stopping place the train could go before coming to a standstill, without trenching upon the jurisdiction of the jury.

The eighth exception is as follows: "The presiding judge erred in modifying defendant's twenty-first request, which is as follows: 'The complaint is based upon the theory that the train, having overshot the station, was going faster and faster at the time the plaintiff alighted, and that he was ordered, invited, and permitted to alight from the moving train by the conductor. The plaintiff is confined to this theory, and cannot recover upon the theory that, irrespective of such order, command, or permission, the train was not going so fast that a man of ordinary prudence would not have made the attempt.' The modification was as follows: 'That is good law, but I would add this: That it is conceivable that if a passenger is invited or ordered or requested to get ready to get off at a station, and proceeds to get ready to get off, expecting the train to stop, and the train slows up, but does not stop, that he may be (it would depend upon the testimony) justified in coming to the conclusion that the train is not going to stop; and if the circumstances are such as would justify a man of ordinary intelligence and common sense in believing that he might get off without danger, he might then get off, and if he is injured under such circumstances, it would be a question for the jury as to whether or not the railroad would be liable to damages. If his getting off was in accordance with the contract implied when he purchased his ticket, he may have come to the conclusion in a supposed case that the conductor did not intend to stop the train, but that he was to get off when the train was in motion. It is altogether a question

for the jury to say whether such was the case or not.' The error consisting in permitting the plaintiff to recover on a state of facts not alleged in the complaint. The complaint is based upon the theory that the train, having overshot the station, was going faster and faster at the time the plaintiff alighted, and that he was ordered, invited, or permitted to alight from the moving train by the conductor. The modification permitted him to recover on the theory that, in the absence of such order, command, or permission, the plaintiff alighted under circumstances such as would justify a man of ordinary intelligence and common sense in believing that he might get off without danger." The complaint alleges three distinct acts of negligence, not dependent upon each other. One of the acts of negligence alleged was the failure of the defendant to stop its train of cars at Whitmire, by which he was injured, irrespective of any order, command, or permission of the defendant to alight. The modification was, therefore, proper under the pleadings.

The ninth exception is as follows: "The presiding judge erred in charging the jury that if a passenger is invited, ordered, or requested to get ready and get off at a station, and proceeds to get ready to get off, expecting the train to stop, if his getting off was in accordance with the contract implied when he purchased the ticket, he may have come to the conclusion in a supposed case that the conductor did not mean to stop the train, but that he was to get off when the train was in motion.' The error consisting in this: Under the circumstances detailed, as a matter of law, the invitation to 'get ready and get off' could never mean to alight from a moving train, but rather to get off when the station is reached, and the train stopped. If the circuit judge's refusal of defendant's eighteenth request upon the ground stated by him was correct, then his charge of the reverse in the matter complained of is error." This is only a portion of the language used by the circuit judge in disposing of the defendant's twenty-first request, set out fully in the eighth exception. It was used by way of illustration, and, considering the connection in which it was spoken, was correct.

The tenth exception is as follows: "The presiding judge erred in charging the jury as follows: 'For example, there is a house going up, building up in your town. There are workmen handling heavy timbers or masonry with dangerous machinery. A man goes in to look at the work. He stands there, and while standing there, looking on, he is injured,—injured by the workmen, it may be, who are endeavoring to move a mass of masonry or hoist a heavy piece of timber. It may be that the man's being in the building at all was on his part negligence. If he had not been there, he would not have been hurt; but if it be shown that by the exer-

cise of due care on the part of the workmen he would not have been hurt, that his being there by itself was not a proximate cause, but that the injury was due directly and naturally to the carelessness of the workmen, then his being there might be a cause, because if he was not there he would not have been hurt, but it would be a remote cause. It would not be regarded as a proximate cause, and, therefore, it would not be regarded as contributory negligence.' The error consisting in this: The example used is as clear a case of contributory negligence as could be employed. The party injured would be clearly a trespasser, and his contributory negligence would bar a recovery. Illustration, being the most forcible form of teaching, when erroneous, is prejudicial." The presiding judge used the words by way of illustration in commenting on the defendant's fourth request to charge. Under the authorities hereinbefore mentioned and the case of Doolittle v. Railway Co., recently filed, the illustration did not make out a case of contributory negligence. It is the judgment of this court that the judgment of the circuit court be affirmed.

(51 S. C. 333)

DAVENPORT v. DAVENPORT.

(Supreme Court of South Carolina. Aug. 13, 1901.)

APPEAL FROM PROBATE COURT—RETURN—SUFFICIENCY—CERTIFICATE OF TESTIMONY.

1. Code Civ. Proc. §§ 57, 61, prescribes the method of appeals from the probate court, and requires appellant to file in the circuit court a certified copy of the records appealed from, and the grounds of appeal, with evidence of notice to the adverse party. *Held*, that where an appellant causes certified copies of the pleadings, decree, notice, and grounds of appeal to be filed in the circuit court he has made such return as will give that court jurisdiction, though the probate judge omits to indorse on the copy, notice, and ground of appeal acceptance of service.

2. Testimony taken in the probate court need not be certified on appeal to the circuit court, unless the ground of appeal involved some question relating to the testimony.

Appeal from common pleas circuit court of Greenville county; Aldrich, Judge.

Petition by Temperance Davenport against Robert Davenport for dower. Judgment for plaintiff. From an order dismissing his appeal from the probate court, defendant appeals. Reversed.

Julius H. Heyward, for appellant. Carey & McCullough, for respondent.

JONES, J. This was a proceeding for the admeasurement of dower, originally instituted in the probate court for Greenville county. A decree in favor of the petitioner was filed in the probate court on the 27th day of September, 1900, and on the 10th day of October, 1900, a notice and grounds of appeal to the circuit court were duly served on the petitioner's attorneys, and filed in the probate

court. On the 12th day of October, 1900, copies of the following papers, duly certified by the probate judge, were filed in the office of the clerk of the circuit court: The petition, answer, decree of the probate court, and the notice and grounds of appeal. These were all the papers in the case except the original notice and grounds of appeal, and the testimony taken by a stenographer, both of which were filed in the probate court. The next stated term of the court of common pleas for said county commenced on the 19th day of November, 1900. On November 21, 1900, the attorneys for petitioner served notice of a motion to dismiss the appeal to the circuit court for failure "to file in the circuit court a certified copy of the record of the proceedings appealed from, and of the grounds of the appeal filed in the probate court, together with the proper evidence that notice has been given to the adverse party according to law, as prescribed by section 58 of the Code of Procedure." On the same day this motion was served the defendant's attorney filed with the clerk of the circuit court the testimony taken in the probate court and the original notice and grounds of appeal, showing the acceptance of service indorsed thereon. The motion was heard on November 26, 1900, and on this hearing defendant's attorney moved for leave to perfect the appeal, if the court should be of the opinion that it had not been perfected. The circuit court granted the motion to dismiss, and refused defendant's motion to be allowed to perfect the appeal. The exceptions to this court impute error in both regards.

Appeals from the probate court to the circuit court are regulated by section 57 et seq. of the Code of Civil Procedure. It is provided as follows:

"Sec. 57. Any person interested in any final order, sentence or decree of any probate court, and considering himself injured thereby, may appeal therefrom to the circuit court in the same county, at the stated session next after such appeal. The grounds of appeal shall be filed in the office of the probate court, and a copy thereof served on the adverse party, within fifteen days after notice of the decision appealed from.

"Sec. 58. The person appealing shall procure and file in the circuit court to which such appeal is taken a certified copy of the record of the proceedings appealed from and of the grounds of the appeal filed in the probate court, together with the proper evidence that notice has been given to the adverse party according to law."

"Sec. 60. When such certified copy shall have been filed in the circuit court, such court shall proceed to the trial and determination of the question according to the rules of law; and if there shall be any question of fact or title to land to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury.

"Sec. 61. If the person appealing from the

proceedings of the probate court, as provided in this title, shall neglect to enter his appeal, the circuit court to which such appeal shall be taken, on motion and producing attested copies of such appeal by the adverse party, shall affirm the proceedings appealed from, and may allow costs against the appellant."

It thus appears that the appellant fully complied with section 57 and endeavored to fully comply with section 58. If the probate court failed to certify as to the proof of service of the notice and grounds of appeal, which was indorsed on the original paper duly filed in his office, that omission was not fatal to the jurisdiction of the circuit court, and was the subject-matter of amendment. Likewise the omission to certify the testimony was not fatal to the jurisdiction of the circuit court and was the subject of amendment. The testimony taken need not be certified unless the grounds of appeal involve some question relating to the testimony; for it is only in such case that the testimony is any part of the "proceedings appealed from." The "case" before us does not disclose whether the appeal in any way involved any question requiring the certification of the testimony. Be that as it may, the omission to certify the testimony was not fatal. The question involved is merely one as to a defective "return" to the circuit court, and not one involving the absence of a "return." The circuit court has ample powers to amend a defective certification of the record appealed from when any necessity therefor arises. In this case there was no neglect to "enter his appeal" on the part of the defendant, since such appeal was entered in due time, notwithstanding the omissions noticed, which were curable by amendment; and, these omissions having been supplied by the filing of the originals in the circuit court, the appeal ought not to have been dismissed. If the filing of the original papers by way of amending the certified record was not a substantial compliance with the statute, the defendant ought to have been allowed to have such originals and proper indorsements thereon duly certified to by the probate court. The judgment of the circuit court is reversed, and the case remanded to the circuit court for further proceedings.

(113 Ga. 1170)

PERRY v. GRANT et al.

(Supreme Court of Georgia. July 24, 1901.)

APPEAL—REVIEW.

The charges complained of were adjusted to the pleadings and evidence, and fairly submitted the issues involved, and the evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge pro hac.

Action by W. D. Grant and others against

A. E. Perry. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hubert Estes and J. J. Bowden, for plaintiff in error. J. B. Jones, J. C. Edwards, and Robt. McMillen, for defendants in error.

PER CURIAM. Judgment affirmed.

(113 Ga. 1155)

HIGGINBOTHAM v. CONWAY.

(Supreme Court of Georgia. July 24, 1901.)

PLEADING—ANSWER—STRIKING OUT.

The answer filed by the defendant contained some averments constituting, in substance at least, a good partial defense against the plaintiff's petition, and hence should not have been stricken on general demurrer.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by T. C. Conway against J. C. Higginbotham. From the judgment striking out answer, defendant brings error. Reversed.

Conway sued Higginbotham on two promissory notes made by Higginbotham, dated November 25, 1898, and due December 1st and 15th of the same year,—one for \$100, and the other for \$308.45. Higginbotham entered a plea denying all of the allegations made in the petition except as admitted by the plea, and alleged that in the years 1897 and 1898 plaintiff and defendant were in business together in Clarke county; that defendant went to Elberton in the fall of 1897, leaving the business in plaintiff's hands, relying upon him to conduct it in a legitimate, careful, and economical way; that while the business was thus carried on the plaintiff damaged the defendant by his failure to properly carry on said business in the sum of \$500; that said damage was occasioned in part by plaintiff's employing incompetent men, and by plaintiff's neglect in permitting such employees to injure the business and occasion loss; that plaintiff was regardless of defendant's interests, and failed to give proper attention to their joint business, and also created large expenses, which he charged to the defendant, and that such expenses were not properly chargeable to the defendant; that the notes sued on were given to the plaintiff in payment of alleged indebtedness when the defendant had no knowledge of the fraud perpetrated on him by the plaintiff's acts, nor did he know of such fraud until after said notes were given, and that because of this fraud and injury he denies his liability to the plaintiff; that he is not indebted to the plaintiff in any manner whatever, and he pleads as a set-off to the amount of injury claimed, to wit, \$500; that in writing said notes the plaintiff fraudulently in-

serted a greater amount therein than was agreed upon, and defendant objected to signing the same, whereupon the plaintiff agreed to write off such excess, and make the notes speak what they intended, and that he would do this after the notes were signed, and before they became due; that plaintiff never carried out this agreement, and that, because of his fraud in failing to do so, defendant pleads and says that said notes are not binding upon him; that the plaintiff charged defendant with expenditures made by the plaintiff in carrying on another and distinct business than that in which they were engaged, and of which the defendant knew nothing, and had no interest in; that the expenditures were objected to by the defendant, and constituted the objections made by defendant to signing said notes; that he relied upon plaintiff's statement that he would correct the same, and that the defendant would never be called upon to pay the same; that upon this statement of the plaintiff the defendant signed said notes, to wit, the notes sued on, and that the plaintiff acted in bad faith, intending to defraud defendant by said statement; that the defendant would not have signed said notes but for said fraudulent statement; that the business of plaintiff and defendant was carried on at Athens; that defendant moved to Elberton, leaving the sole management of the business at Athens in the plaintiff's hands, and therefore knew nothing of the particulars and management of said business; that they dissolved, and in settling up their business defendant gave to plaintiff the notes sued on; that at the time said notes were given defendant did not know that plaintiff had charged to him items of expense for which he was not liable, to wit, expenses incurred in a separate business carried on by the plaintiff, and that these items exceeded the sum of \$200; that defendant had no opportunity of knowing that the representations of plaintiff were false, because he resided in Elberton, and had no personal knowledge of the business at Athens. On demurrer the pleas of defendant were stricken, to which ruling he excepted.

Z. B. Rogers, for plaintiff in error. O. P. Harris, for defendant in error.

LEWIS, J. The statement sufficiently sets forth the nature of this case and the character of the answer filed by the defendant. The court sustained a general demurrer to this defense. We think this was clearly error. Portions of the answer may not be able to withstand a special demurrer, but, as against a general demurrer, there is unquestionably enough in them to take the case to the jury. See *Treadaway v. Richards*, 92 Ga. 264, 18 S. E. 25. Judgment reversed. All the justices concurring.

(113 Ga. 842)

BRUNSWICK & W. R. CO. v. WIGGINS.

(Supreme Court of Georgia. July 19, 1901.)

WITNESS—CREDIBILITY—TRIAL—OPENING AND CLOSE—ACCIDENT AT CROSSING—INSTRUCTIONS—EVIDENCE.

1. While a jury trying a case should give to the evidence of a witness only the weight to which it is, in their opinion, entitled, yet they cannot, in the determination of the issues involved, because of the fact that a particular witness was in the employ of one of the parties, arbitrarily disregard his testimony, and a proper request to (in effect) so charge should not have been refused.

2. To entitle the defendant to the opening and conclusion of the argument in the trial of a case arising *ex delicto*, when the act complained of was not one which, under the law, could be justified, it is necessary that the defendant by proper pleadings admit, not only the commission of the act, which it is alleged was wrongful, but also such other facts as would entitle the plaintiff to have a verdict, without proof, for the amount claimed in the petition.

3. In the trial of an action brought to recover damages against a railroad company for injuries sustained by the running and operation of a train of cars, it was error to charge in such manner as to convey to the jury the impression that, if they should believe that both the company and the person injured were equally negligent, the plaintiff could recover.

4. In an action instituted by a widow for the homicide of her husband, caused by the negligent operation of a train of cars by a railroad company, evidence going to show that the deceased, at the time he was killed, left no estate or property, was inadmissible.

(Syllabus by the Court.)

Error from superior court, Berrien county;
A. H. Hansell, Judge.

Action by Ida Wiggins against the Brunswick & Western Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

D. H. Pope, for plaintiff in error. W. M. Hammond and L. E. Lastinger, for defendant in error.

LITTLE, J. An action was instituted by the defendant in error against the railroad company to recover damages for the homicide of her husband, which she alleged was occasioned by the operation of a train of cars over defendant's railroad at a public crossing. The evidence relied on by the plaintiff in the court below as a basis of recovery was substantially as follows: Robinson, the husband of the plaintiff, was a watchman at a sawmill located at a point near the railroad. He was 54 years old at the time he was killed, was earning \$30 per month, and was in good health. Among other things, it was his duty to fire up a tramway engine on the south side of defendant's road, near where he was killed, and to look after a lot of mules, which were stabled on the north side of the railroad. The public road crosses the railroad in going from the mill to where the tramway engine was stationed. Usually, the trains of defendant's railroad stopped at that crossing. At the time of his

death the deceased had no property or estate other than his daily and monthly wages. Very early in the morning on which he was killed the deceased was at the mill, a few minutes before the train was to pass. When the train which killed Robinson approached the crossing the bell on the engine was not tolled, nor the whistle blown, but the train ran over the crossing at a speed of from 30 to 40 miles an hour, and stopped some distance beyond the crossing to put off a passenger at that station. Then it was discovered that a man, who proved to be the husband, had been struck by the train on or near the crossing. The dead body was found on the south side of the railroad, and about 30 feet from the crossing. The track was straight for a considerable distance from the crossing, and there was nothing to prevent the deceased from seeing the train after he had gotten within 18 feet of the side track. The Carlisle mortality tables were introduced. The engineer testified in behalf of the company to the following effect: The station near which defendant's husband was killed was a flag station. After he sounded the road-crossing signals he got the signal from the conductor to stop. He saw a lamp in the hands of some one, 2 or 3 feet from the crossing, when the locomotive was 75 or 100 yards distant. When he had gotten within one or two car lengths of the crossing he saw that the lamp was held by some one who attempted to cross the track in front of the engine, which was running at about 20 miles an hour. He stopped the train about 125 yards from that point, and backed up near the crossing, where the body of the deceased was found. Usually the train stopped on the crossing. This occurred between 3 and 4 o'clock in the morning. The bell was rung, and the speed of the train reduced from 35 or 40 miles to about 20 miles per hour at the crossing. He was looking forward, and first saw the light when he was about 100 yards distant, and was checking the speed of his train. The deceased attempted to run across in front of the engine. A man standing at the crossing could have seen the train a mile and a half. When he first saw the light it was 8 or 10 feet from the track, and it appeared that the person holding it ran from that point in front of the engine. The fireman also testified for defendant as follows: He was on the engine that killed the deceased. As the train approached the station he was ringing the bell. He saw a lamp held by some one going down to the track from the mill on the north side. It remained stationary until just before the train reached the crossing, when the man holding the lamp stepped on the track in front of the engine. The whistle was sounded for the crossing at the blow post. Witness saw the light of the lamp as it was brought down to the side of the road, as if a person was walking with it. He first saw it when the engine was at the blow post.

The bell was rung until the crossing was passed, and just as the man holding the lamp (who was the deceased) stepped in front of the engine the pilot of the locomotive struck him, and threw him on the other side. The engineer then said that he thought he had killed the watchman. The train stopped, and then backed, and the engineer went back. "No alarm was given to the engineer by me when the man holding the light was first discovered, because I thought he was going to wave down the train, but the light made no signal to stop." On this evidence the jury returned a verdict for the plaintiff for \$1,500. Defendant made a motion for a new trial, which was overruled, and it excepted. Other grounds of the motion for a new trial than those herein specifically considered and passed on allege that the trial judge erred in the rulings therein set out. After having given these careful consideration, we are of the opinion that none of them presents sufficient legal cause for the reversal of the judgment and the grant of a new trial. While some of them are subject to criticism, the causes of error alleged do not have such a material bearing on the rights of the plaintiff in error as of themselves to work a reversal.

1. One of the grounds of alleged error is that the trial judge refused, on a proper request, to charge the jury that the evidence of persons in the employment of the railroad company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. Undoubtedly, this is a sound proposition of law. The jury cannot arbitrarily disregard the evidence of any witness which is not contradicted or discredited by other evidence or circumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give to the evidence of witnesses the weight to which in their opinion, as conscientious men seeking the truth, they believe it is entitled; but the employment or business of a witness affords no reason why this evidence should arbitrarily or without reason be disregarded. *Railroad Co. v. Beason*, 112 Ga. 553, 37 S. E. 863; *Railroad Co. v. Wall*, 80 Ga. 202, 7 S. E. 639. It is urged that, in view of the violent and unwarranted attack made by plaintiff's counsel on railroads generally and the witnesses of the railroad in this case as such, the request was called for as a matter of justice. This may be so. Certainly, such attack, if made, was, to say the least, improper under the evidence in this case, but we cannot consider the refusal to charge in the light of such an attack, because no question concerning it was made before the trial judge and passed on by him, nor do the details of it appear in the record. If it were otherwise, it is possible that the fact that it was unwarrantably made might call for a ruling which would reverse the judgment on that ground; but in any event, as a mat-

ter of law, the refusal to give the charge requested was error.

2. For the purpose of securing the opening and conclusion in the argument of the case before the jury, the defendant proposed to amend its plea by admitting that the "petitioner's husband was killed by a locomotive engine of the defendant, which was at the time running at the rate of from 20 to 25 miles an hour over a public crossing; that the deceased was of the age alleged in the petition, and that he was in good health; and that the defendant assumed the burden." This amendment was rejected by the trial judge as being insufficient to change the burden of proof, and to give the defendant the right to open and conclude the argument, and, in our opinion, properly. The question of the right of the defendant to assume the burden of proof, and thus secure the opening and conclusion of the argument before the jury, is, and has been for many years, a much vexed one. Our Civil Code (section 5100) declares: "The burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential." Ordinarily, this burden lies upon the plaintiff, who, alleging certain facts to exist, claims a right of recovery against the defendant; but when, in such a case, the defendant comes in and admits the facts stated in the petition to be true, and sets up matter in avoidance, then the defendant is the party who asserts the truth of the facts so set up, and the burden is shifted to him to establish the facts so pleaded, failing to do which the plaintiff is, without more, entitled to a verdict. But just when admissions by the defendant of the truth of the facts asserted by the plaintiff changes the onus is a matter which, because of contrary rulings of various courts and divergent opinions of eminent jurists, has not been made entirely plain. In this state, however, the rule in a civil case arising *ex contractu* is now well settled, and, to entitle the defendant to the opening and conclusion of the argument in such a case, he must admit by his plea, filed before the introduction of any evidence, facts which, without further proof, would entitle the plaintiff to a verdict for the amount claimed in the declaration. *Abell v. Jarratt*, 100 Ga. 732, 28 S. E. 453; *Reid v. Sewell*, 111 Ga. 880, 36 S. E. 937; *Insurance Co. v. Gray*, 113 Ga. 424, 28 S. E. 992. For a very comprehensive and interesting discussion of this question, see *Bailey, Onus Probandi*, p. 603 et seq. But a question which seems not to have been determined heretofore in this state by any ruling is, what admissions in a case brought to recover damages for a tort or arising *ex delicto* are sufficient to shift the burden of proof that rests on the plaintiff, and give to the defendant the right to open and conclude? We are met at the threshold of this inquiry with a number of conflicting decisions from courts entitled to high consid-

eration, concerning which Mr. Best says that all the authorities agree that when the damages claimed, or, rather, claimable, are nominal or liquidated, the right is not affected by their consideration. Best, *Beg. & Rep.* §§ 46-49. Mr. Bailey, in his work cited *supra*, says that the rock upon which the cases have split is when the damages are to be assessed within the discretion of the jury. In 2 Elliott, *Gen. Prac.* § 538, after laying down the proposition that the party who would be defeated if no evidence were given on either side must first produce his evidence, the authors cite upon the question of the right to open and conclude, on page 675, note 4, a number of adjudicated cases which support the doctrine that this rule applies where the plaintiff has only to prove his damages; but where the damages are liquidated, and nothing more than a mere computation of interest or attorney's fees or the like is necessary, the law is otherwise. The compilers of the *American & English Encyclopedia of Pleading & Practice* declare the rule to be that in actions in which it is necessary for the plaintiff to prove the amount of his damages, whether arising *ex contractu* or *ex delicto*, he has the right to open and close, unless the defendant admits the whole amount of damages claimed by the plaintiff, which doctrine seems to be supported by adjudicated cases in the states of Arkansas, Indiana, Maine, Missouri, Nebraska, New York, Ohio, South Carolina, Virginia, Wisconsin, and Wyoming, which will be found cited in note 3, p. 189, of volume 15 of that work. There is a class of cases, however, sounding in tort, to which, under the provisions of our Civil Code, this rule does not apply, to wit, those to which a plea of justification may be interposed. Section 3891 of that Code declares that in every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification, and that by such plea admits the act to be done, and he is then entitled to all the privileges of one holding the affirmative of the issue. It will be noted that the provisions of this section apply only to cases arising *ex delicto*, where the act complained of was authorized by law to be done, and in such a case it is not necessary that the admission, in order to entitle the defendant to the opening and conclusion, shall go to the extent of admitting the amount of the damages claimed by the plaintiff; but the defendant, by admitting the act to be done, is entitled to the privileges of one holding the affirmative of the issue. It is true, then, that the provisions of this section do not apply to all cases sounding in tort. Indeed, in the case of *Railway Co. v. Morgan*, 110 Ga. 171, 35 S. E. 347, Mr. Justice Lewis, in delivering the opinion of this court, drew the distinction between the plea of justification and one denying negligence on the part of the railroad company for destroying property belonging to the plaintiff. He said: "Pleas of

justification usually refer to such torts as malicious prosecution, assault and battery, libel, slander, and the like, and in them the defendant admits committing the acts complained of, and claims justification for his conduct. In this sort of a tort, however, of injuring property by the running of a railroad train, we do not well see how there can be any plea of justification," etc. So that our conclusion is that in actions brought to recover damages for an act of a defendant, where the latter was authorized by law to do the act complained of, it is not necessary, to entitle him to the opening and conclusion of the argument, that he shall admit that the plaintiff is entitled to recover the amount of damages which he claims, but he is entitled to these privileges, on filing a plea, at the proper time, by which he admits that he did the act complained of. But in cases arising *ex delicto*, where the defendant was not authorized by law to do the act complained of, his right to the opening and conclusion of the argument must be based on the general rule previously stated; and such admission must not only go to the extent that the defendant did the act, but must go further, and admit every material allegation made in the petition which would authorize the plaintiff to recover without any proof on his part. In the case of *Railroad Co. v. Brown*, 102 Ga. 13, 29 S. E. 130, it appeared that the defendant in error had instituted an action against the railroad company to recover damages for the negligent killing of a jennet belonging to the plaintiff. The defendant company admitted the killing, and claimed the right to open and conclude. This right was denied, and this court, in passing upon that point, said: "The effect of the admission did not go far enough to shift the burden. To entitle the plaintiff to recover he must have shown two things,—the killing; the value. The killing being shown, the law would presume negligence; but it would not have presumed a value, as we understand it. The burden is not shifted until the admissions show a *prima facie* right to recover, to rebut which the defendant undertakes. So long as any portion of the burden of making out his case by proof rests on the plaintiff, he is entitled to open and conclude, unless the defendant introduces no evidence." In the *Morgan Case*, *supra*, where the suit was instituted to recover damages from the company for the killing of a registered Guernsey cow by the running and operation of its train, it was ruled that, in order to entitle a defendant to open and conclude, he must in his answer admit enough to make out a *prima facie* case for the plaintiff. So it must be ruled in this case that the court did not err in refusing to allow the defendant to open and conclude the argument on the plea which was sought to be filed for that purpose, but that, in order for the plaintiff to have obtained the desired privilege, the plea should have gone further, and ad-

mitted such facts as would have entitled the plaintiff to a prima facie right to recover the amount of damages stated in her declaration; otherwise, the burden of proof to establish the amount of her recovery would have still remained on her. The admission only of her right to recover some amount still left on her the burden to establish by evidence the amount of damages which she sustained. Without it she would not be entitled prima facie to a verdict.

3. Error is also assigned because, after instructing the jury that no person should recover damages from a railroad company for injuries to himself or property where the same is done by his consent, or because of his negligence; and that if the deceased and the agents of the company were both negligent the plaintiff might recover damages, but they might be diminished by the jury in proportion to the amount of default attributable to him, the court charged as follows: "If the plaintiff himself was guilty of negligence, and the railroad company was guilty of negligence, then you may take into consideration the amount of negligence on each side. If the deceased was guilty of negligence, you may then diminish the recovery which the widow would be entitled to in proportion to the default of the defendant to that of the deceased." Without further explanation, this charge was error. Under it, if the jury believed that both the company and the deceased were equally negligent, then they could still find for the plaintiff. As a matter of law, the plaintiff cannot recover for injuries inflicted by the negligence of an agent of a railroad company in the operation of its trains, if both the agent and the person injured are equally negligent at the time the injury was sustained. Section 2322 of the Civil Code declares that no person shall recover damages from a railroad company for injuries to himself where the same is caused by his own negligence, but, if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. This section of the Code has been repeatedly construed by this court. See *Railway Co. v. Watson*, 104 Ga. 243, 30 S. E. 818. In the case of *Railroad Co. v. Newman*, 94 Ga. 560, 21 S. E. 219, it was ruled in reference to this subject that: "Where the injury complained of was the result of mutual negligence by the plaintiff's servant and the defendant, there can be no recovery unless the servant was less in fault than the defendant." In the case of *Railroad Co. v. Winn*, 19 Ga. 445, Judge Lumpkin, in discussing the principle now under consideration, said: "And the law, in conformity with common sense, declares that, if both parties are equally in the wrong, neither can or ought to maintain an action against the other." In the case of *Railroad Co. v. Davis*, 27 Ga. 119, McDonald, J., in delivering the

opinion of the court, used this language: "It might so happen, in a case of mutual negligence, that the jury could not determine the preponderance of the blame, and some authorities say that in such case, there being no mode of apportioning damages at law, there can be no recovery." In a very recent case (*Willingham v. Railway Co.*, 113 Ga. 374, 38 S. E. 843) this court approved the following charge on that subject: "If the defendant [the railroad company] was less negligent than plaintiff, plaintiff could not recover." It would seem, under these authorities, that the charge that the jury might take into consideration the amount of negligence on each side, and if the deceased was guilty of negligence they might diminish the recovery to which the widow would be entitled in proportion to the fault of the defendant to that of the deceased, was error, for the reason that, if they were both equally negligent, the widow of deceased might, nevertheless, under this charge, have recovered; the duty devolving on the jury to make the recovery in proportion to the fault. In the *Watson Case*, supra, which was reversed, the trial judge distinctly charged the jury that if the fault was half and half, one party as much at fault as the other, they would have the right to give the plaintiff damages. This was stating the conclusion that could be drawn from the charge in the present case in plain words. That charge was held to be error, and because the same rule of liability might be taken by the jury from the charge in this case a reversal of the judgment must follow.

4. The remaining ground of the motion which we have to consider is the assignment that the court erred in allowing plaintiff's counsel over defendant's objection to prove by the plaintiff herself what estate or property her husband had at the time he was killed, her testimony being that he had none. If there were no other reason which required a reversal of the judgment, the admission of this testimony, under the facts of this case, would certainly be sufficient to set it aside. If the plaintiff was entitled to recover at all, she was only so because of the negligence of defendant company. The rights of each party are well established by law. If the negligence of the company was the cause of the homicide of her husband, then, whether the deceased was rich or poor, whether the defendant was a corporation or an individual, she was, in the absence of fault or want of care on his part sufficient to bar a recovery, entitled to have a verdict for the full value of his life. We are unable to see how the fact that deceased was or was not possessed of any estate at the time he was killed could affect the measure of the recovery or the liability of the defendant. Evidently, the evidence was not sought to be introduced for the purpose of fixing a liability on the defendant company, and it ought not to have been received, because it might have

affected the measure of the recovery. Certainly, it had nothing to do with the case, and inasmuch as it was admitted as a part of the evidence, over the objection of defendant's counsel, no other recourse is left to a reviewing court than to set aside the verdict and grant a new trial. Judgment reversed. All the justices concurring.

(113 Ga. 362)

RALEIGH & G. R. CO. et al. v. BRADSHAW.

(Supreme Court of Georgia. July 19, 1901.)

PLEADING — AMENDMENT — EXCUSING JUROR — FAILURE TO OBJECT — IMPEACHMENT OF WITNESS — NEW TRIAL — INSTRUCTIONS.

1. Under the rule laid down in *Harris v. Railroad Co.*, 3 S. E. 355, 78 Ga. 525, where a petition against two railroad companies charges that the plaintiff's husband was killed, on a designated public crossing, by a passenger train of the defendants, in consequence of the negligence of the defendants in divers named particulars, an amendment which alleges that, "without reference to whether the deceased was killed on or off the crossing, * * * he was visible on the track in the direction from which the train was coming at least 300 yards, and after the danger of the deceased became, or in the exercise of ordinary care should have become, apparent to the defendants' employes in charge of said train, such employes failed to exercise ordinary care, failed to give warning, failed to check or slow up, and thereby were guilty of gross and wanton negligence," does not introduce a new cause of action.

2. Where a juror was excused for providential cause, and one of the parties consented that the trial should proceed before the remaining 11 jurors, such party cannot complain that before making such consent the court had overruled a motion for a mistrial, the right to make such complaint not having been reserved.

3. A witness cannot be impeached by proof of contradictory statements without laying the foundation for the same, by calling his attention "with as much certainty as possible to the time, place, person, and circumstances attending the former statement." This rule is not varied where the testimony of the witness was taken by depositions and the alleged contradictory statements made afterwards and before the trial.

4. Admitting immaterial testimony is not necessarily cause for a new trial.

5. The foregoing notes cover all of the questions made in the grounds of the motion for a new trial requiring special mention. The charges complained of, even if not in all respects accurate, contained nothing which could have operated prejudicially to the defendants. The evidence, though decidedly conflicting, warranted a finding that the plaintiff's husband was killed by a train operated by the defendants, in consequence of the negligence of the employes in charge of the same, and there was no abuse of discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; A. M. Calhoun, Judge.

Action by Lula Bradshaw against the Raleigh & Gaston Railroad Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Erwin & Brown and Vasser Woolley, for plaintiffs in error. Arnold & Arnold and Hamilton Douglas, for defendant in error.

FISH, J. The plaintiff sued the defendant railroad companies for damages for the tortious homicide of her husband. The original petition alleged that he was killed while, "in the exercise of due care, [he] was walking over Johns street public crossing, which is a public street crossing in the city of Atlanta"; that "the defendants negligently failed to have a watchman at said crossing, said train was negligently running forty miles per hour, and negligently failed to check and keep checking as said crossing was approached, and negligently failed to keep any lookout ahead, nor did they blow any whistle or ring the bell, or give any other signal, and said defendants further violated a valid ordinance of Atlanta restraining the speed of trains to four miles per hour over crossings." During the trial the plaintiff offered to amend her petition by alleging that, "without reference to whether the deceased was killed on or off the crossing, * * * he was visible on the track in the direction from which the train was coming at least 300 yards, and after the danger of the deceased became, or in the exercise of ordinary care should have become, apparent to the defendants' employes in charge of said train, such employes failed to exercise ordinary care, failed to give warning, failed to check or slow up, and thereby were guilty of gross and wanton negligence." The defendants objected to the allowance of this amendment, "on the grounds—First, that it set up a new cause of action; second, that it did not definitely set out the location of the deceased at the time of the homicide, whether on the crossing or off the same; and, third, if off the crossing, it set forth no cause of action." The court overruled the objection, and allowed the amendment, to which ruling the defendants excepted pendente lite, and error is assigned upon such ruling.

Under the rule laid down by this court in *Harris v. Railroad Co.*, 78 Ga. 525, 3 S. E. 355, the amendment did not introduce a new cause of action. In that case the substance of the original petition, as stated by Chief Justice Bleckley, was "that the plaintiff's husband was killed by the running of the defendant's train, locomotives, cars, and other machinery. His death was the result of no negligence on his part, but was due to the negligence of the defendant. It was the result of failure by the defendant to use any of the precautions required of railroad companies at public crossings, and to use reasonable care to prevent injury to passers-by at Pryor street crossing, where he was killed." Substituting the words "Johns street crossing" for "Pryor street crossing," the language just quoted would accurately state the substance of the original petition in the present case. The amendment which this court held was properly allowed in the *Harris Case* alleged: "The defendant failed to furnish a safe way for egress from the cars, in this: it placed an iron rail around the platform of

a car, and did not provide steps to another car next to the former, nor proper rails for the protection of persons on the steps. A number of persons were upon the latter car bidding friends good-by. They were there by permission, express or implied, of the defendant, and were negligently urged by the defendant from the car; and while they were getting from it the train started, the conductor not allowing sufficient time for those persons to descend, nor did he stop the train or use any care to prevent an accident, though he saw a crowd endeavoring to get off, and saw that plaintiff's husband, in climbing off the platform, had fallen between the cars, and was hanging to one of the posts of the railing." Surely, if that amendment, which so completely changed "the allegations in the declaration touching the specific acts of negligence and the manner of causing death," was permissible, the amendment in the present case, which does not so radically change the original allegations touching these matters, was properly allowed by the trial court. The principle ruled in the case cited is stated in the headnote thereto as follows: "The cause of action alleged being the homicide of plaintiff's husband by means of the defendant's negligence, the allegations in the declaration touching the specific acts of negligence and the manner of causing death may be varied or added to by amendment during the progress of the trial, so as to adapt the pleadings to the evidence in all its aspects." This is what the plaintiff sought to do in the case now under review by the amendment in question. The plaintiff alleged, and introduced evidence for the purpose of proving, that her husband was negligently killed on Johns street crossing, in the city of Atlanta, by the running of the defendants' train. The defendants, while denying that their train killed the plaintiff's husband, contended that the evidence showed, and they sought to prove, that he was not killed on the street crossing, but some distance beyond it. To meet this theory and evidence, the plaintiff offered the amendment, which, as we have said, under the authority of the case cited, was properly allowed by the trial court. The second ground of the objection to the allowance of this amendment needs no discussion at our hands, as it has not been argued in this court, or specially noticed in the brief of counsel for plaintiffs in error. The third ground of the objection is clearly without merit, for the amendment, of course, does not stand alone, but is to be considered in connection with the original petition, and the petition, with or without the amendment, set forth a cause of action.

2. "During the progress of said trial, and after the evidence had been introduced, and one argument had from the plaintiff's and defendant's counsel each, and one argument each remaining, with an allowance to each of more than one hour, at 12 o'clock, the hour

of recess for the day being 2 o'clock p. m., one of the jurors, O. E. Wingate, privately announced and exhibited to the court a telegram, showing that the parent of the juror's wife had died, and that it would be necessary for the said juror to take his wife to Macon, Ga., and to do so [he] would have to leave the city at 4 o'clock p. m. that day, that his presence with her was necessary for consolation and protection, and that she was feeble and entirely dependent upon him; whereupon the defendants moved the court to declare a mistrial, which motion the court overruled, and refused to excuse the juror, and the defendants, then, under the circumstances, consented to the discharge of the juror, and that the case proceed with eleven jurors." To the overruling of the motion to declare a mistrial, for the reasons indicated, exceptions pendente lite were filed, and error is assigned upon such ruling. We think, under the circumstances, the court should have excused the juror for providential cause, and then declared a mistrial, unless counsel voluntarily agreed that the trial should proceed before the 11 remaining jurors. But the defendants lost the right to except to the action taken by the court by unconditionally consenting that the juror Wingate should be discharged, and the trial proceed with the 11 jurors. By this consent the defendants waived whatever error there may have been in the rulings of the court. Counsel for the plaintiffs in error cite the case of *Simmons v. State*, 88 Ga. 272, 14 S. E. 613. The ruling in that case does not sustain the contention that the plaintiffs in error, after unqualifiedly consenting for the trial to proceed before the 11 jurors, had the right to except to the overruling of the motion to declare a mistrial, made under the circumstances and for the cause indicated. In the case cited the right to except to the order and ruling of the trial court was expressly reserved, for it is stated in the opinion that counsel for the defendants "consented to proceed with the trial before the eleven remaining jurors, provided it was distinctly agreed between such counsel and the solicitor general, with the sanction of the court, that the defendants would reserve the right to except to the order and ruling of the court, * * * and it was then and there so understood and agreed." Here the consent of the defendants that the juror Wingate should be discharged and the trial proceed before the 11 remaining jurors appears to have been unconditional, no right to except to the ruling of the court upon the motion to declare a mistrial being reserved.

3. William Robinson testified, by deposition, for the plaintiff, among other things, that, at the time the plaintiff's husband was killed, he, the witness, worked for the Southern Railway Company. After these depositions were taken, the witness testified in a case brought by himself against the Southern Railway Company, and the defendants in the

present case contended that in the course of this testimony he testified that he did not work for the Southern Railway Company on a date which was the same as the date when the plaintiff's husband was killed. The defendants, for the purpose of impeaching the testimony of this witness, offered to prove by the official stenographer what the witness had testified to in his case against the Southern Railway Company. On motion of the plaintiff's counsel, this evidence was excluded, upon the ground that no proper foundation had been laid for its introduction. One ground of the motion for a new trial alleged error in this ruling of the court. It is unnecessary to consider the materiality of the rejected evidence for the purpose for which it was offered. Section 5292 of the Civil Code, which lays down the rule in reference to the introduction of contradictory statements for the purpose of impeaching a witness, provides: "Before contradictory statements can be proved against him (unless they are written statements, made under oath in connection with some judicial proceedings), his mind should be called with as much certainty as possible to the time, place, person and circumstances attending the former statement; and if in writing, the same shall be shown to him, or read in his hearing, if in existence; and to lay this foundation, he may be recalled at any time." It is contended in the motion for a new trial that no grounds for the introduction of this testimony "could have been laid at the taking of said depositions, and the witness at the trial of this case not being in court, and, as movants contend, being out of the state, as appeared from the testimony of the plaintiff in this case, it was, in the interest of justice and truth, proper for the court to admit this testimony." We do not think it would have been proper for the court to admit this testimony. The above-quoted section of the Civil Code is clear and explicit. It declares that, "before contradictory statements can be proved against" a witness, the rule which it prescribes for the introduction of such evidence must be complied with; and no exception to this rule is made, either in this or any other section of the Code. Plaintiffs in error seek to have this court make an exception to the rule which will apply to the facts of this particular case. Even if we were to grant that an exception to the rule could be made in a case where it was shown that it was absolutely impossible for the party seeking to introduce the contradictory statements to comply with its requirements, the circumstances upon which the plaintiffs in error rely do not make such a case. It does not appear that the defendants could not have sued out interrogatories for this witness, for the sole purpose of laying the foundation for the introduction of this impeaching testimony. "Where a witness makes statements at variance with his testimony after the taking of his depositions, the only

way to take advantage of such statements is to sue out a second commission, and lay the requisite foundation for their reception in evidence." 29 Am. & Eng. Enc. Law (1st Ed.) 788; Kimball v. Davis, 19 Wend. 437; Brown v. Kimball, 25 Wend. 259; Stacy v. Graham, 14 N. Y. 492; Conrad v. Griffey, 16 How. 39, 13 L. Ed. 835. It has been held in other jurisdictions that the impossibility of compliance with the rule requiring the proper foundation to be laid before proof of contradictory statements can be made does not authorize such contradictory statements to be proved without laying the foundation. In Craft v. Com., 81 Ky. 250, it was held: "Where the testimony of a witness given on a former trial is reproduced, the witness having died, testimony to the effect that the witness, subsequent to the former trial, stated that the evidence given by him on that trial was false, is not competent." It has also been held, both by the supreme court of the United States and the supreme court of Ohio, though the decision was not unanimous in either case, that if a witness testifies in a case, and subsequently makes contradictory statements, evidence of such statements cannot be introduced at a second trial, though the witness is dead, and the party against whom his testimony on the first trial is read has had no opportunity of laying a foundation for impeaching him. Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 837, 39 L. Ed. 409; Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459. To the same effect is the decision rendered by the Texas criminal court of appeals (Stewart v. State, 26 S. W. 203), in which it was held: "Where a witness testifies on the examining trial, and is cross-examined, and soon becomes insane, his declarations, made after giving such testimony, are inadmissible on the trial to impeach that testimony then introduced." In the present case, the ruling which we make does not go as far as the decisions in these cases; for, as already indicated, there is nothing to show that it was impossible for the defendants to have laid the requisite foundation for the introduction of the alleged contradictory statements before offering them in evidence.

4. Another ground of the motion for a new trial is "because the court erred in admitting, over the objection of these defendants, the testimony of the plaintiff herself, as follows: 'Q. When your husband would go out home, what was his route across the railroad? Have you ever been with him? A. I certainly have. Q. What was his route across the railroad? A. I will tell you exactly the way we go. We go across this field to those tracks there at the railroad, and across the railroad at that crossing,'—meaning Johns street crossing." This evidence was "objected to as hearsay and immaterial." This testimony certainly was not hearsay, and it is not necessary to determine whether it was or was not material, because

If it was, as alleged, immaterial, then its admission by the court affords no cause for a new trial. "Admitting illegal testimony which is wholly immaterial is no sufficient ground for a new trial." *Williams v. Hamilton*, 30 Ga. 968. "Neither the rejection nor the admission of immaterial evidence is cause for a new trial." *Thompson v. Thompson*, 77 Ga. 693, 3 S. E. 261. See, also, *Lindsey v. Lindsey*, 14 Ga. 657; *Montgomery v. Trustees*, 70 Ga. 39 (4).

5. We have covered all of the grounds in the motion for a new trial requiring special mention; other grounds are sufficiently referred to in the fifth headnote. Judgment affirmed. All the justices concurring.

(113 Ga. 994)

CORLEY v. COLEMAN et al.

(Supreme Court of Georgia. July 20, 1901.)

INJURY TO EMPLOYEES—PETITION.

The petition set forth in substance a cause of action, and it was error to dismiss the same on a general demurrer.

(Syllabus by the Court.)

Error from superior court, Emanuel county; B. D. Evans, Judge.

Action by S. E. Corley against Coleman & Ellison. Judgment for defendants. Plaintiff brings error. Reversed.

This was an action for damages brought by the widow of Corley against Coleman & Ellison, the damages alleged to have resulted from the homicide of Corley. The plaintiff alleged: That the defendants in their sawmill business operated a railroad, not chartered, for the purpose of transporting timber to and from the mill, and also for transporting their employes from the mill to the woods. Said railroad had been operated for about three years. That the way of the railroad was narrow, the woods not having been cleared more than a few feet beyond the space occupied by the roadbed. That the defendants negligently permitted a rotten, boxed, and dangerous pine tree, about two feet in diameter, to stand within twelve feet of the roadbed, and that on the night of September 25, 1899, it fell across the railroad track. That the rules of the defendants required their employes to report at 4 o'clock in the morning, to be conveyed on the railroad train to the woods. That Corley so reported for duty on the morning of September 26, 1899, and that he and the other employes went upon the engine and a flat car, which was pushed by the engine, running backwards. That Corley and other employes were sitting on the car when it was run against the log lying across the track, which caused a wreck of the train, and he was instantly killed, and that said wreck was not occasioned by any neglect of Corley. That he did not know of the pine tree or its condition, nor was it his business to work on the railroad, or to investigate the condition

of the road and roadway, nor was the wreck caused by the negligence of any of his (Corley's) fellow servants, but that the defendants were guilty of the neglect which was the proximate cause of the wreck, because they knew, or should have known, that the way was not clear sufficiently far from the roadbed to insure safety in running the train at night. That the pine tree stood, as already stated and described, subject to fall across the railroad at any time from the slightest wind. That the engine was run backwards on said railroad, and had no headlight, and that it was dangerous to the lives of employes, and unreasonable under the circumstances to order them out in the nighttime over said road. That at the time of the wreck the train was running at an ordinary and reasonable rate of speed, and that the darkness was so dense that it was impossible to discover the obstacle before it was struck. The defendants demurred generally, which demurrer was sustained, and the action dismissed, to which judgment and decision the plaintiff excepted.

Geo. M. Warren, for plaintiff in error.
Williams & Williams, for defendants in error.

COBB, J. The plaintiff sued the defendants for damages alleged to have resulted to her from the homicide of her husband. The court dismissed her petition upon a general demurrer, and to this ruling she excepted. The substance of the allegations of the petition are set forth in the report which precedes this opinion. As against a general demurrer, the petition set forth a cause of action. It alleged that there was standing within 12 feet of the track a tree, which, on account of its condition, brought about by decay and the fact that it had been boxed for turpentine, was a constant menace to the safety of the employes of the defendants, who in the course of their employment were compelled to ride upon the railroad, and that the plaintiff's husband was riding thereon at the time of his death. The petition distinctly alleges that, while the condition of the tree was such as to imperil the lives and safety of the employes upon passing trains, the fact that it was in such a condition was not known to the plaintiff's husband, and could not have been discovered by him by merely passing by the tree. It was further alleged that it was no part of the duty of the plaintiff's husband to make any inspection as to the condition of the right of way or the territory adjacent thereto. It was argued that there was no allegation that the tree was upon the right of way of the defendants. It is not material to the case whether the tree was located upon the right of way of the defendants, or upon the property of an adjacent owner. If the tree was in the condition alleged in the petition, it was the duty of the defendants to have caused it to be re-

moved in some lawful way, even if it was actually located upon the property of another person, or at least to have given warning to their employes of the danger with which they were confronted in riding upon the cars provided for them. When the petition is taken as a whole, it simply presents a case where an employe has sustained injury as a result of a danger which was well known to the employer, but was unknown to the employe, and he, under the circumstances alleged, was under no duty to have made the inspection which was necessary to discover the danger, while the employer was under a duty to his employe not only to have made the inspection which would have resulted in a discovery of the danger, but also to have removed the same. The court erred in dismissing the petition on the demurrer filed thereto. Judgment reversed. All the justices concurring.

(61 S. C. 361)

**ABBEVILLE ELECTRIC LIGHT & POWER
CO. v. WESTERN ELECTRICAL
SUPPLY CO.**

(Supreme Court of South Carolina. Aug. 5, 1901.)

FOREIGN CORPORATION—SERVICE OF SUMMONS—TRAVELING SALESMAN.

Code Civ. Proc. § 155, as amended by Act March 2, 1899 (23 St. at Large, p. 42), provides that a foreign corporation can be made party to an action by serving personally any agent of such foreign corporation within the limits of the state. *Held*, that service on a traveling salesman of a foreign corporation not having a resident agent, place of business, or property within the state, when the salesman visited the state in relation to the transaction out of which the suit arose, is a good service on such corporation.

Appeal from common pleas circuit court of Abbeville county; Benet, Judge.

Action by the Abbeville Electric Light & Power Company against the Western Electrical Supply Company. Motion of defendant to set aside service of summons granted, and plaintiff appeals. Reversed.

The defendant offered the following affidavit in support of its motion, viz.:

"Now comes the Western Electrical Supply Company, defendant herein, and states that George F. Schminke, the person upon whom service of summons was had herein, at the time of said service was not an officer of this defendant, nor a director thereof; that he was simply and solely the traveling salesman for this defendant; that his duties and powers with this defendant were simply and solely to take orders for the sale of merchandise, subject to the approval of this defendant, in such states as he might be directed by this defendant from time to time; that he had no other powers or duties than these; that he was a resident of the city of New Orleans, state of Louisiana; that this defendant has no office or place of business in the state of South Carolina; that said George F. Schminke was especially sent to the town

of Abbeville at the time of said service to examine into the running of the machinery in controversy and report the facts to defendant, and that he was so sent at the request of plaintiff; that the contract between plaintiff and defendant out of which the alleged cause of action arose, if plaintiff has any cause of action, was not made in the state of South Carolina. Western Electrical Supply Co., per R. V. Scudder, Gen'l Mgr.

"State of Missouri, City of St. Louis. R. V. Scudder, being duly sworn, on his oath states that he is, and was at the time hereinbefore mentioned, general manager of the Western Electrical Supply Co., defendant herein, and that the statements contained in the foregoing are true. R. V. Scudder.

"Subscribed and sworn to before me this 27th day of November, 1900, in the city of St. Louis, Mo. J. B. Carroll, Notary Public. [Official Seal.]"

The plaintiff offered the following affidavit and card and letters in rebuttal, viz.:

"Personally appeared before me W. N. Thompson, who, being duly sworn, says that he is the president of the above-named plaintiff; that the letters hereto attached were received from the defendant in due course of mail, and letters, copies of which are hereto attached, sent defendant; that the card hereto attached was handed deponent by Mr. George F. Schminke when he came to Abbeville, representing the defendant in negotiations looking to the settlement of the differences between the plaintiff and the defendant, which resulted in the suit now pending in this court. W. N. Thompson.

"Sworn and subscribed before me this February 21st, 1901. J. L. Perrin, C. O. C. P."

The following is the card referred to in the above affidavit: "George F. Schminke, Western Electrical Supply Company, Electrical Supplies, St. Louis."

The following are the letters and copies of letters in their regular order, referred to and attached to the affidavit of W. N. Thompson, viz.: "St. Louis, October 23d, 1900. Abbeville Electric Light and Power Co., Abbeville, S. C.—Gentlemen: Referring to your favor of October 6th, which has been held for the writer's return to the city, we notice fully what you have to say; and as there is such a marked difference between your report and the factory's report, and as we are put in the position of middleman, as sort of a bumper between you and the factory, you can readily appreciate our position, and we will defer writing you at any great length, excepting to say that, if your position is correct, you shall certainly be treated right. We have written our Mr. George F. Schminke, who will be in Abbeville now in about ten days, and we will get a full report from him, and we have also written the factory fully regarding the matter, and inclosed them a copy of your letter, and we are satisfied that it will be news to them, and we will advise you as soon as we hear from

them, and we have requested them to write us by return mail fully regarding the matter; and we assure you that if your position is correct in this matter, and the machine is defective, that we will replace it with a machine that will perform in accordance with the contract. We trust you will bear with us until we can get a full and definite report from the factory, and a reply to our letter to them to-day inclosing a copy of your letter under answer. [Signed by defendant.] The following is the letter of plaintiff in reply to the above: "Abbeville, S. C., October 27th, 1900. Gentlemen: In reply to your favor of the 23d inst., we note what you say, and would say that we are taking steps to buy a new machine at once, for we cannot afford to be delayed any longer in this matter. Now, in consideration of what you say in your last about sending your Mr. Schminke to Abbeville by the 3d proximo, we will defer buying the machine above referred to until the 5th proximo, provided you write us at once that your authorized representative will be in Abbeville by the above date, with power to act, so that we may be assured of a speedy settlement. [Signed by the plaintiff.]" The following letter in reply to letter of plaintiff follows: "St. Louis, October 29, 1900. Abbeville El. Lt. and Power Co., Abbeville, S. C.—Gentlemen: Your favor of the 27th inst. to hand, and this is simply to acknowledge receipt of your letter, and to let you know that we are following the matter up. Before answering your letter we are waiting to have a reply to a telegram we have sent to our Mr. Geo. F. Schminke to-day, asking him to wire us when he would arrive in Abbeville, and also asking him to advise us by wire where a letter would reach him, as we want to write him fully regarding the situation at Abbeville; and, upon receipt of his reply advising us when he will be able to reach Abbeville, we will answer your letter fully. We have no doubt, however, that he will be able to get into Abbeville not later than November 5th; and we think it will be very foolish of you to replace the Warren machine with a machine of another make, if you intend trying to operate the other machine under the same conditions as the Warren, and we are very sure that, if you will improve the conditions under which you are trying to operate this Warren machine and have your Warren machine fixed up, that you will have no trouble with it. We are very sure that, under the conditions you are trying to operate, you cannot get any machine to give you satisfaction, and we doubt if any machine would have stood the racket as long as the Warren machine has. Mr. Schminke is a very competent man, and capable of passing on a thing of this kind, and can advise you in a very few moments whether or not the conditions under which you are operating are unfavorable; and we trust that you will defer action on this matter until you give us an

opportunity to look over the ground for ourselves, which we will do when our Mr. Schminke arrives in Abbeville. We will defer writing further until hearing from Mr. Schminke, and will notify you as soon as we have his telegram. [Signed by the defendant.] The next letter is dated St. Louis, October 30, 1900, addressed to the plaintiff, and is as follows: "Gentlemen: Referring to your favor of October 4th, in which you inclosed your bill of October 1st against us, amounting to \$32.60, we return you herewith the invoice, and will thank you to kindly hold this with the balance of the papers until final adjustment is made on the account in accordance with the agreement, and, when final adjustment is made of the account, if you are entitled to credit for these items, you shall certainly receive them; but we would prefer not dividing the thing up, and making an entry now and another entry at the final adjustment, but will simply make one bite of the cherry. Please attach this letter and your bill to the other papers pertaining to this settlement, and keep all of the papers together, so that we can have them at the proper time. This letter was in a basket on the writer's desk during his absence in the East, and in cleaning up the basket to-day he found the letter, and he thinks this will be the best way to dispose of the matter temporarily. We have not yet received a telegram from our Mr. Schminke in reply to ours of yesterday asking him when he would reach Abbeville, but we have received a letter which indicates that he will be in Asheville, N. C., to-morrow, at which time we expect to receive an answer to our telegram, and we will then notify you just when you can expect Mr. Schminke in Abbeville. [Signed by the defendant.] Postscript: We are sending Mr. Schminke some letters in your care, which we will thank you to kindly deliver to him when he reaches Abbeville." The next letter is dated St. Louis, November 1, 1900, addressed to the plaintiff, and is as follows: "Gentlemen: Our Mr. G. F. Schminke will be in Abbeville on the 5th inst., and we are writing him fully to-day regarding the situation there. [Signed by the defendant.]"

Wm. N. Graydon, for appellant. Frank B. Gary, for respondent.

McIVER, C. J. (after stating the facts). The action in this case was commenced by the service of summons, with a copy of the complaint attached thereto, upon one George F. Schminke, at Abbeville C. H., on the 7th day of November, 1900, by the sheriff of Abbeville county, under the claim that the said Schminke was an agent of the defendant company, a corporation duly chartered under the laws of the state of Missouri. In the complaint it is alleged that "the cause of action set forth herein arose in this state," and the other allegation set forth as the cause of action is the breach of a contract

whereby the defendant company guaranteed that a certain electric machine for the purpose of generating electricity, known as a "45 K. W. Warren Alternator," sold by defendant to plaintiff in December, 1899, was free from any and all inherent electrical or mechanical defects. Before the time for answering expired, to wit, on the 28th of November, 1899, the defendant, by his attorney, gave notice of a motion to set aside the service of the summons on the ground that the party served with the summons and complaint herein on the 7th day of November, 1900, was not an agent of the defendant, "expressly stating in this notice that defendant will appear for the purpose of objecting to the jurisdiction of this court, and for no other purpose." This motion was heard by his honor Judge Benet upon the affidavits and letters and card thereto attached, which are set out in the "case" (which will be incorporated in the report of this case by the reporter), who, in a short order, granted the motion to set aside the service of the summons, and dismissing the case for want of jurisdiction. The only reason given by the judge is thus expressed in his order: "After argument of counsel on both sides, I hold that defendant, nonresident corporation, could not be brought within the jurisdiction of this court by service of the summons upon the said George F. Schminke; he not being, in my opinion, an agent, in the sense in which 'any agent' is used in the Code." The provision of the Code here referred to may be found in the second paragraph of section 155, which, after prescribing the manner in which a corporation shall be served with a summons, originally proceeded as follows: "Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in this state personally upon the president, cashier, treasurer, attorney or secretary, or any resident agent thereof." But by the act approved March 2, 1899 (23 St. at Large, p. 42), that provision of the Code was amended by striking out the word "resident" in the last line of the above quotation; so that, as the law now reads, and as it read at the time this action was commenced, a foreign corporation could be made a party to an action by serving personally any agent of such foreign corporation within the limits of this state. If, therefore, we look alone to the express language used in the Code, especially bearing in mind the fact that the legislature had, in express terms, seen fit to strike out, by the act of 1899, *supra*, the word "resident,"—the only word qualifying the word "agent," leaving the broad terms "any agent," without any qualification whatsoever,—it is clear that the circuit judge erred in holding, practically, that the word "agent" must be qualified in some way, though he does not specify in what way. In addition to this, it will be observed that the notice of

the motion expressly states that it was based "on the ground that the party served with the summons and complaint herein on the 7th day of November, 1900, was not an agent of the defendant," and that ground was not only not sustained by any evidence offered in the "case," but, on the contrary, was in terms negatived by the defendant's own showing; for in the affidavit of Scudder, the general manager of the defendant, he only says that Schminke "at the time of said service was not an officer of this defendant, nor a director thereof"; but he does not say that he was not an agent of defendant company, but he does say (not expressly, it is true, but by necessary implication) that he was an agent, for he says "that he was simply and solely the traveling salesman for this defendant," going on to state to what extent his powers and duties were limited, and this necessarily implies that he was an agent of the defendant. Nor was there any finding of fact by the circuit judge that Schminke was not the agent of the defendant. On the contrary, the language used by him necessarily implies that while he thought that Schminke was, in one sense, the agent of the defendant company, yet, in his opinion, he was not an agent "in the sense in which 'any agent' is used in the Code." It is clear, therefore, that, if the only ground upon which the motion was based was not sustained, there was error in granting the motion.

It is earnestly and with force contended by the counsel for the respondent that the provisions of the Code above referred to should not be literally construed, and that, on the contrary, with a view to avoiding a conflict with well-settled principles established by the decisions of the supreme court of the United States, the tribunal invested with authority to determine finally controversies between citizens of different states of the Union, the provisions of our Code should be given a liberal construction, as was done in the case of *Tillinghast v. Boston & P. R. Lumber Co.*, and *Moore v. S. C. Forsaith Mach. Co.*, 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49; but as the action was dismissed as to the Boston & Port Royal Lumber Company upon the ground that the complaint did not state facts sufficient to constitute a cause of action against that company, from which there was no appeal, the case was considered as an action against the S. C. Forsaith Machine Company alone. See page 488, 39 S. C., page 122, 18 S. E., and page 51, 22 L. R. A. One of the questions (in fact, the only real question) in the case was whether the state court had acquired jurisdiction of the said machine company, a foreign corporation, chartered by the laws of the state of New Hampshire, by the service of the summons upon that company at their place of business in the city of Manchester, in the state of New Hampshire, after an order of publication had been obtained; the said company having no property within the limits of this state.

and no place of business and no agent in this state. This court held that while it was true that the terms of our Code did seem to justify a service upon a foreign corporation outside of the limits of this state after an order of publication had been obtained, even in an action in personam, yet in view of the fact that the supreme court of the United States had taken a different view in the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and other cases following that case, which were cited in *Tillinghast v. Boston & P. R. Lumber Co.*, it would be necessary to give to our Code such a construction as would avoid a conflict with these decisions of the supreme court of the United States, and accordingly those provisions of our Code there considered were so construed as applying only to proceedings in rem, and not to actions in personam. It will be observed that the court in *Tillinghast v. Boston & P. R. Lumber Co.* was called upon to construe a different section of the Code, containing different language from that which it is now called upon to consider. In the former case the question was as to the construction of the following language in section 156 of the Code, in which the manifest purpose was to provide for service by publication, to wit, that certain officers "may grant an order that the service be made by publication of the summons in either of the following cases: (1) Where the defendant is a foreign corporation, has property within the state, or the cause of action arose therein"; and after mentioning other cases in which service by publication may be made, and after prescribing how such publication is to be made, and that in such cases the officer making the order shall require a copy of the summons to be forthwith deposited in the post office, directed to the person to be served at his place of residence, etc., the following language is used: "Where publication is ordered, personal service of the summons, *out of the state*, is equivalent to publication and deposit in the postoffice." (Italics ours.) But in this case the court is called upon to construe, not section 156 of the Code, nor any language contained therein, but section 155, as amended by the act of 1899, *supra*, which, after prescribing in the first paragraph of the first subdivision of the section how a corporation may be served with the summons, in the second paragraph of that subdivision uses the following language: "Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made, in this state, personally, upon the president, cashier, treasurer, attorney or secretary, or any agent thereof." So that in the former case the question was as to the validity of the service of the summons upon a foreign corporation outside of the limits of this state, while here the question is as to the validity of the service made

within the limits of this state, and the difference is obvious and very important. We do not think, therefore, that the case of *Tillinghast v. Boston & P. R. Lumber Co.*, *supra*, or any of the decisions following that case have any application to the question presented in this case.

It was also contended by counsel for respondent that the defendant company, not having complied with the provisions of section 1406 of the Revised Statutes of 1893, has not waived its exemption from suit in the courts of this state, or consented to be subjected to the jurisdiction of our courts. In the first place, it must be remembered that the provisions of that section, as well as other sections contained in the same chapter of the Revised Statutes, have been amended by the act of 1897 (22 St. at Large, p. 484), and various other conditions have been added, one of which is "that it shall be taken and deemed to be the fact, irrefutable, and part and parcel of all contracts entered into between such corporation [foreign] and a citizen or corporation of this state, that the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, impost, premium, or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding." Now, if the defendant company has received any payment or other moneyed or valuable consideration under or in performance of the contract admittedly made between the parties, as may be reasonably (as we think, must be) inferred, then, under the statutory provision just quoted, it must be regarded as an irrefutable fact that the defendant company was doing business within this state, and the place of the making and of performance of such contract shall be deemed and held to be within this state, notwithstanding anything to the contrary in the contract or the rules and by-laws of the foreign corporation. Under this view, the case must be regarded as a case in which a domestic corporation, having, as it supposed, a claim against a foreign corporation doing business in this state, arising out of a contract made and to be performed in this state, has undertaken to commence its action against such foreign corporation by serving personally within the limits of this state an agent of such foreign corporation with a copy of the summons; and in such a case we do not think that any authority has been or can be cited which holds that the state court had not thereby acquired jurisdiction of the foreign corporation.

But assuming that we are in error in regarding this case as such a case as that just

mentioned, and, on the contrary, that it is a case in which the plaintiff, a domestic corporation, has brought an action, under a contract which was not made in this state and was not to be performed here, against the defendant, a foreign corporation, and has undertaken to obtain jurisdiction of such foreign corporation by the personal service of its agent within the limits of this state, we will proceed to inquire whether, under the admitted facts in this case, such service would be recognized as good and valid, under the decisions of the supreme court of the United States, as we freely recognize the superior authority of such decisions in controversies between citizens of different states.

The first case cited by respondent's counsel is the case of *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451. That was a case in which the question was as to the validity of a judgment recovered against the plaintiff in error, a foreign corporation, in a state court of Ohio, in an action commenced by service of process upon an agent of said plaintiff in error within the limits of the state of Ohio; and the question turned upon the inquiry whether the state court of Ohio had by such service obtained jurisdiction of the said insurance company, the objection to such service being that a state court could not obtain jurisdiction of a foreign corporation created by the laws of another state. As is stated by Mr. Justice Curtis in delivering the opinion of the court: "The precise facts upon which this objection depends are that this corporation was created by a law of the state of Indiana, and had its principal office for business within that state. It had also an agent authorized to contract for insurance, who resided in the state of Ohio. The contract on which the judgment in question was recovered was made in Ohio, and was to be there performed, because it was a contract with the citizens of Ohio to insure property within that state. A statute of Ohio makes special provision for suits against foreign corporations founded on contracts of insurance there made by them with citizens of that state, and one of its provisions is that service of process on such resident agent of the foreign corporation shall be as 'effectual as though the same were served on the principal.'" In discussing the law applicable to this state of facts, the learned justice uses the following language: "The inquiry is not whether the defendant was personally within the state, but whether he, or some one authorized to act for him in reference to the suit, had notice and appeared, or, if he did not appear, whether he was bound to appear or suffer judgment by default." And the true question in this case is whether this corporation had such notice of the suit, and was so far subject to the jurisdiction and laws of Ohio, that it was bound to appear, or take the consequences of nonappearance." Then, after laying down the general proposition that a corporation created by one state

can only transact business in another state by the consent, express or implied, of the latter state, and that such consent may be accompanied by such conditions as the latter state may see fit to impose, provided such conditions are not repugnant to the constitution or laws of the United States, "or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense," the opinion proceeds as follows: "In this instance, one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio, and enter into contracts of insurance there in behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision either unreasonable in itself, or in conflict with any principle of public law." Accordingly it was held that the service on the agent of the foreign corporation was good, and that the judgment rendered by the state court of Ohio was good and valid. It will be observed that the facts in the case just cited are somewhat different from those which appear in the case now under consideration, and therefore it is not direct authority on the point raised in this case. But we have cited it at some length for the purpose of showing the fundamental principles which lie at the bottom of all questions of this kind.

The next case cited by counsel for respondent which we shall notice is *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. In that case the question was as to the validity of a judgment rendered by a state court of Michigan against the Winthrop Mining Company, a foreign corporation created under the laws of the state of Illinois, in an action commenced by service within the state of Michigan upon one Colwell, described simply as agent of the said Winthrop Mining Company, which was engaged in business in the state of Michigan when service was made on Colwell; and as it did not appear, even *prima facie*, that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ upon him, and as the judgment was rendered by default, there was nothing to show that the Michigan court had acquired such jurisdiction of the foreign corporation as would entitle it to render a personal judgment against such corporation. In that case the remarks of Mr. Justice Field, who delivered the opinion of the court, would seem to show that the test as to whether the person upon whom service is made is such an agent as would render such service valid is that such agent is the representative of the corporation in the state where the service is made at the time of such service. For Mr. Justice Field, after citing and commenting on a case from Michigan in which the

service was made on the treasurer of a foreign corporation in the state of Michigan, where the treasurer happened to be casually, and not on any business of the corporation, uses this language: "According to the view thus expressed by the supreme court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the state. This representation implies that the corporation does business or has business in the state for the transaction of which it sends or appoints an agent there." (Italics ours.) Again the learned justice says: "The transaction of business by the corporation in the state, *general or specific*, appearing, a certificate of service by the proper officer, or a person who is its agent there, would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business." (Italics ours.) The same doctrine was recognized in the subsequent case of *Goldney v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. In that case the plaintiff undertook to commence an action in a state court of New York against the defendant, a foreign corporation created by the laws of the state of Connecticut, and carrying on its business in that state only, and having no place of business, officer, agent, or property in the state of New York, by the personal service of the summons upon the president of such corporation in the city of New York, while temporarily there, where the corporation transacted no business; and the court held that the service on the president of the corporation while casually in the state of New York, and not charged with any business of the corporation there, was invalid, for the reason that the president could not, in any sense, be regarded as the representative of the corporation while casually in the state of New York, not for the purpose of attending to any business of the corporation there. Indeed, we find that in a number of cases which we have consulted, but which need not be cited here, it has been uniformly held by the supreme court of the United States that a state court cannot, in an action in personam, acquire jurisdiction of a foreign corporation simply by personal service of the summons upon the president or any other officer or agent of such corporation while he happens to be casually in the state where the action is commenced, and not there for the purpose of attending to any business of such corporation; and to this doctrine we fully subscribe.

The next case decided by the supreme court of the United States which is cited by counsel for respondent is *Manufacturing Co. v. Ferguson*, 118 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, but we are unable to perceive what application that case has to the question which we are now considering. In that case no question as to the validity of the service of any process was raised, for the sole question was whether noncompliance

with a certain provision of the constitution of Colorado, and of the statute passed to carry into effect such constitutional provision, operated as a bar to the action. The action was brought by a corporation created by a law of the state of Ohio, and having its principal place of business at Mt. Vernon, in that state, to recover damages for the breach of a contract entered into in the state of Colorado with the defendants, who were citizens of the state of Colorado, for the sale and delivery to them on the cars at Mt. Vernon of certain machinery at a certain stipulated price. The defendants, among other defenses, pleaded: First, that, when the contract sued on was entered into, the plaintiff, a foreign corporation, had not made and filed the certificate required by the statute; second, that, at the time of the making of the contract the plaintiff did not have a known place of business in the state of Colorado, and did not have an authorized agent or agents in the state upon whom process might be served. The plaintiff demurred to these two defenses, and the demurrer was overruled. The argument in behalf of the demurrer was that, inasmuch as the constitution of Colorado forbids a foreign corporation from doing any business in that state "without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served" (article 15, § 10), and inasmuch as the statute declared that "foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate * * * with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served," etc. (Gen. St. § 200), the failure to comply with these provisions operated as a bar to the action. But the supreme court of the United States held that the failure to comply with these provisions could not operate as a bar to the action, two of the justices holding that to give such a construction to the provisions of the constitution and the statute of Colorado would be a violation of the interstate commerce clause of the constitution of the United States, but the majority of the court rested their conclusion upon the ground that the provisions of the constitution and statute of Colorado could not be reasonably construed as forbidding the doing of a single act of business in that state, but the carrying on of business; and we presume the case was cited to show that doing a single act of business within the state of South Carolina by the defendant company would not justify the service of its agents while in this state for the purpose of attending to this single act of business done by defendant in this

state. To say the least of it, this would be a strained inference to be drawn from the case cited; and, besides, the majority of the court based its conclusion upon the peculiar phraseology used in the constitution and statute of Colorado, and our statute contains no such phraseology.

We have not deemed it necessary to comment upon the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, cited by counsel for respondent, for the reason that in that case there was no personal service within the state of Oregon, but the service was made by publication; and it was accordingly there held that a personal judgment is without any validity if it be rendered by a state court in an action upon a money demand against a nonresident of the state, who was served by a publication of the summons, but upon whom no personal service of process within the state was made, and who did not appear; and no title to property passes by a sale under an execution issued upon such a judgment. Indeed, remarks made by Mr. Justice Field in delivering the opinion of the court seem to imply that the result would have been different if the service had been made within the state of Oregon. For he says: "Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." Substantially the same remarks are made by the same justice in the subsequent case of *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 872, recognizing and following *Pennoyer v. Neff*.

Nor do we propose to refer to the cases cited by counsel for respondent from the *Federal Reporter* and from other states (with one exception), for two reasons: (1) Because they are not decisions of courts of final resort in questions of this kind. (2) Because a consideration of such cases would unduly protract this opinion to an unreasonable length. The excepted case above referred to is the case of *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 25 Pac. 325, reported also in 22 Am. St. Rep. 483, and the reason the following proposition: "A single sale of machinery within the state [of Colorado] by a foreign corporation does not constitute doing business, within the meaning of the statute." But an examination of the case will show that it does not sustain the above-quoted proposition, if it is supposed to refer to the statute regulating the service of process upon a foreign corporation, for it manifestly refers to a different statute; section 260 of the General Statutes of Colorado, declaring that "foreign corporations shall, before they are authorized or permitted to do

any business in this state, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state, and in the office of the recorder of deeds in the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state, residing at its principal place of business, upon whom process may be served." Whereas the statute prescribing the mode of serving a foreign corporation is found in section 40 of the Code of Civil Procedure, and reads as follows: "If the suit be against a foreign corporation, * * * service shall be made by delivering a copy of the writ to an agent, cashier, treasurer or secretary thereof; in the absence of such agent, cashier, treasurer or secretary, to any stockholder." The facts as reported in the case are substantially as follows: The plaintiff, a domestic corporation, doing business in the city of Denver, Colo., contracted in writing with the defendant, a foreign corporation engaged in mining in New Mexico, to manufacture, furnish, and set up for the defendant in New Mexico certain machinery for the reduction of ore, for a stipulated price. The contract was performed by plaintiff, and large payments had been made on the contract, leaving, however, a considerable balance due on the same, for the recovery of which the action was brought. Service of the summons was made by delivering a copy thereof to one Samuel Alsop, a stockholder in the defendant corporation. This service was set aside by the court below, and the plaintiff appealed. In the opinion of the supreme court it is stated that "the first and most important question to be determined is whether appellants could be subjected to the jurisdiction of the courts of this state," it being contended that the defendant, a foreign corporation, had not, by its acts and dealings in the state of Colorado, submitted itself to the jurisdiction of the courts of that state, and that this cause could not there be tried and determined. This contention was based upon the conceded fact that the defendant had not complied with the provisions of section 260 of the General Statutes of Colorado, above referred to, forbidding foreign corporations from doing business in that state until they had complied with the provisions of said section. The court, however, declined to sustain such contention, holding that a single purchase of machinery in Colorado cannot be regarded as doing business "in this state, as contemplated in such section." (Italics ours.) The court then proceeded to inquire whether the state court had obtained jurisdiction of the defendant by the service upon Alsop, and after setting out the provisions of section 40 of the Code of Civil Procedure, as quoted above, used this language: "We conclude, therefore, that the contracting of the debt in question was a sufficient doing business with-

In this state to render the corporation amenable to the courts of this state, if jurisdiction could be obtained by service of process as provided in section 40 of the Code," and, after finding as a fact (which was contested by appellant) that Alsop was a stockholder of the defendant corporation at the time he was served with the summons, held that such service was sufficient to bring the defendant within the jurisdiction of the state, and reversed the finding of the circuit court to the contrary. So that the case just considered is really in favor of, rather than opposed to, the view which we adopt.

We may also cite the case of *Ford v. Calhoun*, 53 S. C. 106, 30 S. E. 830, in which it was held that the circuit court may acquire jurisdiction of the person of a nonresident by the service of a summons upon him while in this state, whether he have property here or not. In that case, after citing the statutory provision upon the subject, the court used this language, which seems quite pertinent to the present inquiry: "Besides this explicit statutory provision, the reason of the thing supports our view. The object of the service of any legal process is to notify the party served of the proceeding against him, and to obtain jurisdiction of his person; and both of these objects are attained where a person, whether a nonresident or a resident of this state, has been personally served within the jurisdiction of the court where such proceeding is pending." For in the case under consideration there can be no doubt that the defendant corporation had, by the service of the summons on its agent, Schminke, full notice of the proceeding in ample time to have served its answer, as is conclusively shown by the fact that the defendant was notified in time to employ counsel and prepare and submit affidavits in support of the motion to set aside the service of the summons. It is true that in *Ford v. Calhoun* the question was as to the service upon a natural, and not upon an artificial, person, like a corporation. But, as we understand the decisions of the supreme court of the United States, there is no difference whether the question is as to the service of an individual nonresident and a foreign corporation, provided the service, in case of a corporation, is made upon an officer or agent of the corporation, who is acting as the representative of such corporation at the time of service,—a matter which will hereinafter be considered.

The only other authority which we propose to cite is the recent decision of the supreme court of the United States in the case of *Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, in which this whole subject is considered at length. That case, in some of its features, is very much like the case now under consideration. In that case the summons was served on an agent of a foreign corporation while temporarily (though not casually) in the state

of Tennessee, where he had been sent by the foreign corporation to look into the claim out of which the cause of action upon which the suit was brought in the state court of Tennessee, and the supreme court held that by such service the state court acquired jurisdiction of the foreign corporation, and that the judgment of the state court, though obtained by default, was a good and valid judgment. In that case, Mr. Justice Peckham, in delivering the opinion of the court, after declaring that it is not necessary that the agent upon whom service is made should be expressly invested with authority to receive service of process in behalf of the foreign corporation, but that authority may be implied, uses the following language: "If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority and service under such circumstances, and service upon an agent of that character would be sufficient." As we have seen above, and as is held in the case last cited, the character of the agency depends upon the inquiry whether the agent can be regarded as the representative of the corporation in respect to the transaction out of which the suit arises. The practical inquiry, therefore, is whether George F. Schminke was the representative of the defendant corporation in this state, in regard to the transaction out of which this controversy arose. This must be determined by an examination of the undisputed testimony in the case, proceeding largely, and in fact entirely, from the defendant corporation itself. It must be remembered that the circuit judge did not find that Schminke was not the agent of the defendant; and, indeed, could not have so found without totally disregarding all of the testimony in the case. All that he found was that Schminke was not, in his opinion, "an agent in the sense in which 'any agent' is used in the Code"; and this was a conclusion of law, based upon his construction of the meaning of the words, "any agent" as used in the Code, and was not a finding of fact at all, except that his phraseology implies that he found as a fact that Schminke was an agent of the defendant company, but that, according to his construction of the language of the Code, he was not such an agent as the Code contemplated. This court is therefore at liberty to consider and determine for itself, from the undisputed testimony in the case, whether George F. Schminke must be regarded as such a representative of the defendant corporation, in reference to the transaction out of which this action arose, as would, under the decisions of the supreme court of the United States, justify the service of the summons upon Schminke. It seems

to us that the letters of the defendant corporation, used at the hearing of this motion below, fully show that Schminke, when served with the summons in this state, was here as the representative of the defendant corporation in the very transaction out of which this controversy arose. In the first letter, under date of 23d October, 1900, which shows on its face to have been written in reply to a letter from plaintiff to defendant, of the 6th of October, 1900, which was not offered in evidence, but its tenor may be inferred from the reply, to have been a notification or complaint of the deficiency in the machinery, the defendant says, among other things, "We have written *our* Mr. George F. Schminke, who will be in Abbeville now in about ten days, and we will get a full report from him," and expresses the hope that plaintiff "will bear with us" for a while. To this letter plaintiff replied by letter dated 27th of October, 1900, in which, after stating that plaintiff was taking steps to buy a new machine, as it could not afford to be delayed any longer in the matter, the following language is used: "Now, in consideration of what you say in your last about sending your Mr. Schminke to Abbeville by the 3d proximo, we will defer buying the machine above referred to until the 5th proximo, provided you write us at once that your authorized representative will be in Abbeville by the above date, with power to act, so that we may be assured of a speedy settlement." To this letter defendant replied under date of 29th October, 1900, in which, after saying that they had telegraphed "*our* Mr. Geo. F. Schminke," asking him to wire defendant when he would be in Abbeville, and after saying that they had no doubt that Schminke would be able to reach Abbeville not later than the 5th of November, etc., they used this language: "We trust that you will defer action on this matter until you give us an opportunity to look over the ground for ourselves, which we will do when our Mr. Schminke arrives in Abbeville." And again, on the 1st of November, 1900, the defendant wrote plaintiff: "Our Mr. G. F. Schminke will be in Abbeville on the 5th inst., and we are writing him fully to-day regarding the situation there." If the language which we have quoted above, especially that which we have italicized, does not show that Schminke was sent to Abbeville as the representative of defendant in relation to the very matter in dispute between the parties, then we are at a loss to conceive what language could show more conclusively that fact. If so, then the service of the summons upon Schminke while in Abbeville for the purpose of representing the defendant corporation in the very matter in dispute between the parties would be held by the supreme court of the United States, even apart from our own Code of Procedure, a valid service upon the defendant corporation. For, as said by Mr. Justice Field in *St. Clair v. Cox*, at page 359,

106 U. S., page 362, 1 Sup. Ct., and page 226, 27 L. Ed.: While "service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state where such service is made, yet, if he is the representative of the corporation in the state at the time the service is made, such service would be sufficient; and this representation implies that the corporation does business or has business in the state, for the transaction of which it sends or appoints an agent there." We are of opinion, therefore, that service upon the agent of the defendant corporation while in this state for the purpose of attending to the business of the corporation here, in any view that may be taken of the case, was a good service, and that the circuit judge erred in holding otherwise. The judgment of this court is that the order of the circuit judge setting aside the service of the summons in this case, and dismissing the case for want of jurisdiction, be reversed, and that the case be remanded to the circuit court for Abbeville county for such further proceedings as may be necessary, with leave to the defendant to serve its answer within 20 days after written notice to the counsel, who represented the defendant at the hearing of the motion to set aside the service of the summons, of the filing of the remittitur in this case in the circuit court for Abbeville county.

(61 S. C. 404)

BURNS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 20, 1901.)

NONSUIT — APPEAL — REVIEW — INJURIES AT RAILROAD CROSSING — QUESTION FOR JURY — PLEADING — AMENDMENT.

1. Where plaintiff appeals from a judgment of nonsuit, no other grounds than those upon which the motion was made can be considered.

2. In an action to recover for injuries at a railroad crossing, there was evidence that defendant stopped its train across a public way for a longer period than allowed by the ordinance of the town, and that it started it without giving statutory signal, whereby plaintiff, who was passing over the bumpers on the freight cars to reach a passenger train, was injured. *Held* error to direct a nonsuit.

3. In an action for injuries at a railroad crossing, where there is evidence of negligence by plaintiff and also by defendant, it is error to direct a nonsuit.

4. Where there is evidence that plaintiff was injured by attempting to pass between cars standing at a public highway, it was error to refuse to permit him, on motion, to amend his complaint by alleging that the accident occurred at a street, highway, or traveled place.

Appeal from common pleas circuit court of Oconee county; Aldrich, Judge.

Action by W. L. Burns against the Southern Railway Company. Judgment of nonsuit. Plaintiff appeals. Reversed.

J. R. Earle, for appellant. T. P. Cothran, for respondent.

GARY, A. J. This is an action for damages for injury to the plaintiff in consequence

of alleged negligence on the part of the defendant. The allegations of the complaint material to the questions presented by the exceptions are as follows: "(2) That on the 6th day of April, 1899, the defendant corporation negligently and unlawfully allowed one of its trains, consisting of a locomotive and a number of freight cars, in charge of its authorized agents, to stop for a considerable and unreasonable time, about twenty minutes, across one of the public streets or crossings of the town of Seneca, in the county and state aforesaid, to the great inconvenience and annoyance and in violation of the rights of the public, and in violation of the ordinances of said town; thus completely blockading the said street or crossing which leads from the business portion of said town to the passenger landing of the Blue Ridge Railroad, across the track of said defendant, during which time the passenger train on the Blue Ridge Railroad had arrived and was due to depart. (3) That on said day plaintiff was accompanying and assisting his son off to his command, who had purchased a ticket and was to take the Blue Ridge Railroad train at this point; that waiting for a considerable time, and no opening being made in said freight train through which persons might pass, and said passenger train being due to depart, the way being thus blockaded for a great distance either way, persons were therefore compelled to cross said freight train in going to and from said passenger train by going over the bumpers, and a number of persons did so, and plaintiff's son crossed said train as aforesaid, and plaintiff immediately following him attempted to cross said freight train, which was at the time standing motionless across said street or crossing; that while plaintiff was in act of crossing between two of said freight cars, without any notice or warning, without the sound of a whistle or the ringing of a bell on said locomotive, the defendant company, through its agents and servants, then and there in charge of said train, negligently, recklessly, and unlawfully caused said train of cars to move rapidly and suddenly, and thereby caught plaintiff's foot between two of said cars, and so mangled and crushed it as to necessitate its being amputated, all of which was grossly negligent, reckless, and unlawful on the part of the said defendant corporation."

The defendant answered the complaint, denying its allegations, and setting up contributory negligence as a defense. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, on the grounds: (1) That the plaintiff had failed to adduce any evidence tending to establish negligence on the part of the railroad company; and (2) that the evidence on the part of the plaintiff shows a state of facts from which only one inference could be drawn, and that is that the plaintiff was guilty of negligence himself.

The motion was granted, and the plaintiff appealed upon exceptions, the first, second, third, fourth, and sixth of which are as follows: "(1) That his honor erred in holding: 'It first becomes necessary to determine whether this action has reference to the sections of the Revised Statutes 1685 and 1692, or, as we commonly say, whether it is an action under the statute or under the common law. I hold that it is an action under the statute, using that expression in its ordinary sense; or, in other words, that it is an action for injuring the plaintiff at a street or crossing of the Southern Railway track. It is needless for me to read these sections (1685, 1692). They are intended for travelers or persons desiring to cross a highway, street, or traveled place, and if one is not traveling or attempting to cross the street or highway, in the sense of the statute, and is injured, and it appears the sounding of bell or blowing of the whistle,—that those signals were not given as required by the statute,—that a person cannot rely upon these statutes as supporting a case other than is provided; so that the question comes up right now, is there any testimony here tending to show that the plaintiff was injured by the railway company upon a public highway, street, or traveled place, or while attempting to cross the railroad track along a street or public highway or traveled place? and, if there is, I must let it go to the jury; and, if there is no such testimony, then the action must fail. I listened to the testimony, and so far from sustaining the view that the plaintiff was injured at a street or highway or traveled place, he was not injured there. He was injured at another place. He didn't go on the train at a street or traveled place. He got on below it, and was injured there, and therefore there is no testimony to go to the jury on that line; and on that line I think the defendant is entitled to the nonsuit,—but should have held that, if this is to be regarded as an action under the statute, then there is testimony tending to show that a street crossed the track of the defendant company at the place, and the public had an equal right to use of it with the defendant company, and the defendant had so blockaded and obstructed it for an unreasonable time that the public was deprived of the use of it; and, if these be the facts, a passenger, whose occasion requires it, would have the right to make reasonable use of the defendant's property, without injury to it, to overcome such obstruction for the sole purpose of crossing the railway track, and it would be estopped from saying that such person was a trespasser, if he deviated from the line of the street or highway in making a reasonable use of its property for the sole purpose of crossing its track. (2) That his honor erred in holding: 'Now, if there is sufficient allegations in the complaint to sustain it at common law, then I fail to see wherein the railroad company has been proven to have been guilty of actionable neg-

ligence. It was in the railroad yard there, and the testimony of the plaintiff shows that this street, or what had been the street, had been surrendered as part of its yard. The testimony does not show that the railroad company was doing anything more in its yard, or was guilty of any negligence in moving its train backwards and forwards in the yard,—but should have held that there is testimony tending to show that this is the only street or passageway from the business portion of the town to the passenger landing of the Blue Ridge Railroad; that it was being used as such upon this occasion by the plaintiff until he came in contact with the obstruction placed across it by the defendant, and was compelled, in order to continue his lawful passage, to make a reasonable use of the defendant's property; that such obstruction during the arrival or departure of a passenger train, whose passengers must cross this way going to and from, was grossly negligent and actionable. (3) That his honor erred in holding: 'I must assume that the railroad company had the right to move its cars in the railroad yard, and the motion for a nonsuit is granted,'—but should have held that, while there is testimony tending to show that the defendant had been using this crossing in part as a yard for the last eight or ten years, yet that could not give it the exclusive right to occupy or use it, and there is no testimony tending to show that the public had ever relinquished its rights or acquiesced in the exclusive occupation of the defendant, and a person whose occasion requires him to pass there has as high a right as the defendant. (4) That his honor erred in not holding that there is testimony tending to show that the plaintiff was injured at a crossing of a highway, street, or traveled place, and that no signals as required by law were given by the defendant, and in refusing to submit the case to the jury." "(6) That his honor erred in granting the order of nonsuit, and not allowing the facts to be passed upon by the jury."

Rule 18 of the circuit court (33 S. E. viii.) provides that "a motion for a nonsuit must be reduced to writing by the moving counsel, or by the stenographer, under the direction of the court, stating the grounds of the motion." The first ground of the motion for nonsuit rests solely upon the alleged fact that the plaintiff had failed to adduce any evidence tending to establish negligence. Under the rule of court, no other grounds than those upon which the motion was made can be considered.

There are allegations in the complaint appropriate both to an action under the statute and to an action at common law. The right to bring an action at common law was not superseded by the statutory remedy. *Kaminsky v. Railroad Co.*, 25 S. C. 53; *Spies v. Railroad Co.*, 47 S. C. 28, 24 S. E. 992. The defendant did not make a motion that the

plaintiff be required to elect upon which cause of action he would proceed to trial. Therefore a nonsuit should not have been granted, if there was any testimony tending to show negligence either under the statute or at common law. *Cartin v. Railroad*, 43 S. C. 221, 20 S. E. 979. The plaintiff introduced in evidence the following ordinance of the town of Seneca, to wit: "That any person or persons obstructing the public crossings with cars, engines or trains, longer than ten minutes at a time, shall be deemed guilty of a misdemeanor, and fined or imprisoned at the discretion of the council." The evidence tended to show that the defendant obstructed the crossing for a longer period than 10 minutes, and that its conduct was therefore in violation of law. If the defendant kept its train of cars standing at a crossing contrary to law, this was evidence of negligence, and that it was a trespasser. *Littlejohn v. Railroad Co.*, 49 S. C. 12, 26 S. E. 967. Section 1635 of the Revised Statutes also makes it negligence for the railroad company not to give the following warning: "If an engine or cars shall be at a standstill within a less distance than one hundred rods of such crossing, the bell shall be rung or the whistle sounded for at least thirty seconds, before the engine shall be moved, and shall be kept ringing or sounding until the engine shall have crossed such public highway or street or traveled place." In commenting on this provision of the statute, the court, in *Littlejohn v. Railroad Co.*, supra, says: "At the time when the plaintiff went between the cars for the purpose of crossing the track, the train was at a standstill, and obstructed the crossing. It was therefore the plainly-expressed duty of the defendant, before moving the engine, to ring the bell or sound the whistle for at least thirty seconds." Being its duty, it was negligence to fail to discharge it. Apart from the evidence of negligence arising from the violation of the ordinance and the statutory requirements, there was evidence of negligence at common law by reason of the failure to give warning to those who were forced by its conduct to climb over the bumpers to reach the Blue Ridge landing; also by reason of the fact that the defendant obstructed the crossing for an unreasonable length of time. Under the authority of *Mason v. Railway Co.*, 58 S. C. 70, 36 S. E. 440, it is not necessary to discuss the reasons assigned by his honor, the presiding judge, in granting the order of nonsuit. We may say, however, that there was evidence tending to show that there was a street crossing the railroad which was obstructed by the defendant's train of cars. It was the thoroughfare from the business portion of the town to the Blue Ridge landing for those on foot, and for wagons until they reached the wooden curbing around the depot. The defendant knew that it was traveled by the public and acquiesced in its use. Those getting on board and those alighting from the Blue Ridge

trains had of necessity to pass over this crossing. The public had the right to use the crossing. The facts in the case of *Hale v. Railroad Co.*, 34 S. C. 292, 13 S. E. 537, upon which the respondent relies, were materially different from those in this case.

The circuit judge did not rule upon the second ground of the motion for a nonsuit, but it would have been error to have sustained it, as we have shown that there was evidence of negligence on the part of the defendant; and, even if there was evidence of negligence by the plaintiff, a nonsuit would not be proper. This case would have to be submitted to the jury.

The fifth exception is as follows: "(5) That his honor erred in not allowing plaintiff to so amend his complaint as to allege that the accident occurred at a crossing of a street, highway, or traveled place." Under all the facts of this case, the amendment should have been allowed.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(61 S. C. 411)

ROBERSON v. McCAULEY et al.

(Supreme Court of South Carolina. Aug. 20, 1901.)

SLAVE MARRIAGES—REGULATION.

1. Act Dec. 21, 1865 (13 St. at Large, p. 81), passed to regulate the domestic relations of persons of color, was repealed by Act Sept. 21, 1866 (13 St. at Large, p. 393), only in so far as the last-mentioned act deals with the rights of persons lately slaves prospectively. Act March 12, 1872 (15 St. at Large, p. 183), provided that persons who, previous to their actual emancipation, had occupied the relation of husband and wife, should be deemed husband and wife, as though they had been married according to law. *Held* to apply to the relations between slaves during the year 1862.

2. Act March 12, 1872 (15 St. at Large, p. 183), legalizing certain marriages between slaves, was passed with intent to remedy a case where the parties had agreed to be husband and wife, but where the agreement was invalid because of the want of power of the parties to contract, and not one where the relation was mere concubinage.

Appeal from common pleas circuit court of Anderson county; Hudson, Special Judge.

Action for partition by Amanda Roberson against Mary McCauley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

R. Y. H. Nance, Esq., special referee, filed the following report, omitting formal parts: "(4) The plaintiff introduced testimony to show that Abram McCauley, the late husband of Mary McCauley, the defendant herein, had one Mary Yarborough as his wife during the war, and prior to 1865, and that Amanda Roberson was born to them as their child, and that the said Amanda Roberson visited Abram McCauley at his home in the city of Anderson, S. C., on several occasions, and that she was recognized by him as his daughter,

and thereby entitled to inherit from his estate. (5) The defendants introduced testimony to show that Abram McCauley never had Mary Yarborough as his wife, but that he was married to Emily Scott, and that she was the only wife he had prior to 1868, when he was then married to the defendant Mary McCauley, and resided with her until his death, in the spring of 1899, and that no children were born to Emily Scott and Abram, nor to Abram and Mary, his wife, at the time of his death. (6) After reviewing and considering the testimony very carefully, while it is very contradictory in many respects, and a great deal of it for the want of memory, as will be observed by the testimony of those who testified as to how long the war lasted, when Emily and Abram married, and how long before the war, and how long after the war they lived together, when the fact is, according to Mr. I. H. McCalla's testimony, they may have been married as late as 1863 (referring to the battle of Battery Wagener, which was fought on July 18, 1863), and that they parted in Christmas, 1865, or January, 1866: Therefore, from the testimony, I find as matters of fact: First. That Abram McCauley visited Mary Yarborough prior to 1865, and while there occupied the relation of man and wife. Second. That the said Mary Yarborough gave birth to a child in July, 1862, and that she was named Amanda, and that she is the plaintiff in this case. Third. That Abram McCauley was married to Emily Scott probably as late as 1863, and that there were no children born to them. Fourth. That Abram McCauley and Mary Keaton were married in 1868, and the said Abram McCauley and Mary McCauley lived together until his death, in 1899, and no children were born to them. Fifth. I find Amanda Roberson visited the said Abram McCauley at his home in the city of Anderson, S. C., on several occasions, and on one occasion that the said Abram McCauley gave the said Amanda Roberson a clock. Sixth. That the said Abram McCauley recognized the said Amanda Roberson to be his daughter, and that Amanda called him 'Pa,' and Mary 'Ma.' Seventh. The testimony does not satisfy my mind beyond a doubt that the said Amanda Roberson is the child of the said Abram McCauley, but from his acknowledgment of her being his daughter I find the following conclusions of law: (1) That the marriage of Abram McCauley and Mary Keaton, now Mary McCauley, and one of the defendants herein, was a legal and valid marriage. (2) That it appears that Amanda Roberson was born prior to the passage of the act of 1865, and I think it clear that she was recognized by the said Abram McCauley to be his daughter, thereby making the said Amanda Roberson a legal heir, under the fourth section of the act of 1865, in which it declares, 'Every colored child heretofore born is declared to be the legitimate child of his mother and also of his

colored father, if he is acknowledged by said father.' *Knox v. Moore*, 41 S. C. 361, 362, 19 S. E. 683. As stated before, I think the evidence shows that Abram McCauley recognized or acknowledged Amanda Roberson to be his child, and therefore she is entitled to inherit from his estate. I would therefore recommend to the court that the premises described in the said complaint be sold for partition between the said Mary McCauley and Amanda Roberson, and that the said Mary McCauley be allowed to prove the debts, if there be any, of the said Abram McCauley, deceased, and, after paying such debts, and the costs of this action, that the surplus, if there be any, be divided between the said Mary McCauley and Amanda Roberson, according to their respective interests."

The circuit decree is as follows, omitting formal parts: "The case involves the construction and effect of those statutes in this state relating to the marital relations and issues of former slaves, and the statutes and decisions in the state relating thereto were fully discussed by counsel in their arguments. In order to entitle the plaintiff to recover, she must establish her claim by the preponderance of the evidence,—by proof satisfactory to the court. That will depend upon two facts: 'First. Is plaintiff, as she alleges, a daughter of the deceased, Abram McCauley?' The testimony on this question is conflicting, and leaves the question in doubt. The special referee, while not satisfied beyond a doubt that such was the case, bases his findings on the admission or acknowledgment by Abram McCauley that plaintiff was his child. While, therefore, it is doubtful whether Abram McCauley had a daughter by Mary Yarborough, in the face of the statements testified to by several of the witnesses that Abram McCauley had made to the effect that plaintiff was his daughter, I am unwilling to disturb the findings of the referee in that respect. We come, therefore, to the question: 'Second. If plaintiff is a daughter of the deceased, Abram McCauley, is she, under the facts proved in this case, entitled to inherit from him? Did he recognize her?' I hold that he did. Under the statute she would clearly be entitled to inherit from the mother. Is this right equally clear as to the estate of the father? The statute was passed to meet the conditions that surrounded the newly-emancipated race. The legislature must have recognized that, whether primarily through their own fault, or by virtue of conditions which they were practically powerless to combat, the slaves had, prior to their emancipation, become a lecherous race, and that want of chastity among their women was notorious. But, notwithstanding this fact, even among these degraded people, a clear distinction was recognized between the marriage relation and mere concubinage, and between lawful issue and bastards. At emancipation these slaves entered upon new

life, with new rights and enlarged powers. Among these were the rights of legal marriage and the right of property. The statute was intended to regulate both these rights, and we must conclude that it was intended to be construed, as far as possible, in the interest of both industry and good morals. Abram McCauley was, as the testimony shows, a slave, who, after his emancipation, by industry and thrift accumulated property. He had, at the time of his death, a wife, Mary McCauley, the companion of years of his toil. Under the view that I take of this case, the question now comes squarely upon the issue whether the laws of South Carolina will allow a mere bastard, the issue of concubinage prior to emancipation, to come in and share this property with the widow, upon the mere declaration by Abram McCauley in his lifetime that such issue was his child? Would not such a conclusion put on the statute a construction favorable to immorality, and a construction which the legislature never intended? If this were true, a negro who, under the low state of morals existing (especially just after the war) among them, boasted that a certain child was his, when no marriage relation had ever existed whatever with its mother, would thereby have entitled such issue to inherit from him along, perhaps, with his lawful wife and children, who may have shared in years of labor to accumulate the property in dispute. Our laws, in my judgment, do not give mere bastards such rights. If, therefore, Amanda Roberson, the plaintiff, is a mere bastard, the issue of a bald concubinage, she cannot inherit from Abram McCauley. A careful review of the evidence leads me to conclude that no kind of marriage relation, either legal or moral, ever existed between Abram McCauley and Mary Yarborough. They never recognized or intended that such relation should exist between themselves. Mary Yarborough was never more to Abram McCauley, either morally or legally, than a mere concubine; and Abram McCauley, neither before nor since emancipation, has ever recognized any other relation. I hold, therefore, that the plaintiff is the issue of concubinage, and that she is not entitled to inherit from Abram McCauley. I recognize that no formal ceremony was necessary to create the relation of husband and wife; but, as Abram McCauley and Mary Yarborough did not intend, while cohabiting, to be regarded as husband and wife, and did not so regard themselves, I hold that the issue of the relation cannot be made to inherit by the statement of the father that this issue was his own, as testified to in this case. The act wisely enables children to inherit from their slave mothers, because the link that bound in this case was certain; but the slave husband at freedom, if compelled to recognize all the issues of his concubine, or even the bastard issue of her who occupied to him the relation of wife, might have a burden fixed

upon his efforts to accumulate property, by being compelled to support children that were not his own. And one of the objects in the acknowledgment clause of the act was evidently to protect him against his own wife's bastards, and not to allow him to prevent those who had no moral claim for his support from coming in and inheriting the fruits of his labor. So far as the referee's report is in accordance with the views herein expressed, it must be sustained, and, so far as in conflict herewith, it must be overruled, and so with the exceptions. It is therefore ordered, adjudged, and decreed that the complaint be dismissed, and that the plaintiff pay the costs of this action." From this decree the plaintiff appeals.

E. M. Rucker, Jr., for appellant. Bonham & Watkins, for respondents.

McIVER, O. J. (after stating the facts). This was an action for partition of a certain lot of land in the city of Anderson, of which one Abram McCauley died seised and possessed some time in January, 1899. He having died intestate, the only question is as to who is entitled to inherit his estate. The plaintiff, in her complaint, alleges that "the said decedent left surviving him as heirs at law a daughter, the plaintiff, by a former marriage, and his widow, Mary McCauley, one of the defendants"; the other two defendants, William Edwards and John C. Osborne, being persons who claim an interest in the said lot of land under the said Mary McCauley. The defendants, in their answer, deny that the plaintiff is entitled to any interest, either as heir at law or otherwise, in the estate of the decedent, Abram McCauley, and, on the contrary, aver that he died leaving as his sole heir at law his widow, the said Mary McCauley, and that she alone is entitled to inherit his estate. By consent an order was passed referring the case to a referee to take the testimony and report his findings of fact and conclusions of law. The testimony so taken is set out in the "case." The referee made his report, a copy of which is also set out in the "case," and will be incorporated in the report of this case by the reporter, and the case was heard by the circuit judge upon exceptions to the said report, who rendered a decree (which will likewise be embraced in the report of this case) dismissing the complaint. From this judgment the plaintiff appeals upon the several grounds set out in the record, which need not be set out here, as they practically raise but two questions: (1) Did the circuit judge err in concluding as matter of fact that no marital relation, either legal or moral, ever existed between Abram McCauley and Mary Yarborough, the mother of plaintiff, but that such relation was one of mere concubinage? (2) Did he err in concluding as matter of law that the plaintiff, having sprung from such an illegal relation, was not entitled to inherit

from Abram McCauley, notwithstanding the fact that Abram acknowledged her as his child?

For a proper consideration of these questions it will be necessary to make a brief general statement of the facts out of which this controversy has arisen. Abram McCauley was a slave, and belonged to Col. George McCauley. Mary Yarborough was also a slave, belonging to Dr. Yarborough. During the war between the states, there is testimony tending to show that Abram visited Mary at the plantation of Dr. Yarborough, her master, not, however, with, but against, his consent, and apparently against the consent of his owner, Col. McCauley. We do not find any evidence that there ever was any pretense or even a moral marriage (as it is termed in the books), nor is there any satisfactory evidence that they ever recognized each other as man and wife, or lived together as such. On the contrary, the testimony of Col. Isaac McCauley, who was the son of Abram's owner, satisfactorily shows that at some time during the war (when does not very clearly appear, though it must have been early in the war) Abram was formally married to another one of Col. Geo. McCauley's slaves, Emily Scott by name, with the consent of his owner. "They had a big wedding," at which this witness was present; and they lived together as man and wife on the plantation until about the close of the war, or perhaps shortly after the war ended. But, without going into any detailed consideration of the testimony, which is all set out in the "case," and has been carefully examined, it is sufficient for us to say that we agree with the circuit judge "that no kind of marriage relation, either legal or moral, ever existed between Abram McCauley and Mary Yarborough," and that they never, either before or since emancipation, recognized or lived with each other as husband and wife, but that their relation towards each other was merely that of concubinage. The finding of the referee, which is claimed to be adverse to the conclusion which we have reached, is expressed in the following dubious language: "That Abram McCauley visited Mary Yarborough prior to 1865, and while there occupied the relation of man and wife." The words which we have italicized leave it at least doubtful whether he meant to find that these persons lived as man and wife, or merely to say that while on these visits Abram "occupied" the same bed with Mary Yarborough; and, if he meant the latter, that would be entirely consistent with the conclusion which we have reached. At all events, whatever may have been the meaning which the referee intended to express by the dubious language which he used, we are entirely satisfied that the preponderance of the evidence is decidedly in favor of the view which we have adopted, and does not support the conclusion that these persons ever sustained to each other

the relations of husband and wife. Inasmuch as both the referee and the circuit judge have found as facts—though manifestly with some hesitation—that the plaintiff was the issue of sexual intercourse between Abram McCauley and Mary Yarborough, and that Abram acknowledged the plaintiff as his daughter, and as there is no exception to these findings by the circuit judge, and no notice has been given of an attempt to support the judgment appealed from by controverting either of these findings of fact, we will assume them to be facts in the case, though we must add that there is much in the testimony, which, if the question were open, would be well calculated to induce a different conclusion, or at least calculated to show that the plaintiff, upon whom was the burden of proof, had failed to establish by the preponderance of the evidence either of those facts, both of which were necessary to her right to recover. But, waiving this, for the reason above indicated, we will proceed to consider the question of law as to whether the plaintiff, under the facts found by the circuit judge, was entitled to inherit any portion of the estate of the intestate, Abram McCauley. That question may be stated as follows: Whether the offspring, born during the existence of slavery, of an illicit connection between a man and a woman both of whom were slaves, who has been acknowledged by the man as his child, can, upon his death intestate, inherit any portion of his estate. During the existence of slavery it was well settled in this state, at least, that marriage was a civil contract, and that, slaves being incapable of contracting, they were incompetent even to enter into a contract of marriage which the law would recognize as valid and binding upon the parties, giving rise to the rights and obligations which would attend a marriage between persons not laboring under the disability to contract. But, while this was the well-settled legal doctrine, yet it was a well-known and universally acknowledged historical fact that slaves of different sexes were in the habit, during the existence of slavery, of entering into such relations with each other, usually with the consent of their owners, as followed from a legal marriage between persons capable of contracting. Frequently these relations between slaves were entered into by a formal ceremony of marriage, while in other instances the parties simply came together by agreement to live with each other as husband and wife, and recognized by each as such. These relations, when thus assumed between slaves, are termed "moral marriages," lacking only the power to contract to make them legal marriages. When, therefore, the institution of slavery was abolished, the general assembly of this state, in view of the condition of things, on the 21st of December, 1865, passed an act entitled "An act to establish and regulate the domestic relations of persons of color, and to amend the

law in relation to paupers and vagrancy," to be found in 13 St. at Large, at page 31 of the edition of the acts of that year which the writer of this opinion now has before him, though we see that it is cited in the argument of appellant's counsel as 13 St. at Large, at page 291 (2d Ed., vol. 13, p. 269), which we presume is the page of the other edition of the acts of that year. The manifest object of that act, as we think, was, among other things, to recognize as legal the moral marriages above spoken of, and to declare legitimate the offspring of such marriages, under the conditions mentioned in the act. The act of 1866, entitled "An act to declare the rights of persons lately known as slaves and as free persons of color," passed the 21st of September of that year (13 St. at Large, p. 393; 2d Ed. p. 29), which is sometimes referred to as repealing the act of 1865, above cited, only repeals such acts and parts of acts as are contrary to or inconsistent with the provisions of the act of 1866, and the last-mentioned act deals only with the rights of persons lately known as slaves or as free persons of color, prospectively, whereas such portions of the act of 1865 as we think are applicable to this case are retrospective, and have been so declared to be in the cases of *Davenport v. Caldwell*, 10 S. C. 317; *Clement v. Riley*, 33 S. C. 66, 11 S. E. 699; *Callahan v. Callahan*, 36 S. C. 454, 15 S. E. 727; and *Knox v. Moore*, 41 S. C. 355, 19 S. E. 683. Hence those portions of the act of 1865 which are applicable to this case, not being contrary to or inconsistent with the provisions of the act of 1866, cannot be regarded as repealed by that act. Indeed, we do not see that the act of 1866 has any application to this case.

We will next refer to the act of 12th of March, 1872 (15 St. at Large, p. 183), entitled "An act legalizing certain marriages, and for other purposes therein mentioned." That act was probably passed because of the express repeal of the act of 1865, above referred to, by the Revised Statutes of 1872, at page 842, which went into effect on the 10th of February, 1872. The first section of the act of 1872 provides:

"That all persons in the state of South Carolina, who, previous to their actual emancipation, had undertaken and agreed to occupy the relation to each other of husband and wife, and are cohabiting as such, or in any way recognizing the relation as still existing at the time of the passage of this act, whether the rites of marriage have been celebrated or not, shall be deemed husband and wife, and be entitled to all the rights and privileges, and be subject to all the duties and obligations of that relation, in like manner as if they had been duly married according to law.

"Sec. 2. And all of their children shall be deemed legitimate, whether born before or after the passage of this act; and when the parties have ceased to cohabit before the pas-

sage of this act, in consequence of the death of the woman, or from other cause, all the children of the woman recognized by the man to be his, shall be deemed legitimate: provided, however, that no provision of this act shall be deemed to extend to persons who have agreed to live in concubinage after their emancipation."

The third section simply repeals all acts and parts of acts inconsistent with this act. This act was probably passed in view of the fact that the act of 1865, hereinabove referred to, had just been repealed by the Revised Statutes of 1872, thus leaving no statutory provision for the anomalous condition of those who had once been slaves, and had, prior to their emancipation, undertaken to enter into marital relations, which resulted in the birth of offspring, which, though of no legal force and effect, simply because of the want of power in the parties to contract at the time such relations were assumed, ought, nevertheless, to be regarded as morally binding, and that the issue of such relations, if acknowledged as such, ought to be regarded as legitimate. The act of 1872 may, therefore, be regarded as a substitute for the provisions of the act of 1865 in respect to this peculiar condition of things, which act had been repealed. Under this view of the object of the act of 1872, it is quite clear that the conclusion reached by the circuit judge in this case is correct,—that it was the intention of the legislature to declare only the issue of moral marriages to be legitimate, and capable of inheriting from their father as well as from their mother, and not to declare the issue of mere concubinage legitimate. The language of the first section of the act of 1872, "That all persons * * * who, previous to their actual emancipation," shows clearly that the act applies only to persons who had once been slaves; and the subsequent language of that section shows with equal clearness that it was intended only to apply to those who, while they were slaves, had undertaken to enter into marital relations, which, while not constituting legal marriages, did constitute what is termed in the decisions "moral marriages"; and the language of the second section of the act, "and all of their children"—that is, all of the children of such moral marriages—shall be deemed legitimate, manifestly shows that the provisions of the second section apply only to the children of such moral marriages. If, therefore, this case is to be determined by the provisions of the act of 1872, as we think it should be, we do not think there can be a doubt that the conclusion of law reached by the circuit judge is correct. It was the only law in force at the time this controversy arose, and also at the time of the death of the intestate,—the period to which we must look in determining who are his heirs at law, entitled to inherit from his estate. *Young v. Dinkins*, Rich. Eq. Cas. 23; *Glover v. Adams*, 11 Rich. Eq. 264; *Shaffer*

v. McDuffie, 14 Rich. Eq. 146. It was in terms retroactive, and did not divest any vested rights, for "*nemo est heres viventis*." We see no reason why the act of 1872 should not be applied to this case.

But, even if we are in error in this, and the case should be governed by the act of 1865,—as it seems to be assumed in the argument it must be,—we are still of opinion that there was no error in the conclusion of law reached by the circuit judge under the facts as he found them, which finding we approve, so far, at least, as relates to the nature of the connection between Abram McCauley and Mary Yarrowborough. While it is quite true that the terms of the fourth section of the act of 1865, if looked at alone, might justify the conclusion contended for by the appellant, yet such conclusion involves the necessity of imputing to the legislature an intention to recognize and sanction a moral wrong by placing the offspring of mere concubinage upon the same footing as the offspring of a moral marriage,—so far, at least, as the colored race is concerned,—and thus discriminating between the colored and the white race in favor of the former. A conclusion involving such an imputation upon a co-ordinate branch of the government will not readily be adopted by the courts. But when we examine the provisions of the fourth section of that act in connection with the other provisions of the act, we find that such a conclusion is not forced upon us. As has been said above, the object of that act was to provide for the anomalous condition of things with which the people of this state were confronted, when, at the close of the war between the states, a very large proportion of the inhabitants of the state were suddenly converted from a condition of slaves into the condition of freemen. The legislature, therefore, very wisely undertook to provide for the recognition of the family relation among that class of the inhabitants of the state which, though morally, could not have been legally, recognized, simply because of their want of power to contract a marriage, which constitutes the basis of the family relation. Hence we find that in the first section of the act "the relation of husband and wife among persons of color is established" in express terms. In the second section it is declared that "those who now live as such are declared to be husband and wife." In the third section of the act provision is made for the case of one man having two or more reputed wives, or one woman having two or more reputed husbands. Then follows the fourth section, in these words: "Every colored child, heretofore born, is declared to be the legitimate child of his mother, and also of his colored father, if he is acknowledged by such a father." From the connection in which this language was used, we must conclude that it was intended to apply only to the children born of what have been termed moral marriages between persons who were

slaves at the time they entered into such so-called marital relations, which it was well known existed among slaves prior to their emancipation, and from which large numbers of children had been born, and was not intended to declare every colored child legitimate, for in section 16 of the act illegitimate colored children are expressly recognized. As was well said by the late Mr. Justice McGowan in delivering the opinion of this court in the case of *Clement v. Riley*, 83 S. C., at page 81, 11 S. E., at page 699: "We cannot think that it was the intention of any or all of the acts aforesaid [referring to the acts of 1865, 1866, and 1872] to attempt the impracticable thing of legitimizing the whole colored race, without the least regard to the circumstances under which they were born, including the offsprings of mere concubinage. As it strikes us, it could not have been the intention to create marriage relations which in fact never existed, so as to affect the rights of inheritance. The law does not undertake to make the marriage contract. That must be the act of the parties themselves. The law only declares its consequences. As we understand it, the purpose was to remedy a case where the parties had agreed to occupy towards each other the relations of husband and wife; that is, a moral marriage, lacking only the power of contract to make it legal." This states the legal proposition for which we contend, and justifies the conclusion which we have reached.

Counsel for appellant, in his argument, relies upon certain language used by the justice delivering the opinion of this court in *Davenport v. Caldwell*, 10 S. C., at page 339, and again at page 341, in support of his contention; but that language was a mere dictum, and not authority, for in that case there was a moral marriage between the persons under whom the parties claimed the right to inherit; and that case can only be regarded as authority for the proposition—which we concede—that the issue of a moral marriage between persons who, at the time, were slaves, may inherit not only from their mother, but also from their father, if acknowledged by him. So, also, he cites the case of *Knox v. Moore*, 41 S. C. 356, 19 S. E. 683, relying specially upon certain language used by the justice who delivered the opinion of the court, at page 361, 41 S. C., and page 684, 19 S. E. But in that case also there was a moral marriage, during the existence of slavery, between Thornton Moore and Rhindy, and it was of the right of the children of such marriage, who had been acknowledged by the father, to inherit his estate, or rather their portion thereof, that the learned justice was speaking when he used the language relied upon. Of course, the language used by a judge in delivering the opinion of the court must always be construed with reference to the facts of the case

which he is considering. While, therefore, the learned justice in that case did hold (and rightly so) that the issue of the moral marriage between Thornton and Rhindy Moore, who were acknowledged by him, were entitled to inherit a portion of his estate, there is nothing in the language which he used that would even imply that he thought that the issue of a relation of mere concubinage between two persons while slaves, where there was no pretense of a moral marriage, would likewise be entitled to inherit from their reputed father. We are, therefore, of opinion that there was no error in the conclusions, either of fact or law, reached by the circuit judge. The judgment of this court is that the judgment of the circuit court be affirmed.

(61 S. C. 386)

MATTHEWS et al. v. MONTS.

(Supreme Court of South Carolina. Aug. 16, 1901.)

MECHANIC'S LIEN—FORECLOSURE—PLEADING—DESCRIPTION OF PROPERTY—STATEMENT—OWNERSHIP.

1. Where a complaint to foreclose a mechanic's lien alleges that petitioners delivered materials to defendant during the months of January, February, and March, it shows with reasonable certainty that the last of the materials were furnished in March.

2. Rev. St. 1893, § 2466, requires that the statement to be furnished in order to maintain a mechanic's lien after ceasing to furnish labor or materials shall contain a description of the property intended to be covered by the lien. A complaint alleged the furnishing of materials for the erection of a building on a described tract of land, and that after ceasing to furnish labor and materials petitioners filed a statement as required by statute, and made said statement and petition a part of the complaint as an exhibit, in which exhibit the property was described as in the complaint. *Held* to sufficiently show a filing of the statement required by the statute containing a description of the property.

3. The complaint alleged that defendant said the land on which materials were used was his own, and a statement filed, which was attached to the complaint as an exhibit, alleged that the property was that of the defendant. *Held* a sufficient allegation of ownership.

4. Under Rev. St. 1893, § 2466, notice to the owner of the property to be affected by a lien of an intention to claim lien for materials furnished need not be given, where the purchaser of the materials was the owner of the property.

Appeal from common pleas circuit court of Newberry county; Benet, Judge.

Action by Matthews & Wilson against J. Ed. Monts to foreclose a mechanic's lien. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

Johnstone & Welch, for appellant. Hunt & Hunt, for respondents.

JONES, J. This appeal is from an order overruling a demurrer to a complaint to foreclose a mechanic's lien. The demurrer was as follows: "The said complaint does not state facts sufficient to constitute a cause of

action: (1) In that it is not alleged in the complaint that this action was commenced within six months after the plaintiffs ceased to labor or furnish material for said building; (2) in that no description of the property is alleged to have been given in the 'statement' filed in the clerk's office May 21, 1898; (3) in that it is not alleged that the defendant is the owner of the property upon which said building was erected; (4) in that it is not alleged that notice was given to the owner of the said property; (5) in that the date of ceasing to labor and furnish material upon said building is not given."

The action was commenced on September 1, 1898, and the complaint alleges that "the petitioners above named delivered to the said J. Ed. Monts, during the months of January, February, and March of the year 1898, lumber and other building materials, and performed labor thereon," etc. So that it appears with reasonable certainty that the action was commenced within six months after the plaintiffs ceased to furnish labor or material, even if it be conceded that demurrer is the proper remedy. It would seem, however, that the proper remedy in such case is not demurrer, but answer setting up the statutory bar to the action. Section 94 of the Code provides that "the objection that the action was not commenced within the time limited can only be taken by answer."

2. We think the complaint shows compliance with section 2469, Rev. St. 1893, which requires that the "statement" to be filed with the clerk of the court or register of mesne conveyances within 90 days after ceasing to furnish labor or materials shall contain "a description of the property intended to be covered by the lien sufficiently accurate for identification." The complaint alleges in paragraph 2 that plaintiffs, by the contract made with defendant, "were to furnish lumber and other building materials for the construction and erection of a one-story frame shingle-roof building upon certain real estate hereinafter more fully described"; and paragraphs 6 and 7 allege as follows: "(6) That the above-mentioned one-story frame shingle-roof building is situate on a piece, parcel, or tract of land lying in the county and state aforesaid, containing fifty acres, more or less, and bounded on the east by lands of * * *. (7) That, within ninety days after petitioners had ceased to furnish labor and materials for above-described building,—that is to say, on May 21, 1898,—the above petitioners filed in the office of the clerk of the court for Newberry county a

just and true account due them, with all credits due, with notice therein that said petitioners would avail themselves and seek the benefit pursuant to the provisions of the act of the general assembly of the state of South Carolina in reference to 'labor performed or furnished, or for materials furnished and actually used, in the erection, alteration, or repair of any building or structure upon any real estate,' and all acts and parts of acts amendatory thereto. Said above-mentioned paper was filed in the office of the clerk of the court for Newberry county on May 21, 1898, in Book No. 10, at pages 290, 291, 292, 293." Then, in paragraph 9, said "statement" and petition was made a part of the complaint as an exhibit, in which exhibit the property is described as in the sixth paragraph of the complaint. While an exhibit to a complaint may not be used to supply a material allegation or cure a fatal defect in the complaint, it may be resorted to to make the allegations of the complaint definite and certain. *Cave v. Gill*, 59 S. C. 258, 37 S. E. 817. For the purposes of a demurrer, these allegations sufficiently show the filing of the statement required by the statute, containing a description of the property sufficiently accurate for identification.

3. The third specification is likewise untenable. The complaint, after referring to the real estate to be affected by the lien for labor and material, alleged that "the said J. Ed. Monts then and there stated that he was the owner of said real estate," and in the exhibit accompanying the complaint, which as shown may be resorted to to make the allegations of the complaint definite and certain, it is stated that J. Ed. Monts is the owner of the premises.

4. This specification cannot be sustained. Under section 2466, Rev. St., notice to the owner of the property to be affected by the lien of the intention to claim such lien need not be given if the owner is the purchaser. By the allegations of the complaint the owner of the premises was the purchaser of the material, etc.

5. As already shown, the complaint alleges that the materials were delivered, and labor performed, during the months of January, February, and March, 1898, which substantially alleges that the date of ceasing to labor and furnish material was during the month of March, 1898. The judgment of the circuit court is affirmed, with leave, however, to the defendant to answer, if he be so advised, within 20 days after the filing of the remittitur herein.

(113 Ga. 363)

MAYOR, ETC., OF CITY OF WAYCROSS
et al. v. HOUK.

(Supreme Court of Georgia. July 20, 1901.)

**NUISANCE—INJUNCTION—ABATEMENT—CITY
SEWER.**

1. Although municipal authorities may have plenary powers in the matter of establishing a sewerage system for a city, they cannot lawfully create, in connection therewith, a nuisance dangerous to life or health; and, when necessary and proper, a court of equity will, at the instance of a citizen injuriously affected thereby, enjoin the maintenance of the same.

2. While, in the present case, a local board of commissioners may have had exclusive control over the sewerage system of the city, it was, nevertheless, the duty of the mayor and council to abate a nuisance such as that complained of, and they were properly held accountable for the maintenance thereof, notwithstanding they may not have been responsible for its creation.

(Syllabus by the Court.)

Error from superior court, Ware county; Joseph W. Bennet, Judge.

Action by Virginia W. Houk against the mayor and council of the city of Waycross and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Leon A. Wilson and John C. McDonald, for plaintiffs in error. Toomer & Reynolds, for defendant in error.

LUMPKIN, P. J. The plaintiff below, Mrs. Virginia W. Houk, filed an equitable petition against the sanitary and waterworks commissioners of the city of Waycross and the mayor and council of that city, the main purpose of which was to enjoin the defendants from continuing the location of the mouth of the main sewer of the city at a designated point near her premises, or from extending it, as was contemplated, so that the sewage would be discharged directly upon her land. In this connection she alleged that the main sewer emptied into a small stream within about 600 feet of her premises, which was wholly incapable of carrying off the vast quantity of sewage discharged into it, and as a result the atmosphere of the neighborhood was permeated with "noxious gases, noisome odors, pestilential stenches, poisonous vapors," etc., which were dangerous to health, and caused sickness among her tenants. She further alleged that her damages would be irreparable if this state of affairs was permitted to continue, or matters were made worse by the proposed extension of the sewer, and the discharge of its filth into a ditch which ran for half a mile through her lands. The commissioners demurred to the plaintiff's petition on various grounds to the effect that, under the facts set forth, she was not entitled to the equitable relief sought. The mayor and council demurred on the ground that they were improperly joined as defendants, for the reason that, as shown by legislative acts referred to in plaintiff's petition, the board of commissioners alone had control and supervision of this sewerage system

of the city, and its mayor and council, therefore, had "no interest in the subject-matter in controversy." Separate answers were also filed by these two defendants. The evidence introduced on the interlocutory hearing was voluminous and conflicting, and, after considering the same in the light of the issues raised by the pleadings, his honor of the trial bench granted an injunction as prayed for. To this action on his part the defendants excepted. The questions presented by the bill of exceptions sued out in their behalf will be briefly dealt with below.

1. We have no hesitancy in holding that under the facts alleged in the plaintiff's petition she was entitled to the equitable relief sought. In *Butler v. Mayor, etc.*, 74 Ga. 570, it was distinctly ruled that: "When a municipal corporation is proceeding to lay sewers, and discharge filthy sewage upon the land of a property owner, which may probably cause injury to his health and sickness in his family, and where the nuisance is continuing, and likely to be permanent, and the consequences are not barely possible, but to a reasonable degree certain, a court of equity may interfere to arrest such nuisance before it is completed." And in *City of Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301, 44 Am. St. Rep. 17, this court decided that there was no abuse of discretion in granting a temporary injunction enjoining the city from continuing to maintain a nuisance already created. The nuisance complained of in that case consisted of "openings called 'manholes' in a sewer located in a public street contiguous to the dwelling of a citizen, the manholes being allowed to emit poisonous gases in large quantities through perforated covers placed over them." A general grant of power to establish in a city a sewerage system does not carry with it any right on the part of a municipality to create and maintain a nuisance dangerous to life or health. *Holmes v. City of Atlanta* (this day decided) 39 S. E. 458. Certainly, therefore, a flagrant abuse of power on the part of municipal authorities may, upon a proper petition filed by one having a peculiar interest in the matter, be enjoined before irreparable injury ensues. The evidence relied on by the plaintiff in the present case was such as to authorize the granting of the injunction prayed for.

2. It is insisted, however, that, even if this be true as to the commissioners, the court erred in not holding that the mayor and council were improperly joined as defendants, for the reasons stated in the demurrer filed by them. Reliance is placed upon the decision of this court in *Griffin v. Railroad Co.*, 72 Ga. 423, as authority for the proposition that "a demurrer only admits such facts as are well pleaded, and, where the bill alleges facts as true which are contradicted by the legislative acts and records, of which the court is bound to take judicial notice, it cannot hold such facts to be true, and they will not prevent the sustaining of the demurrer." It is

accordingly urged that the trial judge should have taken judicial cognizance of the fact that the legislative acts referred to in the plaintiff's petition conferred upon the commissioners exclusive control over the sewer system of the city, and its mayor and council were clothed with no power and charged with no duty in the premises. A careful consideration of the allegations of the petition convinces us that, conceding the doctrine thus invoked to be perfectly sound, it had no real application to the present case. The alleged nuisance was one wholly within the corporate limits of the city, and it had sole power to abate it, acting through its mayor and council, and not through its board of commissioners. See *Smith v. City of Atlanta*, 75 Ga. 110. The plaintiff distinctly charged that, instead of complying with their official duty in the premises, the mayor and council actually refused to abate the nuisance, and acted in conjunction with the commissioners in maintaining the same. If this be true, it cannot be seriously doubted that, without respect to how or by whom the nuisance originated, the mayor and council cannot lawfully be permitted to sanction it, and keep it in existence, as the plaintiff undertook to allege, and actually proved to the satisfaction of the court below. For aught that appears, the granting of the injunction against them was eminently proper, and they have no cause of complaint that the trial judge held them accountable for the maintenance of the alleged nuisance, notwithstanding they may not have been responsible for its creation. Judgment affirmed. All the justices concurring.

(113 Ga. 968)

MASSENGALE v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 20, 1901.)

CITY SEWER—NUISANCE—LIABILITY OF CITY.

Permitting a public city sewer to be or remain in such a defective condition as to become a nuisance, with resulting injury to realty, gives a cause of action against the municipality in favor of the owner of such realty, and on the trial thereof he may recover for all damages to his property which have occurred within four years of the filing of his petition. This is so without regard to the time when the sewer was constructed, or when it became in fact such a nuisance. *Reid v. City of Atlanta*, 73 Ga. 523, and cases cited; *Smith v. Same*, 75 Ga. 110; *Maguire v. Mayor, etc.*, 76 Ga. 84; *Mayor, etc., v. Tucker*, 29 S. E. 701, 103 Ga. 233; *Holmes v. City of Atlanta*, 39 S. E. 453; *Mayor, etc., v. Houk*, 39 S. E. 577.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by Mrs. H. E. Massengale against the city of Atlanta. Judgment for defendant, and plaintiff brings error. Reversed.

Lumpkin & Colquitt, for plaintiff in error. J. A. Anderson, J. T. Pendleton, J. L. Mayson, and W. P. Hill, for defendant in error.

PER CURIAM. Judgment reversed.

(129 N. C. 12)

COMMISSIONERS OF CURRITUCK COUNTY v. COMMISSIONERS OF DARE COUNTY.

(Supreme Court of North Carolina. Sept. 10, 1901.)

FINAL JUDGMENT—JUDGMENT ON MOTION.

In an action between two counties to determine the proportionate liability for debts existing at the formation of one of the counties out of the territory of the other, a judgment provided that plaintiffs should account to the defendants for a certain part of all taxes levied and received, and "hereafter levied and received," and that "the same shall be accounted for in the settlement of the judgments hereby rendered and authorized to be rendered," and this right to cease after the final settlement of the debt. Subsequent judgments were entered in the action on motions therefor, one of which stated that costs of the "action" were taxed against the plaintiffs, and that the matter referred to the referee was "the whole account of the matter of indebtedness between the two counties"; but the record showed that the referee had made only a partial statement of the judgments, and the matter was referred for full statement. *Held*, that the latter judgment was not a final judgment, and that a motion for the entry of an additional judgment for the amount due on the original judgment was proper.

Appeal from superior court, Dare county; Allen, Judge.

Action by the commissioners of Currituck county against the commissioners of Dare county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. B. Shaw and W. M. Bond, for appellant. E. F. Aydlott, for appellee.

MONTGOMERY, J. In an action commenced by the commissioners of Currituck county against the commissioners of Dare county, the object of which having been to have determined and collected whatever part of the debt of Currituck the county of Dare was liable for at the time of its formation as a county, a judgment known as the "Cannon judgment" was entered at the spring term, 1877, of Dare superior court, wherein it was decreed that Dare's part of such debt was $15\frac{11}{20}$ per cent. At the time of the Cannon judgment a part of the debt against Currituck was already in the form of judgments, and there was other known indebtedness not yet reduced to judgments; and the Cannon judgment arranged that the plaintiffs should have the right to take judgment against the defendants for $15\frac{11}{20}$ per cent. of any judgments that in the future might be obtained against the plaintiffs, upon a notice of 10 days to the defendants. The fourth section of the Cannon judgment was in the following words: "It is considered that the plaintiffs shall account to the defendants for $15\frac{11}{20}$ per cent. of all taxes levied and received, and hereafter levied and received, upon the value of the franchise and property of the Albemarle & Chesapeake Canal lying within Currituck county, and that the same shall be accounted for in the settlement of the judgments hereby rendered and authorized to be

rendered. This right to a proportion of said tax to cease after the final settlement of said outstanding debt, for which plaintiffs and defendants are liable." In the sixth section of the judgment it was ordered that the action be kept open on the docket for further orders. In April, 1900, in the original action, the defendants served a notice on the plaintiffs to the effect that at the next term of Dare superior court, before his honor, Judge Coble, they would move for judgment against the plaintiffs, under the fourth section of the Cannon judgment. The plaintiffs made no appearance, and his honor, seeing that a long account was involved, referred the matter for a statement of that account. Both parties appeared before the referee, and a report was made to the next term of the court. In the meantime the plaintiffs had a notice served on the defendants, returnable to the fall term, 1900, of Dare superior court, to have the judgment of Coble, J., set aside for irregularity.

The contention of the plaintiffs is that a motion in the original cause was not the proper method of procedure, and that a new action was necessary, and that the same had to be commenced by summons. The line of argument of defendants' counsel on this point was that a final judgment had been entered in the original action by his honor, Judge Hoke, at the fall term, 1892. The last-mentioned judgment, however, is not a final judgment. It was rendered upon a notice in the original action, and, as provided for in the original action, for judgment for the amounts which had been collected by the plaintiffs in the shape of revenues from the Albemarle & Chesapeake Canal. The record shows that such a proceeding had been resorted to on two or three occasions. It is true that in the Hoke judgment the costs of the action were taxed against the plaintiffs, but certainly the word "action" was inadvertently used for "motion," for the costs in the original action were in the Cannon judgment taxed against the defendants. And it is also true that it was recited in the Hoke judgment that the matter which was referred was that of having stated by a referee "the whole account of matter of indebtedness between the two counties, growing out of the old indebtedness due by Currituck"; but that language, as will be plainly seen from the entire record, refers to that indebtedness against Currituck which had been discovered and reduced to judgment at the time of the Hoke judgment. In a former report made, the referee had made a partial statement of the judgments against Currituck, which not being satisfactory, the matter was re-referred, to have a full statement of the judgments which had been procured against Currituck from the date of the Cannon judgment. There is nothing in the Hoke judgment which, either in express terms or by fair inference, impairs or destroys the force of the Cannon judgment, and we therefore think that a motion

in the cause was the proper method of procedure.

It is not necessary to discuss the other matters raised by the record and in the argument of plaintiffs' counsel in this court. No error.

(129 N. C. 16)

ROBINSON et al. v. LAMB.

(Supreme Court of North Carolina. Sept. 10, 1901.)

COUNTY COMMISSIONERS—ORDERS—FERRIES—ESTABLISHMENT—VESTED RIGHT—LICENSE—REVOCATION—PETITION TO OPERATE FERRY—DISMISSAL.

1. An order of the commissioners of a county to settle and lay out a ferry as petitioned for amounts to an establishment of such ferry.

2. An order of the board of commissioners of a county establishing a ferry gives the petitioner a vested right, which, notwithstanding an appeal to the superior court, can be taken away only by a reversal or modification by the superior court.

3. Priv. Laws 1873-74, c. 27, provided that no ferry should be established within three miles of the one allowed by the act. Priv. Laws 1897, c. 103, amended such act by inserting "two" for "three." Priv. Laws 1901, c. 72, repealed the act of 1897, provided the owners of the established ferry should provide ample facilities for the convenience of public travel. Prior to the passage of the act of 1901 the petitioners' ferry was established within three, but not within two, miles of that of defendant. Held, that the petitioners' license was not revoked by the act of 1901, since such act did not affect licenses for a ferry already granted.

4. Where, on motion to dismiss a petition for permission to operate a ferry, the owner of the established ferry neither showed nor offered to show that he had provided ample facilities for the convenience of public travel, as provided by such act of 1901, a dismissal of the petition was error.

Appeal from superior court, Camden county; Allen, Judge.

Action by Charles H. Robinson and others against E. F. Lamb. From a judgment in favor of the defendant, plaintiffs appeal. Reversed.

E. F. Aydlett, G. W. Ward, and P. H. Williams, for appellants. Busbee & Busbee, for appellee.

DOUGLAS, J. This is practically the same case as Robinson v. Lamb, reported in 126 N. C. 492, 36 S. E. 29, as it relates to the Camden end of the ferry. The principal facts stated in the former case will equally apply to that at bar. The main difference is that after the board of commissioners of Camden county had made an order establishing the ferry asked by the plaintiffs, and pending an appeal to the superior court, the general assembly passed an act, ratified on the 5th day of February, 1901, being chapter 72 of the Private Laws of 1901, entitled, "An act to repeal chapter 103, Private Laws of 1897." This act is as follows:

"The general assembly of North Carolina do enact:

"Section 1. That chapter one hundred and

three, Private Laws of 1897, entitled, 'An act to amend chapter 27, Private Laws of 1873 and 1874,' be and the same is hereby repealed: Provided the owners of the established ferry shall provide ample facilities for the convenience of public travel.

"Sec. 2. This act shall be in force from and after its ratification."

The defendant pleaded this act in bar of any further proceeding in the superior court, and on his motion the petition of the plaintiffs was dismissed. In such dismissal there was error. The act of 1873-74 which provided that "no other bridge, boat or ferry shall be established within three miles of the one allowed by said act," was amended by the act of 1897 by striking out the word "three" and inserting the word "two," thus changing the limit of exclusion to two, instead of three, miles. While the statute was in this condition the plaintiff petitioners filed their petition in due form before the boards of commissioners of Pasquotank and Camden counties for the establishment of a ferry across Pasquotank river between said counties. Before the passage of the act of 1901, the proceedings in Pasquotank county were finally adjudicated by the decision of this court in *Robinson v. Lamb*, supra, and the commissioners of Camden county had made and entered the following order: "This cause coming on to be heard before the board of commissioners of Camden county on the 5th day of May, 1899, upon the petition of the petitioners to settle, lay out, and establish a ferry across Pasquotank river, between the western end of Goat Island, in Camden county, and thence a straight line across Pasquotank river, to a point between the north line of William Pailin's shipyard and the south line of Main street in Elizabeth City, in Pasquotank county, at its nearest point; and it appearing to the board from the examination of the evidence that the said ferry is not within two miles of any other ferry; and it further appearing that the settling, laying out, and establishing of the said ferry prayed for by the petitioners is necessary for the good and convenience of the public; It is therefore ordered, adjudged, and decreed by the board that the said ferry prayed for by the petitioners is not within two miles of any other ferry, and that it is necessary for the good and convenience of the public; and it is further ordered by the board that a ferry be settled, laid out, and established across Pasquotank river, at the points above named, and the same is hereby settled, laid out, and established across said Pasquotank river, between the western end of Goat Island, in Camden county, and thence running a straight course across Pasquotank river, to a point between the north line of William Pailin's shipyard and the south line of Main street in Elizabeth City, in Pasquotank county, at its nearest point; and it is further ordered by the board that the petitioners, Charles H. Robinson, J. B. Flora, W. J. Wood-

ley, Dr. O. McMullan, G. W. Ward, H. T. Greenleaf, J. W. Sharber, D. B. Bradford, and John L. Sawyer, and their assigns, be allowed, and are hereby allowed and vested with, the rights and privileges of building and operating the said ferry; and it is further ordered by the board that the said petitioners aforesaid, Charles H. Robinson and others, shall pay all the expenses and cost in establishing and maintaining the said ferry, and be allowed as a compensation therefor to charge for passing over the said ferry the sum of ten cents and no more for a cart, buggy, carriage, or wagon going either way. This the 5th day of May, 1899. G. C. Barco, Chairman Board of Commissioners of Camden County, N. C. C. B. Garrett, Clerk of the Board of Commissioners of Camden County, North Carolina." This, we think, was in contemplation of law the establishment of the ferry. It has long been settled that, when the county court ordered the laying out of a public road, such order amounted to the establishment of the road, and, unless appealed from, could not thereafter be questioned. *Anders v. Anders*, 49 N. C. 243; *Minor v. Harris*, 61 N. C. 322, 325. We therefore have the ferry in question properly established by lawful authority before the passage of the act of 1901. It is true the proceeding in Camden county was under appeal to the superior court, but such an appeal from a tribunal of exclusive original jurisdiction did not have the effect of vacating the original order, which remained in force, even if suspended in its operation, until reversed or modified by the superior court. To that extent we think it analogous to the judgment of a justice of the peace. *Dunham v. Anders*, 128 N. C. 207, 38 S. E. 832.

However, we do not mean to say that the plaintiff had acquired such a vested right as was free from legislative interference. That question was practically settled in *Robinson v. Lamb*. We concede the power of the legislature to revoke or limit the plaintiff's franchise; but it does not appear to us to have done so, either expressly or by implication. The repealing act of 1901 operated as an amendment to the act of 1873-74, and as such amendment took effect from its passage only. Code, § 3766. Neither the amendment nor the original act contains any provisions which are retrospective in their nature. Speaking as of February 5, 1901, it says in substance that no other ferry shall be established within three miles of Lamb's ferry; but it does not profess to revoke or limit any license already granted. If it had provided that no such ferry should be "operated or maintained," the plaintiff's license might have been revoked by implication; but no such words appear. It may be that the defendant intended to revoke the plaintiff's license when he introduced his bill; but it is the intent of the lawmaking power, and not of the draftsman, that we must seek, and such intent must be found in the statute itself. Upon

the face of the statute we must hold that the legislature did not intend to revoke any existing license.

There is another fatal ground of error in the dismissal of the petition. The act of 1901 extended the limit to three miles upon the express condition that "the owners of the present ferry (Lamb) shall provide ample facilities for the convenience of public travel." In moving to dismiss the plaintiff's petition, the defendant neither showed nor offered to show that he had furnished such facilities, in spite of the fact that he was confronted with a finding of fact to the contrary by the board of commissioners. Considering the nature of the proviso and its relation to the essential purposes of the act, we think that a strict compliance therewith is necessary for the operation of the act. In other words, the act of 1901 does not go into effect until ample facilities are provided for the public travel. Conceding, therefore, to the act of 1901 its fullest possible operation, if it be admitted that it revoked by implication the plaintiff's franchise, it was error in his honor to dismiss the petition before it was found as a fact that the public wants had been fully met. For the reasons herein stated a new trial must be ordered. Error.

(129 N. C. 7)

LUTON v. BADHAM.

(Supreme Court of North Carolina. Sept. 10, 1901.)

WITNESS—TRANSACTIONS WITH DECEDENTS.

Under Code, § 590, disqualifying parties from testifying against the representative of a deceased person concerning any transaction between witness and deceased, defendant, in a suit by an administratrix for the value of improvements put on defendant's lot under a parol promise to convey it to intestate, cannot testify as to such promise over objection.

Appeal from superior court, Chowan county; Allen, Judge.

Action by Margaret Luton, administratrix of the estate of Alexander Badham, against Hannibal Badham. From a judgment for defendant, plaintiff appeals. Reversed.

W. J. Leary, Sr., and Busbee & Busbee, for appellant. Shepherd & Shepherd and Pruden & Pruden, for appellee.

FURCHES, C. J. The only question involved in this appeal is the admission of evidence of the defendant, under section 590 of the Code. The action is by the administratrix of Alexander Badham to recover the value of improvements put upon a lot belonging to the defendant, under a parol promise to convey the same to her intestate. For the purpose of establishing the parol promise, the plaintiff had introduced several witnesses, but had not been a witness herself, nor had she offered the evidence of her intestate. The defendant was then introduced in his own behalf, and "was asked if he, at any time during the life of Alexander Badham [intestate], promised him to convey the land described in the complaint, if he would go on it and improve it. Plaintiff objected. The court sustained the objection, but permitted the witness to be asked concerning any promise made to his deceased son, as testified to under objection of defendant by plaintiff's witnesses. The witness Hannibal Badham [defendant] then testified that he had never made any such statements or promises to his son as was testified to by the plaintiff's witnesses. To the admission of this evidence the plaintiff excepted."

We are of the opinion that there was error in admitting the evidence objected to, and sustain the plaintiff's exception. *Sumner v. Candler*, 92 N. C. 634; *Bunn v. Todd*, 107 N. C. 286, 11 S. E. 1043. The case of *Gilmore v. Gilmore*, 86 N. C. 801, principally relied upon by defendant, does not involve section 590 of the Code, and is not in point. New trial.

(129 N. C. 9)

RUMBO v. GAY MFG. CO.

(Supreme Court of North Carolina. Sept. 10, 1901.)

QUIETING TITLE—DISMISSAL OF ACTION—JUDGMENT.

Under Laws 1893, c. 6, giving a right to maintain an action against any party claiming an interest adverse to the party suing, where defendant claims an interest under contract in timber on plaintiff's land, the court, on adjudging the claim invalid, cannot properly dismiss the action, as plaintiff is entitled to a decree adjudging the contract invalid as a lien on the land.

Appeal from superior court, Chowan county; Allen, Judge.

Action by J. Rumbo against the Gay Manufacturing Company. From a judgment denying defendant certain relief demanded, and dismissing the action, both parties appeal. Reversed.

W. M. Bond and C. S. Vann, for plaintiff. Pruden & Pruden and Shepherd & Shepherd, for defendant.

OLARK, J. The complaint alleges ownership and possession of a tract of land; that defendant claims, without legal right, an interest in the timber standing thereon by virtue of an alleged contract, and asks the judgment of the court that such contract be declared null and void. The defendant answers, admitting the complaint, except the allegations as to the contract, which it asserts is valid, and asks judgment declaring it a valid lien upon the timber interest in said land. The court below adjudged that the defendant was not entitled to the relief it demanded, and then dismissed the action. Both parties appealed.

As the defendant did not prosecute the appeal, that part of the case is determined. Besides, it was justified by *Manufacturing Co. v. Hobbs*, 128 N. C. 46, 38 S. E. 26, which held an exactly similar contract, given th'

same defendant, invalid. It seeks, however, to justify the dismissal of the action on the ground that, its claim having been adjudged invalid, there was no cloud to remove, and no equity could be invoked. If the claim had been valid, the court could not remove it. It is only when there is an invalid claim that a decree removing the cloud can be made. The court below should not have dismissed the action, but should have entered its decree adjudging the defendant's contract invalid as a lien on the timber. The defendant strenuously argued the equitable doctrines formerly applicable, but we need not discuss their application here, for this is not an equitable proceeding. It is an action given by statute. Laws 1893, c. 6. It was because the general assembly thought the equitable doctrines as laid down in *Busbee v. Macey*, 85 N. C. 329, and *Busbee v. Lewis*, Id. 332, and like cases, inconvenient or unjust, that the above act of 1893 was passed. If defendant had, as permitted under section 2 of said act, disclaimed any interest in the property, judgment could not have gone against him for costs. But having asserted his claim and lost, he cannot now plead the invalidity of his own claim as ground to dismiss the action. Error.

(129 N. C. 11)

MAKELY et al. v. A. BOOTHE CO. et al.
(Supreme Court of North Carolina. Sept. 10, 1901.)

TROVER AND CONVERSION—VENUE—REMOVAL OF OYSTERS—INJURY TO LAND.

A defendant in an action for damages for conversion of oysters wrongfully taken from plaintiff's oyster beds cannot have a change of venue to the county in which the beds are situated on the ground that the action was one in reality for injury to the land.

Appeal from superior court, Chowan county; Allen, Judge.

Action by M. Makely and another against the A. Boothe Company and others. An order was entered denying a change of venue, and defendants appeal. Affirmed.

Chas. F. Warren and W. M. Bond, for appellants. Shepherd & Shepherd and Pruden & Pruden, for appellees.

MONTGOMERY, J. The plaintiffs in their complaint alleged that the defendants received from John M. Flowers and others certain quantities of oysters which Flowers and others had wrongfully and unlawfully taken from the plaintiffs' oyster grounds, situated in Hyde county, with full knowledge that the oysters had been wrongfully and unlawfully taken from the plaintiffs' oyster grounds, and that the defendants converted the oysters to their use. The oysters were alleged to be worth \$2,000, and the action was brought against the defendants for the conversion of the same (trover) and for damages. The defendants denied the main allegations of the

complaint, and prayed for a change of venue, under subdivision 1 of section 190 of the Code, insisting that the action was in reality one for trespass upon and injury to land in Hyde county; the oysters being regarded as a part of the real estate. The court refused to remove the action to Hyde county for trial, and the defendants excepted and appealed.

Whatever might be the nature of the property in the oysters while they were in the oyster grounds, they became personal property upon being removed from their beds. The oysters could have been recovered as personal property, or, if not to be found, an action for the conversion of personal property could have been maintained against any one,—the original wrongdoer or any subsequent one. *Lee v. McKay*, 25 N. C. 29. It could not be that the owner of personal property, such as oysters taken from their beds or timber cut from the land, would have to go to the county in which the land was situated, and bring an action in trespass for injury to real estate for redress. There was no error in the ruling of his honor. No error.

(129 N. C. 1)

SHIELDS et al. v. NORFOLK & C. R. CO.
(Supreme Court of North Carolina. Sept. 10, 1901.)

RAILROADS—RIGHT OF WAY—CONDEMNATION PROCEEDINGS—EASEMENT—BUILDINGS ON WAY—FIRES—LIABILITY.

1. Under Code, § 1946, providing that parties to proceedings to condemn land for railroad purposes shall be divested and barred of all right, estate, and interest in such land during the corporate existence of the railroad company, such company acquires only an easement on the land condemned, with the right to actual possession of so much only thereof as is necessary for the operation of the road and to protect it against contingent damages; and hence a house situated on the right of way at the time of condemnation proceedings does not become the absolute property of the company.

2. A railroad company permitting dry grass and broom straw to accumulate and remain on its right of way is liable for the loss of a house and contents situated on the right of way by a fire caused by a spark from such company's engine lighting on and igniting the grass and straw, by which it was communicated to the house.

Appeal from superior court, Halifax county; McNeill, Judge.

Action by M. A. Shields and others, executors of the estate of James G. Shields, deceased, against the Norfolk & Carolina Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

George Cowper, for appellant. W. A. Dunn, for appellees.

FURCHES, C. J. This is an action for damages against defendant for burning a house and a lot of peanuts belonging to plaintiffs. The case comes to us upon the appeal of defendant, upon the following facts agreed, and judgment thereon for the plaintiffs:

"The following facts are admitted: (1) That James G. Shields, the testator of the plaintiffs, at the time of the condemnation of the right of way of the defendant, was the owner of a large farm over which the right of way aforesaid was located, and the plaintiffs now own the same under the provisions of his will. (2) That at the time of the condemnation of the right of way there was located thereon a common tenant house which was then used by the testator as such, and which has since been used and occupied by the plaintiffs for the purposes of their farm until the time of the fire hereinafter mentioned. (3) That a short time before said fire the plaintiffs had said house repaired at a cost of \$25, which was without the knowledge or consent of the defendant, and had stored therein picked peanuts of the value of (\$80) eighty dollars. (4) That said house was wholly on the right of way. (5) That the right of way was acquired by the defendant by regular condemnation proceedings. (6) That in the month of December, 1898, a fire originated on the right of way at a point 200 yards from said house, from sparks from one of its engines, and the said house and peanuts were entirely consumed. (7) That the defendant's engine was equipped with an approved and modern spark arrester, which was in actual use at the time of the fire, and the engine was carefully and skillfully managed by a competent engineer. (8) That the defendant permitted dry grass and broom straw to accumulate on its right of way, which was ignited by sparks from its engine, by which the fire was communicated to said house. (9) That the use and occupation of said house was without the knowledge or consent of the defendant, but the defendant has never notified the plaintiffs to vacate said house, or to discontinue its use. (10) That the value of the house at the time of the fire was \$40. (11) That the value of the peanuts in the house at the time of the fire in December, 1898, was \$80. (12) That at the time of the fire there was dry grass and broom straw on defendant's right of way between its roadbed and the house, and plaintiffs did not remove any dry grass or broom straw from the right of way, though they could have done so." And it seems to us that upon the facts agreed the judgment of the court below must be affirmed. The defendant contends that, it being agreed that the house was on defendant's right of way, it was defendant's house, and it should not be made to pay for burning its own house, and, as the house belonged to defendant, plaintiffs had no right to use it, and if they put peanuts in the house of defendant, and they burned, the defendant is not liable for their loss. For this position the defendant cites section 1946 of the Code, which provides that all persons, parties to proceedings to condemn land for railroad purposes, "shall be divested and barred of all right, estate, and interest in such real estate during the

corporate existence of the company aforesaid." This act seems to have been passed in 1871, and it must be admitted that it uses very strong language. But it cannot be supposed that it has been entirely overlooked by the profession and the courts for 30 years; and this court has so often, since its enactment, held that a railroad only acquired an easement upon the land under condemnation proceedings, that we must take it to have put that construction upon the act of 1871. *Railroad Co. v. Sturgeon*, 120 N. C. 225, 26 S. E. 779; *Beach v. Railroad Co.*, 120 N. C. 498, 26 S. E. 703; *Lassiter v. Railroad Co.*, 126 N. C. 509, 36 S. E. 48; *Geer v. Water Co.*, 127 N. C. 349, 37 S. E. 474; *Blue v. Railroad Co.*, 117 N. C. 644, 23 S. E. 275. In the case of *Blue v. Railroad Co.* this language is used by the court: "The right of railway companies is, by judgment of condemnation, made subject to occupation where, and only where, the corporation finds it necessary to take actual possession in furtherance of the ends for which the company was created. The damages are not assessed upon the idea of a proposed actual dominion, occupation, and perception of the profits of the whole right of way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches, and houses to be used for station houses and section hands. Unless the land is needed for some such use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. *Ward v. Railroad Co.*, 113 N. C. 566, 18 S. E. 211, and *Id.*, 109 N. C. 358, 13 S. E. 926. The defendant company was liable if grass and other inflammable material, negligently left upon its right of way, was ignited by sparks from its engine, for any damage to adjacent landowners, caused by the spreading of the fire. 8 Am. & Eng. Enc. Law, 14; *Black v. Railroad Co.*, 115 N. C. 667, 20 S. E. 713, 909." This quotation from *Blue's Case* was approved by the court and quoted in the opinion in *Railroad Co. v. Sturgeon*, 120 N. C. 225, 26 S. E. 779. It therefore seems to be the settled law in this state, so far as judicial construction can settle a question, that a railroad company, by condemnation proceedings, only acquires an easement upon the land condemned, with the right to actual possession of so much only thereof as is necessary for the operation of its road and to protect it against contingent damages. It also seems to be settled by these and numerous other decisions of this court that it is negligence in a railroad company to allow dry grass and broom straw to accumulate and remain on

its right of way, and that such companies are liable to the damage resulting from fires caused by sparks from their engines, setting such dry grass and broom straw on fire. The facts agreed admit that dry grass and broom straw were allowed to accumulate and remain on defendant's right of way in December; that the fire which destroyed the house and peanuts was caused by a spark from defendant's engine lighting upon and igniting said dry grass and broom straw at a point 200 yards from the house. This made the defendant liable for the house, and, we think, for the peanuts. If the plaintiffs had the right to use and occupy the house,—as it seems they had,—and their property rightfully in the house was destroyed by the negligence of the defendant, we see no reason why defendant is not also liable for the peanuts. We are not able to distinguish the liability for the one from the other. If the plaintiffs had placed combustible matter on defendant's right of way, and the fire had originated in that, and destroyed the plaintiffs' house and peanuts, it would seem that in that case they could not recover; and defendant cited authorities tending to show that they could not. But this question is not presented by the facts agreed, and we do not pass upon it.

The defendant's principal contention is that the condemnation proceedings put the absolute title to the land condemned in the defendant, and, it being admitted that the house was on the right of way,—that is, on the land condemned to defendant's use,—that the house was defendant's property, the same as if defendant had bought the land on which it stood, paid for it, and had obtained a deed in fee simple therefor. All the authorities the defendant cites to sustain this position are decisions of other states, or text-books, except *Railroad Co. v. McCaskill*, 94 N. C. 746. But it does not seem to us that any of the cases sustain defendant's contention. Probably *McCaskill's Case* comes nearer doing so than any authority cited, and we do not think it goes to that extent. But, if it ever could have been considered authority for the position contended for by defendant,

it has not been so considered since the case of *Blue v. Railroad Co.*, supra, as that case expressly holds to the contrary, and overrules *McCaskill's Case*, if it announced any such doctrine as that. And *Blue's Case* has been expressly approved and followed by this court since its first announcement. *Railroad Co. v. Sturgeon*, 120 N. C. 226, 28 S. E. 779. The doctrine that the railroad has acquired and paid for the land and the buildings on the same by condemnation proceedings is fully discussed in *Blue's Case* and *Sturgeon's Case*, where it is expressly held that this is not so; that these assessments were never intended to, and in fact did not, include the freehold value of the property condemned; that it was never expected that the roads would claim the actual possession and enjoyment of any more of said lands than were necessary for their operation and for their protection. If this is true,—as we have every reason to believe it is,—it would be monstrous to allow them, under such titles, to assume and take actual possession, and occupy all the houses within 100 feet of their roadbed, and turn the occupants out. If this were so, what would become of Salisbury, through which the North Carolina Railroad runs, where many of its valuable houses stand within less than 50 feet of its roadbed, and were there many years before the road was located? Were they paid for? And are they to be occupied by the railroad and its lessees and tenants, and the owners turned out of possession? If this were so, what would become of Hickory? what of Marshall, where there is hardly a house in the town but would belong to the railroad, including the court house and public jail? Have these been assessed and paid for by the railroad? The question seems to have been settled by the decisions of this court that the railroad only acquired an easement to be used for the benefit and protection of the road in its being operated, and not as a means of acquiring property for the benefit of the corporation; and, as it seems to us that it has been settled in accordance with justice, we have no disposition to disturb what has been done. The judgment will be affirmed.

(99 Va. 363)

DAVIS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

CRIMINAL LAW—ATTEMPT TO POISON WELL—EVIDENCE—SUFFICIENCY.

The wife of defendant, in a prosecution for poisoning a well, while testifying for the commonwealth, produced a letter written to her by defendant, to the effect that she was wrong as to her hearing him go to the pump from a certain store, and that if she heard any one it was B., a colored man with whom he had been playing cards, which letter was admitted in evidence. The prosecution then introduced colored men by the name of B. to show that they were not at the store, and that there were no others by that name in the neighborhood. The other evidence was insufficient to warrant a conviction. *Held*, that the conflict in the defendant's statement in the letter and those of the witnesses was but a circumstance to be considered by the jury, supplied no fact needed to connect the prisoner with the offense, and added nothing to the incriminating force of the other evidence; and, the presumption of defendant's innocence not being overcome, he was entitled to an acquittal.

Error from Fauquier county court.

H. A. Davis was convicted for poisoning a well, and he brings error. Reversed.

Moore & Keith, for plaintiff in error. A. J. Montague, Atty. Gen., for the Commonwealth.

CARDWELL, J. H. A. Davis was indicted in the county court of Fauquier county for poisoning a well, and was convicted, and sentenced to four years' imprisonment in the penitentiary. The judge of the circuit court awarded him a new trial, and at that trial he was again convicted, and sentenced to a like imprisonment. This court at its March term, 1901, set aside that judgment and verdict, and awarded him a new trial. 99 Va. —, 38 S. E. 191. A third trial has been had, and the same verdict and judgment have been rendered against the prisoner, and this court has awarded him a writ of error; the writ having been denied by the judge of the circuit court.

The facts spread upon the record are practically the same as those which appeared in the former record in this court, and they are fully stated in the opinion of the court, *supra*.

The testimony relied on by the commonwealth at the last trial differs from that at the preceding trial only in the following particulars: Mrs. Davis, the wife of the prisoner, while testifying for the commonwealth, produced a letter written to her by the prisoner, and dated October 8, 1900. In this letter he says: "I know you do not think I ever tried to poison you, and you are certainly wrong about hearing me come to Stewart's pump on the night of December 10th. If you heard anybody leave the store, it was Baker, a colored man whom I was playing cards with that night. I never thought you could have heard him when he left, though

he wore large, heavy boots, and usually slams the door when he goes out."

The letter having been admitted in evidence, the commonwealth introduced, over the objection of the prisoner, Nelson and Henry Baker to prove that only three colored men by the name of Baker were living at Meetze station, the locality of the prisoner's store, and that neither of the witnesses was playing cards with him on the night in question. Nelson Baker says that he did not remember playing cards with the accused Sunday or Monday night for over three years; that he and his two brothers, Henry and James, were the only colored men by the name of Baker he knew of living in the vicinity of Meetze, but there might be others. Henry Baker says that he was not at Meetze station on the night of December 10th, was in Washington or Maryland, and did not get home until the 22d, and it was agreed by counsel that if James Baker had been present at the trial he, too, would have stated that he was not playing cards with the prisoner on the night of the 10th of December, nor was he there.

Conceding that the commonwealth had the right to introduce Nelson, Henry, and James Baker to contradict the statement made by the prisoner in the letter of October 8, 1900, it had itself introduced in evidence, as to which, in the view that we take of this case, it is unnecessary for us to express an opinion, the conflict between the statement of the Bakers and that made by the prisoner in the letter was but a circumstance to be considered by the jury, and supplied no fact needed to connect the prisoner with the offense of which he was charged, and added nothing to the incriminating force of the evidence, which we have already said was wholly insufficient to warrant his conviction.

It was for the commonwealth to prove—first, the *corpus delicti*; second, that the accused committed the offense; and to warrant a conviction the evidence should be such as, if true, would exclude all rational doubt of the guilt of the accused. He is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the commonwealth to point out any other criminal agent, nor is he called upon to vindicate his own innocence by naming the guilty man. He rests secure in that presumption of innocence until the proof is adduced which establishes his guilt beyond a reasonable doubt, and whether the proof be direct or circumstantial, it must be such as excludes any rational hypothesis of the innocence of the accused. The guilt of a party is not to be inferred because the facts proved are consistent with his guilt, but they must be inconsistent with his innocence. *Johnson's Case*, 29 Grat. 796; *McBride v. Com.*, 95 Va. 826, 30 S. E. 454; *Brown v. Com.*, 97 Va. 791, 34 S. E. 882, and authorities cited.

We are aware of the weight which ought

to be given to three concurring verdicts approved by the learned judge who presided at the trial, but, in the light of the well-recognized principles stated above, we can reach no other conclusion than that the evidence does no more than create a suspicion of the prisoner's guilt. It may be said that the facts shown are consistent with his guilt, but they are also consistent with his innocence, and therefore do not amount to that degree of proof which connects him with the offense and warrants his conviction.

The judgment must be reversed, the verdict set aside, and the cause remanded to the county court of Fauquier county, for a new trial, if the court and prosecuting attorneys consider that a better case against the prisoner can be made out.

(99 Va. 613)

THOMAS v. SNEAD.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

MUNICIPAL CORPORATIONS—AUTHORITY TO EXEMPT FROM LICENSE TAX—LICENSE TAXES—STATUTES.

1. Acts 1895-96, p. 213, § 3, authorizes the city of L. to tax real and personal property in the city, corporations, and all stocks in incorporated joint-stock companies doing business therein, and section 5 provides that manufacturers may be taxed whether taxed by the state or not, and that the council might lay a direct tax, or require a license tax under such regulations as it might prescribe. *Held*, that the council could not exempt the capital of certain joint-stock companies and of one partnership from taxation, the power to exempt not being capable of implication.

2. Const. art. 10, § 1, provides that all taxation shall be equal and uniform, and all property be taxed in proportion to its value, and section 4 authorizes the general assembly to levy a tax on licenses to persons engaged in certain designated employment and on all other business which cannot be reached by the ad valorem system. Acts 1889-90, pp. 201, 214, impose a property tax on capital stock of corporations and capital of individuals engaged in manufacturing. *Held*, that Acts 1895-96, p. 213, empowering the city of L. to lay a direct tax or license tax on the business of manufacturing, was void, and ordinances passed in pursuance of this power, imposing a license tax on manufacturers, were inoperative, the same being taxed under the ad valorem system.

Error from circuit court of city of Lynchburg.

Action between one Thomas and one Snead. From the judgment, Thomas brings error. Reversed.

John G. Haythe and Harrison & Long, for plaintiff in error. S. C. Manson, Jr., and Blackford, Horsley & Blackford, for defendant in error.

BUCHANAN, J. The principal question involved in this case is the validity of certain ordinances of the city council of the city of Lynchburg exempting, or attempting to exempt, from taxation the capital stock of eight joint-stock companies and the capital of one partnership, all manufacturing firms doing business in the city.

The exempting ordinances are substantially the same, and the following is a copy of the ordinance exempting the Lynchburg Plow Works, one of the eight joint-stock companies:

"Be it ordained by the council of the city of Lynchburg, that the Lynchburg Plow Works be, and the same is hereby, exempted from taxation on capital invested in business for a period of ten years from December 3, 1897. Nothing herein contained, however, shall be construed as exempting said Lynchburg Plow Works from a taxation on realty as usually levied by law."

By section 3 of chapter 8 of the charter of the city (Acts 1895-96, p. 213), the city council was authorized to tax (among other things, and with certain limitations, not material to this case) all real and personal property in the city, all corporations doing business or having their principal office in the city, all capital of persons having a place of business or doing business in the city, and all stocks in incorporated joint-stock companies doing business therein: provided, that no capital should be taxed when a license or other tax was imposed upon the business in which said capital was employed.

By section 5 of the same chapter, the city council was authorized to impose a tax upon persons engaged in a number of designated business enterprises,—among others, upon manufacturers; and also upon any other person or employment which it might deem proper, whether such person or employment was therein specially enumerated or not, and whether any tax was imposed thereon by the state or not. That section further provides that "as to all such persons or employments the council might lay a direct tax or might require a license tax therefor under such regulations as it might prescribe and levy a tax thereon," subject to the provisions of the third section of that chapter.

Acting under those provisions of its charter, the city council, by sections 60, 61, and 63 of its license ordinance, imposed a graduated license tax upon persons engaged in certain designated employments, and by section 62 of the same ordinance imposed upon every person engaged in manufacturing any article not otherwise specified a license tax of \$1.50 upon every \$100 of capital engaged in such business.

Under those provisions the capital stock of the joint-stock companies and the capital of the partnership in question were clearly liable to a license tax, if the city council had the right to impose such a tax upon manufacturers; and they should have been assessed therewith, unless the city council had the power to pass the several ordinances relieving them from such tax.

Although there are some expressions of opinion in our cases upon the subject, it is still an open question whether, under the provisions of article 10 of the constitution,

the legislature has the power to exempt property from taxation beyond the subjects named in section 3 of that article. *Whiting v. Town of West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750. But, if it were conceded that the legislature has such power, it has not conferred it upon the city of Lynchburg. There is nothing said in its charter about making exemptions. In the absence of such authority, has its council the power to pass the ordinances in question?

The power to exempt from taxation, like the power to tax, is an incident of sovereignty, and cannot be exercised by a municipal corporation unless such power has been granted by the state.

This was so held in the case of *Whiting v. Town of West Point*, supra, where this question arose, and its determination was necessary to a decision of the case. Judge Lewis, who delivered the opinion of the court in that case, reviews at length its former decisions relied on as persuasive or conclusive authority upon the question involved, and clearly shows that the question was then an open one in this state, and reaches the conclusion, upon reason and authority, that a municipal corporation has no inherent power to exempt from taxation any property which, by its charter, it is authorized to tax.

It is true, as argued, that two of the judges dissented from the opinion of the court in that case. Upon what precise ground they based their dissent the report of the case does not show, as no dissenting opinion was filed. But, whatever may have been the ground of their dissent, we are of opinion that the conclusion reached by the majority of the court was right upon principle, is in full accord with the prior and subsequent decisions of this court as to the limited powers of municipal corporations, and is sustained by the great weight of authority outside of the state.

Judge Cooley, in his work on *Taxation* (2d Ed., p. 201), says, in discussing this question, that: "Pertaining, as it does, to the sovereign power to tax, the inferior municipalities of the state are not possessed of it, and they cannot, therefore, make exemptions except as expressly authorized by the state."

"And it would obviously not be within the competency of the legislature," he continues, "to confer a general power to make exemptions, since this would be nothing short of a general power to establish inequality. Exemptions, when properly made, must be determined in the legislative discretion; but even this is not untrammelled. It is not an arbitrary discretion, and there must underlie its exercise some principle of public policy which can support a presumption that the public interest will be subserved by the exemptions which are allowed."

Again, on page 215, he says: "It would be difficult to conceive of a justifiable exemp-

tion law which should single out individuals or corporations or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality. It would lack the semblance of legitimate tax legislation. It is certain that municipal bodies or taxing officers have no authority to make such exemptions, unless expressly empowered by legislation. * * * The motives of the exemption, or the beneficial purposes expected to be accomplished by it, can make no difference."

Desty, in his work on *Taxation* (volume 1, p. 466), says: "The imposition of and exemption from taxation must be by one and the same state authority,—that of legislation; hence towns and cities, etc., cannot exempt property from taxation, or discriminate in favor of any property, as the power to exempt property from taxation is not included in the power to tax. It must be specially conferred."

In 12 Am. & Eng. Enc. Law (2d Ed.) p. 283, which is the most recent discussion of the question that we have seen, and where numerous cases are cited, the rule upon the subject is as follows, viz.: "That a municipal corporation possesses no inherent power to create exemptions from taxation, nor can such a power be implied from a delegation of the power to tax, but it exists only where the legislature has expressly granted it, and can be exercised only within the limits of such grant."

In addition to the cases cited in the opinion of the court in *Whiting v. Town of West Point* on this subject, see *City of New Orleans v. St. Charles R. Co.*, 28 La. Ann. 497; *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 South. 416, 63 Am. St. Rep. 202; *City of Louisville v. Board of Trade*, 90 Ky. 409, 14 S. W. 408, 9 L. R. A. 629; *Cartersville Waterworks v. City of Cartersville*, 89 Ga. 689, 16 S. E. 70; *Hayzlett v. City of Mt. Vernon*, 33 Iowa, 229; *Mack v. Jones*, 21 N. H. 393; *City of New Orleans v. New Orleans Sugar Shed Co.*, 35 La. Ann. 548; and note to 15 L. R. A. 860.

We are of opinion, therefore, that the city council had no authority to exempt the capital stock of the joint-stock companies and the capital of the partnership in question from taxation, and that the commissioner of the revenue, the defendant in error, ought to have assessed them with a license tax, if the ordinance imposing a license tax upon manufacturers is valid, and, if not, he ought to have assessed them with a property tax, under sections 4 and 5 of the ordinance of February 23, 1900, imposing a property or ad valorem tax upon all the capital of all incorporated joint-stock companies and the capital invested, used, or employed in any business upon which no license or other tax was imposed.

The validity of the license tax upon manu-

facturers or the business of manufacturing is denied by the plaintiff in error upon the ground, among others, that the capital stock of corporations and the capital of individuals engaged in manufacturing are taxed by the state upon the ad valorem system, and that, where such tax can be levied, a license tax cannot be imposed.

By section 1 of article 10 of the constitution it is provided that taxation, except as thereafter provided, whether imposed by the state, county, or corporate bodies, "shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value." By section 4 of the same article the general assembly is authorized to levy a tax upon incomes, upon licenses to persons engaged in certain designated employment, and upon all other business which cannot be reached by the ad valorem system.

Under these provisions of the constitution the general assembly has no power to levy a license tax upon any employment or business other than those named in the fourth section, except in cases where such business cannot be reached by the ad valorem system. Whether a business can or cannot be reached by the ad valorem system is a question primarily for the legislature; and its determination of the question cannot be held to be erroneous, unless it is manifestly so. *Morgan v. Com.*, 98 Va. 812, 815, 35 S. E. 448; *Com. v. Moore & Goodsons*, 25 Grat. 957.

The general assembly, for state purposes, does not impose a license tax upon the business of manufacturers, but imposes a property tax upon the capital stock of joint-stock companies and the capital of individuals engaged in such business. Acts 1889-90, pp. 201, 214, etc.

As long as the general assembly continues that method of taxation for state purposes, it is a conclusive determination that such business can be reached by the ad valorem system, and, if it can be, and is so reached by that system for state purposes, it must be so reached when taxed by municipal corporations, for the legislature has no power under the constitution to impose a license tax, or to authorize a municipal corporation to do so, upon any business other than those specifically mentioned in section 4 of article 10 of the constitution, except where it cannot be reached by the ad valorem system.

The legislature having no power to authorize the council of the city of Lynchburg to levy a license tax upon the business of manufacturing, the ordinances imposing such a tax must be held invalid and void.

The capital stock of the joint-stock companies and the capital of the partnership in question not being assessed with a license tax, nor liable to such assessment, they were liable to, and ought to have been assessed with, a property or ad valorem tax, as provided by sections 4, 5, and 6 of the ordinance of the city council imposing a tax upon property which, as we have seen, was clearly

broad enough to embrace them, and to require their assessment for taxation.

The judgment complained of must, therefore, be reversed, and set aside, and this court will enter such order as the circuit court ought to have entered.

Reversed.

WHITTLE, J., absent, decided case in lower court.

(99 Va. 620)

DAVIS et al. v. ANDERSON.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

CONTRACTS — CONSIDERATION — CREDITORS — MORAL OBLIGATION — PAST CONSIDERATION — CONVEYANCES — TITLE — LIEN — ENFORCEMENT — IMPEACHMENT.

1. A contract founded on a good, but not on a valuable, consideration is voluntary, and void as to creditors.

2. A moral obligation must be one which has been once a valuable consideration, but has ceased to be binding from some supervenient cause, in order to be sufficient to sustain a conveyance.

3. A past consideration, which imposed no obligation at the time it was furnished, is insufficient to support any promise.

4. Under Code, § 2459, providing that every conveyance which is not on a consideration deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made, where a brother indebted to insolvency, after suit brought, devests himself of all his property by a deed to his sister, based on past services alleged to have been rendered by her for their mother, which services were not shown to have been rendered at the brother's request, express or implied, such sister takes no title.

5. A grantee in a deed, whose rights are subordinate to those of the grantor's creditors, cannot impeach the proceedings of a court of chancery to enforce a lien on the property conveyed in an independent suit, however irregular such proceedings may have been.

Appeal from circuit court, Rockbridge county.

Action by Fannie L. Anderson against Samuel A. Davis and another for the partition of certain land. From a judgment in favor of plaintiff, defendants appeal. Reversed.

J., J. L. & R. Bumgardner, for appellants. C. S. W. Barnes, for appellee.

WHITTLE, J. In June, 1890, Lucy F. Weeks brought an action of assumpsit in the circuit court of Rockbridge county against James T. Freeman, a nonresident, and caused to be issued an ancillary attachment, which was levied July 2, 1890, upon an undivided moiety of 116 acres of land, the property of the defendant.

On July 23, 1890, Freeman executed a deed by which he conveyed his interest in the land to his sister, Fannie L. Anderson, "in consideration of the care and attention of my mother, Lucy Freeman, who has been blind for the last ten years, to me fully paid by Fannie L. Anderson, * * * the receipt of which is hereby acknowledged." This deed

was acknowledged in substantial compliance with the requirement of the statute, and admitted to record.

The defendant Freeman appeared, and pleaded to the action, and, upon the issue joined, a verdict and judgment were rendered against him at the November term, 1890.

No further proceedings were had upon the attachment, and no memorandum was left with the clerk to be recorded and indexed, as required by section 3566 of the Code.

In a suit in chancery, brought afterwards to enforce her lien, the property was sold, and purchased by the plaintiff, Lucy F. Weeks, and she, having become the owner of the other moiety, sold and conveyed the entire tract of 116 acres to appellants Samuel A. Davis and William J. Hite. Thereupon Fannie L. Anderson filed a bill in equity against the appellants Davis, Hite, and Lucy F. Weeks, in which she alleged that before Lucy F. Weeks had acquired any lien upon the undivided moiety of her brother, James T. Freeman, complainant had become the bona fide purchaser thereof for valuable consideration, and without notice, and vouched the deed of July 28, 1890, to sustain the allegation. She insisted that she was not a party to the suit in which her property was sold, and not bound by any of the proceedings therein. A paper purporting to be the answer of Davis and Hite, denying generally the allegations of the bill, was copied into the record, but seems never to have been formally filed, and was not noticed in any of the decrees in the cause.

The bill prayed for partition of the land, and that appellants be required to account to the plaintiff for the rents and profits of her moiety thereof during the time they were respectively in the possession and enjoyment of the same.

The commissioner to whom the case was referred reported that the land was not susceptible of convenient partition in kind, and ascertained the amounts for which the defendants were respectively liable to the plaintiff for its use and occupation.

Exceptions were taken by the defendant to the report, which the court overruled, and the report was confirmed. The plaintiff was declared entitled to an undivided moiety of the land, which was decreed to be sold for partition, and the amounts ascertained to be due by the defendants to the plaintiff for rents and profits were decreed against them respectively.

From that decree this appeal was allowed.

A number of questions have been raised and discussed by counsel, chiefly affecting the regularity of the proceedings on the attachment and in the suit in chancery in which the property in controversy was sold; but the view which this court takes of the matter renders it unnecessary to notice them in detail.

The real question involved is whether the consideration in the deed from Freeman to his sister was a valuable consideration or

merely a meritorious consideration. If the former, she was clearly entitled to the relief accorded by the decree of the trial court, but, if the latter, it is equally clear that she was not so entitled, as against the creditor of her grantor. Section 2459 of the Code provides that "every gift, conveyance, assignment, transfer, or charge, which is not upon a consideration deemed valuable in law, * * * shall be void as to creditors whose debts shall have been contracted at the time it was made."

A deed founded upon a good, but not upon a valuable, consideration is considered merely voluntary, and, while binding between the parties, is void as to creditors. *Ohit. Cont. 28*. For a moral obligation to be sufficient to sustain a promise or conveyance, it must be one which has once been a valuable consideration, but which on account of some rule of law was not binding upon or enforceable against the party, e. g. from infancy or *Mike* cause, or which had ceased to be binding from some supervenient cause, as the act of limitations, the intervention of bankruptcy, and the like. But a past consideration, other than of the class referred to, which imposed no legal obligation at the time it arose, will support no promise whatever. *Eastwood v. Kenyon*, 11 *Adol. & E.* 446; *Earle v. Oliver*, 2 *Exch. 71*; *Clark, Cont. 201*.

There is not a suggestion that the alleged past services of the grantee for her afflicted mother, the sole consideration for the deed in question, were rendered in pursuance of a contract between the grantor and herself. Such an allegation, if proved, would have presented quite a different question. But the case under consideration is one in which a brother indebted to insolvency, after suit brought, divests himself of all the property which he owns within the jurisdiction of the court by a deed to his sister, based upon past services alleged to have been rendered by her for their mother. The services were neither alleged nor proven to have been performed at the request of the brother, express or implied. Such a consideration is in no sense a valuable consideration, and the grantee in the deed occupied the position of a volunteer, and not of a bona fide purchaser for value. There was no legal obligation resting on either the son or the daughter to care for and support their mother, and the high moral obligation to discharge that duty was as incumbent upon the one as the other.

A past consideration which did not place the grantor under a legal obligation at the time the services are alleged to have been rendered cannot be regarded a sufficient consideration to sustain a deed from an embarrassed debtor to his sister, executed after legal proceedings had been commenced by a creditor to subject the property to the payment of his debt.

While bona fide purchasers for value are a highly favored class, and courts of equity are always solicitous to uphold their rights, it would be indeed a dangerous precedent to

enlarge the doctrine so as to embrace in that category allenees of debtors whose memories have been refreshed and consciences quickened into action and a recognition of past moral considerations moving from near relations only after suit brought to subject their property.

This court, in the recent case of *Stoneburner v. Motley*, 95 Va. 788, 30 S. E. 364, quotes with approbation the language of *Wightman, J.*, in *Beaumont v. Reeve*, 8 Q. B. 488, that "a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise," and adds: "It is clear that, independent of the express promise on the part of the son, made after the services were rendered, there could, in this case, have been no recovery upon the original cause of action, for it rested upon no consideration from which the law would have implied a promise to pay, and therefore the subsequent promise is insufficient."

Occupying the position of a volunteer, had *Fannie L. Anderson* been made a defendant to the chancery cause in which the land was sold, her deed would have interposed no valid defense. Her rights, therefore, under said conveyance, being subordinate to those of the creditor of her grantor, she cannot be permitted to impeach those proceedings in the independent suit which she has brought for that purpose, however irregular they may have been.

For the foregoing reasons the decree complained of must be reversed and annulled, and an order will be made here dismissing appellee's bill, with costs.

Reversed.

(99 Va. 658)

HOUCK'S ADMR et al. v. KERFOOT'S ADMR et al.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

RES JUDICATA—INTERLOCUTORY DECREE—ADJUDICATION—CONCLUSIVENESS.

Where, in a suit for an accounting between the joint owners of real estate, various interlocutory decrees spoke of the owners as "partners," and the account as the "partnership account," the words being used indifferently, such decrees were not *res judicata* of the existence of a partnership in a subsequent suit.

Appeal from circuit court, Rockingham county.

Action by Andrew Houck's administrator, widow, and heirs against J. C. Woodson and others. From a decree declaring certain moneys subject to the liens of Dunham & Kerfoot, plaintiffs appeal. Affirmed.

John E. Roller, for appellants. Yancey & Haas, for appellees.

HARRISON, J. This cause was before us in 1895, the controversy then being as to the validity of the two judgments in favor of the firm of Dunham & Kerfoot, obtained in 1858, against Andrew Houck. These judgments were resisted upon the grounds (1) that they

were barred by the statute of limitations, and (2) because of the alleged laches of the creditor in prosecuting his claims.

These contentions were decided adversely to the appellants, and the decree of the lower court declaring both judgments to be valid and subsisting liens against the real estate of Andrew Houck, deceased, was affirmed. *Houck v. Dunham*, 92 Va. 211, 23 S. E. 238.

By decree of November 1, 1897, a fund of \$568, with interest from November 6, 1890, ascertained to be in the hands of John E. Roller, special receiver, was declared to be a real fund, arising from the rentals of the real estate of Andrew Houck, deceased, subject to the liens of the Dunham & Kerfoot judgments; and the special receiver was ordered to pay the same to the administrator of the surviving partner of that firm, after first deducting a fee of \$150 allowed counsel and the unpaid costs of the suits.

From this decree the cause is again before this court, the contention now being that the fund in question is not a real fund, that the real estate from which it arose was partnership property of Andrew Houck and Alfred Sprinkle, and the rentals thereof personalty, which should pass into the hands of the administrator of Andrew Houck, to be distributed in equal proportions to all of his creditors.

It appears that by deed dated April 8, 1855, George Miller and wife conveyed to Andrew Houck and Alfred Sprinkle two houses and lots in the town of Harrisonburg. The language of this deed is apt, and such as is usually employed to create in the grantees of a deed a joint ownership in the property conveyed. There is not a word used by the draftsman which suggests that the parties occupied or intended to assume the relation of partners; nor does it appear that a partnership of any kind existed between them either before or after the date of the deed in question.

There is no direct or affirmative proof tending to show an intention on the part of the grantors to hold these two houses and lots as partnership property, or to use the same for any partnership purpose.

It appears that in 1856 Andrew Houck conveyed all of his estate, including his interest in these houses and lots, to a trustee, for the benefit of his creditors. It further appears that Andrew Houck died about 40 years ago, that shortly thereafter Alfred Sprinkle died, and that their respective estates have since been continuously the subject of litigation. It appears that there are pending not less than five chancery suits for various purposes in connection with the settlement of these estates, and involving many questions of controversy. One or more of these causes involved a settlement of the accounts between Andrew Houck and Alfred Sprinkle, growing out of their joint ownership of the two houses and lots in question.

In the absence of other evidence to support the contention that this real estate was part-

nership property of a firm composed of Andrew Houck and Alfred Sprinkle, appellants rely upon certain recitals in the decrees and other proceedings had in the several chancery causes mentioned, and chiefly upon the proposition that the question is res adjudicata under the decrees of April 19, 1884, November 5, 1887, and October 28, 1889.

There was a settlement to be had between the estates of Andrew Houck and Alfred Sprinkle involving the purchase money paid by them, respectively, upon their joint purchase of the houses and lots, and the rents arising from the same. The several commissioners, in dealing with these matters, would speak of the firm of Houck & Sprinkle and the partnership accounts of Houck & Sprinkle, and the decrees, following the language of the commissioners, would use the same description; but it is apparent that this was done without reference to the technical meaning attached to the terms employed. The decrees and other proceedings frequently speak of Houck & Sprinkle as joint owners of the houses and lots, the terms "partners" and "joint owners" being sometimes indifferently used in the same decree.

The decrees relied on were interlocutory, and do not constitute an adjudication of the question that a partnership existed between Houck & Sprinkle with respect to their ownership of these houses and lots. The adjudication of a question is the deliberate action of the court upon that question. It is clear that no such question was ever considered by the court until the decree appealed from was entered.

The fund in controversy arose some years after the death of Andrew Houck, it being conceded that it represents his share of the rentals of the two houses for the two years beginning April 1, 1865, and ending April 1, 1867. The administrator of Andrew Houck could, therefore, have no interest in the fund. If any one could claim the fund as against the judgment lien creditor of Andrew Houck, it would be his widow and heirs, and, although they are parties to these proceedings, they are not here complaining.

There is no error in the decree appealed from to the prejudice of appellants, and it must be affirmed.

Affirmed.

(99 Va. 633)

VIRGINIA-CAROLINA RY. CO. v. BOOKER.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

EMINENT DOMAIN—RAILROADS—CONDEMNATION PROCEEDINGS—PERSONS ENTITLED TO COMPENSATION.

1. Where, pending the hearing of exceptions to the commissioners' allowance of compensation in condemnation proceedings by a railroad, the land was conveyed, the owners of the land at the time the commissioners' report was confirmed were entitled to compensation, and not

the owner at the time proceedings were commenced.

2. Where, pending the hearing of exceptions to the commissioners' allowance of compensation in condemnation proceedings by a railroad, the land was conveyed and partitioned, and after the partition the railroad company purchased the right of way across part of the land, on the company paying the sum allowed by the commissioners into court, and entering on the property on the confirmation of the report, it was error to allow the owners of the tracts over which the right of way was not purchased compensation from the fund in court in excess of the value and damage of their property.

Error from circuit court, Washington county.

Condemnation proceedings by the Virginia-Carolina Railway Company against W. O. Booker. From a judgment fixing the compensation to defendant, plaintiff brings error. Reversed.

White & Penn, for plaintiff in error. Daniel Trigg, for defendant in error.

CARDWELL, J. In the year 1888 the Abingdon Coal & Iron Railroad Company commenced proceedings in the county court of Washington county to condemn a right of way through certain lands of W. O. Booker. July 20, 1888, the commissioners appointed to ascertain what would be a just compensation for the land proposed to be taken and the damages to the residue of the tract reported that 5.99 acres of "cleared land" would be taken for the roadbed and right of way, which they valued at \$50 per acre, aggregating \$299.50, and that the damages to the residue of the "cleared land" would be \$750; that 13.68 acres of the "knob land" would be taken, of the value of \$2.50 per acre, aggregating \$34.20; and that the damage to the residue of the "knob land" would be \$250,—making the total damages assessed \$1,333.70. Exceptions were indorsed on the report by counsel for W. O. Booker on the ground that the damages assessed were inadequate, but no action was taken upon the exceptions or the report for nearly 12 years. In the summer of 1890, W. O. Booker contracted to sell his farm, through which the railroad's right of way was sought to be condemned, and on January 15, 1891, conveyed the same to the purchaser, the Litchfield Land Company. February 15, 1891, the Abingdon Coal & Iron Railroad Company entered upon the land, and began grading its roadbed, no objection being made by any one; but soon thereafter all work on the line of the road was discontinued, and the enterprise apparently abandoned. All of the property of the Abingdon Coal & Iron Railroad Company was sold under deeds of trust, and the purchasers organized the Virginia Western Coal & Iron Railroad Company, and by an act of the legislature approved March 1, 1898, the name of this new company was changed to Virginia-Carolina Railway Company. At the second December rules, 1897, of the circuit court of Washington county, certain stockholders of the Litchfield Land

Company filed a bill to have its real estate partitioned among its stockholders, and the charter of the company revoked and annulled. Accordingly, commissioners were appointed, the real estate partitioned, and by a decree of May 6, 1898, the report of the commissioners as to the partition of the real estate was confirmed, and the charter of the company revoked and annulled. In this partition all the "cleared lands" were given to H. C. Stuart and the widow and heirs of W. A. Stuart, deceased, and the "knob lands" to Mrs. C. P. Booker and T. P. Trigg and associates; Mrs. Booker having acquired the rights of her husband, W. O. Booker, in the lands. February 1, 1900, H. C. Stuart and the widow and heirs of W. A. Stuart, deceased, sold and conveyed to the Virginia-Carolina Railway Company the right of way for its railroad as located and graded through the lands partitioned to them, and on March 6, 1900, the Virginia-Carolina Railway Company paid into court the sum of \$1,333.70, the amount of damages ascertained by the commissioners in their report of July 20, 1888.

Additional exceptions on behalf of W. O. Booker were filed on April 18, 1900, to the commissioners' report, and when the case came on to be heard by consent of all parties in interest at the May term, 1900, of the county court, the matter was submitted to the judge of the county court for decision, subject to the right of appeal, but only two questions were raised and considered by the court, viz.: First, who is entitled to compensation, etc., for the "cleared lands" of the Booker farm taken by the Virginia-Carolina Railway Company for its purposes? and, second, what interest should be allowed upon the compensation, etc.? The county court, by its order made June 27, 1900, directed that one-third of the \$1,333.70 paid into court by the Virginia-Carolina Railway Company be paid to Mrs. C. P. Booker, with interest thereon from February 15, 1891, and that one-sixth of the \$1,333.70, with like interest, be paid T. O. Trigg and associates.

This judgment having been, upon a writ of error awarded the Virginia-Carolina Railway Company, affirmed by the circuit court of Washington county, it is before us for review upon a writ of error awarded by one of the judges of this court.

It is manifest that the order of the county court complained of is based upon the view that the fund paid into court by plaintiff in error belonged to the stockholders of the Litchfield Land Company in proportion to their respective holdings, and that they were entitled to their respective interests in this fund as of February 15, 1891, when the Abingdon Coal & Iron Railroad Company went upon the land and began grading its road-bed.

Nothing whatever is said in the deed from W. O. Booker to the Litchfield Land Company conveying the lands through which the railroad's right of way runs about compen-

sation for the land proposed to be taken as the railroad's right of way and damages to the residue of the tract; nor did the Litchfield Land Company ever treat this claim for damages as an asset of the company. The conveyance from Booker to the Litchfield Land Company is a simple conveyance of the land, without reference to compensation or damages by reason of the proposed railroad, and the partition of this land among the stockholders of the land company was made without reference to such compensation in damages.

Title to land condemned in Virginia for public purposes remains in the owner until judgment of the court in which the condemnation proceedings are pending confirming the report of commissioners as to damages assessed, and payment of the money to the party entitled or into court. Code Va. § 1083.

Where there are exceptions to the report, the party seeking to condemn the land may pay the money into court, and may thereupon enter into and construct its works upon and through that part of the land described in the commissioners' report. Section 1081, Code. But this gives the party condemning no title to the land until there is a final judgment of the court fixing the amount of compensation, and the payment of same to the party or parties entitled or into court. Section 1083, *Id.* Robinson v. Crenshaw, 84 Va. 348, 5 S. E. 222.

Arising, doubtless, out of diverse statutory provisions in the various states touching condemnation proceedings under the right of eminent domain, there is some conflict among the authorities as to party entitled to compensation, where there has been a sale of the locus in quo pending condemnation proceedings.

In discussing this question, Lewis, in his work on Eminent Domain (section 318), says: "The right to compensation is a personal claim, and, after it has once accrued, does not pass by a deed of the land. When land is occupied wrongfully, or by mere consent of the owner, express or implied, no right or title to the land so occupied passes, and a subsequent deed by the owner vests the entire estate in the grantee, and such grantee, in the absence of any reservation, is entitled to just compensation for the land so occupied. The grantor in such case, who has not consented to the occupation of his land, may recover for all damages sustained up to the time of the deed, to be estimated as in an action of trespass."

In section 627 this learned author further says: "Where a party, having power to acquire property for public use, enters upon and occupies property for the purpose of appropriating it to such use, without having complied with the law, a conveyance of the property pending such occupation will vest the right to compensation in the grantee, whether the entry was with or without consent. The authorities are by no means har-

monious upon this proposition, but it is supported by the greater number, and by the general rules which govern the acquisition of interests in real estate."

In *Carli v. Railroad Co.*, 16 Minn. 260 (Gil. 234),—a very similar case to this,—the court said: "If the proceedings to condemn the property were completed, and the company acquired the title to the easement or right of way over the locus in quo before the execution of the deed, Carli [grantee] would take the premises subject to the right of the company, and the damages would inure to the owner of the land at the time the right vested in the company; but, if the proceedings were not completed, but inchoate, and the company did not acquire title to the easement prior to the execution of the deed, the premises passed to Carli, and he became the owner, and the right to damages was in him as an incident to the ownership." See, also, *Meginnis v. Nunamaker*, 64 Pa. 374.

We have no case in Virginia adjudicating this precise question, but it clearly appears to be the policy of our statutes on the subject that, until the person or corporation entitled to acquire property for public use has so far progressed in condemnation proceedings, and against the will of the owner, to take immediate possession thereof, no right to compensation for the land proposed to be taken and for damages to the residue of the tract accrues to the owner; and his conveyance of the locus in quo, in the absence of any reservation, carries with it to the grantee the right of compensation for the land taken, etc., when there has been a confirmation of the report of commissioners, and payment to him or into court. As has been stated, there was no reservation in the conveyance of the locus in quo from W. O. Booker to the Litchfield Land Company of the right to compensation for the land proposed to be taken for the right of way of the Abingdon Coal & Iron Railroad Company, and at no time did the Litchfield Land Company treat this claim to compensation for the railroad's right of way as an asset, but submitted to a partition of its land among its stockholders without any reference to it whatever.

The right of way and roadbed were taken into consideration, by the commissioners, and partitioned, as were other portions of the lands of the Litchfield Land Company. In doing this the commissioners doubtless equalized the rights of all parties concerned, giving to each that to which each was entitled. The "cleared lands" were allotted to the Stuarts, and the "knob lands" to Mrs. Booker and Trigg and associates, and this partition was acquiesced in by the parties, and confirmed by the court. By it the right of compensation for the land proposed to be taken for the railroad's right of way and for damages to the residue of the lands passed to the parties, respectively, as an incident of ownership of the lands partitioned to each; so that, when the condemnation proceedings

had so far progressed as to give to the plaintiff in error the right of immediate entry upon the land against the will of the owner, these parties to whom the lands had been partitioned became entitled, respectively, to the compensation fixed by the commissioners in their report of July 20, 1888. The Stuarts became entitled to the compensation for the "cleared lands" taken, and to the damages to the residue of the "cleared lands," and Mrs. Booker and T. P. Trigg and associates to the compensation for the "knob lands" taken, and to the damages to the residue of the "knob lands." Plaintiff in error having acquired by purchase from the Stuarts a right of way for its railroad through the "cleared lands," appellees were only entitled out of the fund paid into court March 6, 1900, by plaintiff in error, to the compensation fixed by the commissioners' report for the "knob lands" taken, and as the damages to the residue of the "knob lands."

The judgment complained of will therefore be reversed, and annulled, and the cause remanded, to be further proceeded with in accordance with this opinion.

Reversed.

(99 Va. 646)

TRAMMELL v. ASHWORTH.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

VENDOR AND PURCHASER—BOUNDARIES— MISREPRESENTATION—RESCISSON —EVIDENCE—APPEAL.

1. Where a sale of real estate was set aside for the vendor's misrepresentation, and a decree entered that the notes given for the price should be rescinded, and the cause be referred to a commissioner to take the accounts rendered necessary by the decree, a motion to dismiss an appeal by the vendor from the decree, on the ground that the appeal bond was not executed within one year from the date of the decree, should be dismissed, inasmuch as the decree was not final in character.

2. Where a vendor of real estate stated to a vendee, prior to the sale, that the boundary line would fall a certain distance from the house, pointing out the place where it would be, and subsequently the vendor undertook to place a fence nearer the house than the line pointed out by him, when the vendee called his attention to the fact that it was not where he had said the line would be, and he then placed the fence where he pointed out the line, the latter location should be established as the true boundary line.

3. A vendee of a house and lot sued to set aside the sale thereof on the ground that the vendor had informed her, prior to the sale, that her boundary line would fall at a certain place, and that the vendor informed her that a chimney in the hall of the house was more than two feet distant from a partition wall, so that the partition might easily be moved two feet, and the hall be enlarged, both of which representations were false. Held that, inasmuch as the representations were of such character that the truth or falsity was apparent, no rescission should be allowed.

4. Where a vendee of a house and lot occupies the same for a considerable time after the purchase, she may not thereafter be allowed rescission of the contract on the ground of false representations by the vendee as to where the boundary line would fall, and the distance be-

tween a partition wall in the hallway and a certain chimney.

Appeal from corporation court of Bristol.

Action by one Trammell against M. J. Ashworth. From a decree in favor of defendant, complainant appeals. Reversed.

A. B. Whiteaker, H. W. Sutherland, and John E. Burson, for appellant. Bailey, Price & Byars, J. S. Ashworth, A. H. Blanchard, H. G. Peters, and J. H. Fulton, for appellee.

KEITH, P. Trammell filed his bill in the corporation court of the city of Bristol, in which he shows that he is the assignee of a note for \$700 executed by M. J. Ashworth to Rives Walker on February 26, 1895, due 12 months after date, payment of which was secured by a vendor's lien on a house and lot on the corner of Sycamore and Johnson streets, in the city of Bristol. M. J. Ashworth and Rives Walker, his assignor, are made parties defendant, and the prayer of the bill is that the house and lot be sold for the satisfaction of the lien.

M. J. Ashworth filed her answer, in which she admits the execution of the bond set out in the plaintiff's bill, and then states the transaction which led to its execution.

Rives Walker was the owner of a house and lot in the town of Bristol, which Mrs. Ashworth desired to purchase, and after some negotiation she agreed to give the sum of \$3,000 for them, \$400 of which was paid in cash, \$400 to be paid on the 15th of the following March, \$1,500 on or before the 15th of July, 1895, and the remainder, \$700, evidenced by the bond in suit, payable one year after its date. The property conveyed by Walker begins at a stake on the north side of Johnson street, and runs thence with Johnson street in a northerly direction 55 feet; thence west to an alley, about 108 feet; thence south with said alley 55 feet, to Sycamore street; and east to the beginning. This lot was part of a lot owned by Walker, bounded on the south by Sycamore street, running thence north along Johnson street 128½ feet to Wood's line. Deducting the 55 feet sold to Mrs. Ashworth, there would remain 73½ feet still undisposed of by Walker. Upon this lot fronting 73½ feet on Johnson street running back to the alley the Holstein National Building & Loan Association had a prior lien by deed of trust upon the 70 feet lying contiguous to Wood's line, which would leave 3½ feet between the south line of the property conveyed to the building association and the 55 feet conveyed to Mrs. Ashworth.

Mrs. Ashworth claims that during the progress of the negotiation between herself and Walker he showed to her the point that would be reached by a line extending from Sycamore street 55 feet north, and that she bought with reference to that statement. She avers that the boundaries established by measurement fall short of the representations made to her with respect to them; that the variance is a very material one, which great-

ly impairs the value of the property, as it brings the north boundary of her lot almost in contact with her house, so that there would be no convenient passageway between her house and the boundary fence. She further avers that she called Walker's attention to the fact that the hallway in her house was too narrow, and that, owing to the location of the chimney, it would be very difficult and expensive to enlarge the hall, and that Walker assured her that the chimney was more than two feet distant from the partition wall, so that the partition might easily, and without much cost, be moved two feet, and the hall be, to that extent, enlarged; that, relying upon these representations, which she deemed material, and without which she would not have made the purchase, she executed the bond in suit. She claims that by reason of these misrepresentations she is entitled to have the contract rescinded, and to recover the money paid by her to Walker upon the contract, with interest.

She sets out in her answer that at the time of the purchase she assigned in full payment of the balance due upon the purchase a judgment in the name of "Kendrick v. Aston's Adm'r" for the sum of \$3,131, with interest on \$2,441.90 from January, 1895, till paid. She asks that her answer be treated as a cross bill; that the contract, notes, conveyances, and assignment of the judgment be rescinded; and that she recover of Walker the money which he has received, with interest thereon.

There are other allegations in the answer, which need not be noticed, as they were not relied upon in the argument.

Walker answered this cross bill, in which he denies its allegations with respect to the representations he is alleged to have made with reference to the widening of the partition hall and the location of the chimney in the house. He declares that he made no representation whatever upon the subject to Mrs. Ashworth, but that, on the contrary, she examined the house a number of times before she purchased, and fully understood its plan. He denies also the statement of the cross bill with respect to the boundaries of the lot purchased by her, and claims that the lot is correctly described in his deed of the 26th of February, 1895, which was accepted by her, and under which she took possession, and has since enjoyed the property in controversy.

The cause came on to be heard upon the issues thus presented, upon the proofs taken, and the court decreed on October 8, 1898, that the contract of sale, the notes given in pursuance thereof, and the assignment of the judgment should be rescinded; that Mrs. Ashworth should recover of Walker the money he had received, with interest on each item from the date paid, subject to a reasonable rent for the property; that the judgment of Kendrick against Aston's administrator had been assigned as a collateral se-

curity, and not as a payment, and that Walker was chargeable only with the money actually received by him; and the decree also disposed of other issues and questions not now relied upon, and which we shall not discuss.

The cause was referred to a commissioner to take the accounts rendered necessary by the decree. The question of costs was reserved for future decision, and the cause was continued.

The commissioner filed his report in obedience to this decree on the 8th day of December, 1898, and on January 9, 1899, the court entered a decree disposing of certain exceptions to this report, ascertaining the amount which Mrs. Ashworth should recover against Rives Walker, and establishing it as a prior lien upon the property.

About this time certain creditors of Mrs. Ashworth came in by petition, seeking to subject her recovery to the lien of their judgments, upon which no execution had issued, and by the decree of September 23, 1899, the court held that the judgment set up against Mrs. Ashworth did constitute a lien upon the interest held by her in the property prior to the decree for rescission.

On the 4th of October, 1899, Trammel, assignee, and Rives Walker presented their petition asking that an appeal be allowed from the decrees against them, which are described in their petition as final. On the 5th of October, 1899, the appeal was granted, and we are met by a motion on behalf of appellees to dismiss the appeal upon the ground that the appeal bond was not executed within one year from the date of the decrees appealed from.

This motion would prevail if the decrees of October, 1898, had been final in their character. They are obviously interlocutory, though they so far dispose of the merits of the controversy as to give this court jurisdiction to review them. A final decree is one which disposes of all matters in controversy and leaves nothing to be decided by the court: while the decrees before us merely establish the principles which are to control the commissioner in stating the accounts which were necessary in order to enable the court to pass finally upon the rights of the parties in the view taken by it. The motion to dismiss is denied.

The deed rescinded by the decree complained of was executed on the 26th day of February, 1895, and the grantee went immediately into possession under that deed, and made no demand for its rescission until the filing of her cross bill on the 17th of December, 1897. It appears from the evidence that the property was shown to and examined by her before she agreed to purchase it, and she entered and occupied the house without objection for a period of nearly three years. The width of the hall was apparent to the most casual observation; the location of the chimney with reference to

the partition wall was equally obvious; so that we are of opinion that, if the representations upon this subject were as stated by Mrs. Ashworth,—which the appellant denies,—she would not be entitled to a rescission of her contract upon that ground.

With respect to the boundary of the lot, it appears that after she had been in possession for some time, Walker made preparation to build a fence upon its north line, measuring 55 feet from Sycamore street. When Mrs. Ashworth discovered where the post holes were being dug, she called the attention of Walker to the fact that the proposed line of fence would leave no convenient passageway between it and the side of her house, and thereupon he consented to have the fence placed two feet further north. In his deposition Walker claims that this was a temporary arrangement. Mrs. Ashworth, however, looked upon it as a recognition of her claim. The fence was placed so as to embrace within her boundary 57 feet from Sycamore street to the northern limit of Mrs. Ashworth's lot, and we are of opinion, upon a review of all the evidence in the case, that this should be established as the true boundary line of her purchase.

We do not think that the facts warrant a rescission of the contract.

A vendee, in order to obtain a rescission of a contract upon the ground that it was procured by fraudulent representations of the grantor, must prove that the representations were of positive fact, made for the purpose of procuring the contract; that they were untrue; that they were material; and that the party to whom they were made relied upon them and was thus induced to enter into the contract; and he must do so as soon as he discovers the fraud, for if, after he discovers the fraud, he treats the contract as a subsisting one, he will be deemed to have waived his right of repudiation; and his election may be manifested by acts as well as by words, and, when once made, is final, and cannot be retracted. *Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831.

The misrepresentations here relied upon were of such a character that the truth must have been apparent. This property seems to have greatly depreciated in value, which rendered it all the more imperative that Mrs. Ashworth should promptly disaffirm the contract upon the discovery by her of the location of the chimney, and that the 55 feet named in the deed which she received did not place the northern boundary of her lot at the point which had been indicated to her according to her statement by Mr. Walker.

We are of opinion that the corporation court erred in rescinding the contract.

With respect to the judgment which appellee claims was assigned in satisfaction of the purchase money due by her, we are of opinion that there is no error in the decree which holds that it was merely transferred

as additional and collateral security. Upon this point the decree appealed from is affirmed.

With respect to the claims asserted by the creditors of Mrs. Ashworth, it is sufficient to say that, as the fund to which they lay claim arises from a rescission of the contract of sale, their contention has been disposed of in reversing the decree in that respect, the necessary result of which is that the fund disappears, and the interest of Mrs. Ashworth in the property becomes real estate bound, first, for the payment of any balance due upon the vendor's lien for the purchase money, and the surplus, if any, by liens against her in the order of their priority, which should be ascertained by the corporation court, to which this cause is remanded to be further proceeded with in accordance with the views expressed in this opinion.

Reversed.

(39 Va. 653)

CITY OF STAUNTON v. MARY BALDWIN SEMINARY.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

TAXATION—EXEMPTION—POWER OF LEGISLATURE—CHARITABLE INSTITUTIONS—CONSTRUCTION OF STATUTES—INJUNCTION.

1. Const. art. 10, § 3, authorizing the legislature to exempt from taxation all property used exclusively for state, county, municipal, benevolent, charitable, educational, and religious purposes, authorizes the legislature to exempt property the proceeds of which are used for such purposes.

2. Code, § 457, as amended by Act Jan. 28, 1896 (Acts 1895-96, p. 218), entitled "An act relating to real estate which is exempt from taxation," provides that real estate owned by benevolent and educational institutions, the proceeds of which are devoted exclusively to charitable and educational purposes, shall be exempt, and when part of a lot or building or its proceeds is used for such purposes "the same" shall be exempt from taxation to that extent. *Held*, that a building rented and the proceeds used for charitable purposes is exempt, and not merely the proceeds thereof.

3. Injunction will lie to prevent the enforcement of a tax levied on exempt property.

Appeal from hustings court of Staunton.

Injunction by the Mary Baldwin Seminary against the city of Staunton to restrain the collection of an illegal tax. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Patrick & Gordon, for appellant. A. F. Robertson, for appellee.

BUCHANAN, J. The question involved in this case is the right of the city of Staunton to tax certain houses and lots owned by the Mary Baldwin Seminary, an incorporated educational institution.

Section 457 of the Code, as amended by an act of the general assembly approved January 28, 1896 (Acts 1895-96, p. 218), provides, among other things, that real estate belonging to certain classes of educational institutions and charitable associations shall be ex-

empt from taxation where the proceeds arising from such property are devoted exclusively to charitable or educational purposes, with the proviso that nothing contained in the section shall be construed to exempt from taxation any part of a lot or building used for any private purpose or for profit; but, where a part of the property or its proceeds is used for charitable or school purposes, then to that extent the same shall be exempt from taxation.

The house and lots in question are leased by the seminary, and the rents derived therefrom are used exclusively for the purposes of the school.

The city of Staunton insists that the legislature had no power under the constitution to exempt any property from taxation which was not used by the seminary for school purposes, although the rents or proceeds of the property were devoted exclusively to such purposes, and that, even if the legislature had such power, section 457 of the Code, as amended, does not exempt the property in question from taxation, but only exempts the proceeds of such property.

The power of the general assembly to exempt property where the rents or proceeds of the property, and not the property itself, are used for charitable purposes, was decided in the case of *City of Petersburg v. Petersburg Benev. Mechanics' Ass'n*, 78 Va. 431. It was there held that section 3, art. 10, of the constitution, which provided that the legislature may exempt all property "used exclusively for state, county, municipal, benevolent, charitable, educational and religious purposes," carried with it the power to exempt property the proceeds of which are devoted to any of the purposes named.

The constitutional power of the general assembly to exempt the property in question from taxation must be considered as settled and controlled by that case.

The next question is, does section 457 of the Code, as amended, exempt the property itself, or does it only, as the city insists, exempt the rents or proceeds of the property from taxation?

The act of January 28, 1896, under which the seminary claims that its houses and lots in question are exempt from taxation, does not, upon the point under consideration, differ in its legal construction from the act of April 2, 1877 (Acts 1876-77, p. 302), which was in force when the case of *City of Petersburg v. Petersburg Benev. Mechanics' Ass'n*, supra, was decided, and which was held to exempt the property itself from taxation, and not merely the proceeds or rents arising therefrom.

The purpose of both acts was to exempt from taxation real estate, not personal property, owned by certain designated classes of persons, including charitable associations and educational institutions under certain conditions.

The act of April 2, 1877, provides that

"real estate belonging to * * * incorporated colleges and academies; to seminaries and other institutions devoted to purposes of education; * * * real estate owned by Masonic, Odd Fellows and other like benevolent associations, where the proceeds arising from said property is devoted exclusively to charitable or school purposes, * * * shall be exempt from taxation: * * * provided, however, that nothing herein contained shall be construed to exempt from taxation any lot or building used for any private purpose or for profit; but where a part of such proceeds are used for charitable or school purposes, then to that extent said property shall be exempt from taxation."

Section 457 of the Code, as amended by act of January 28, 1896, is entitled "An act to amend and re-enact section 457 of the Code relative to what real estate shall be exempt from taxation." It exempts from taxation certain real estate not theretofore exempted, and then provides, among other things, "that real estate owned by benevolent associations and educational institutions, where the proceeds are devoted exclusively to charitable or educational purposes, * * * shall be exempt from taxation: provided, however, that nothing herein contained shall be construed to exempt from taxation any part of any lot or building used for any private purpose or for profit; but where a part of the property or its proceeds is used for charitable or school purposes, then to that extent the same shall be exempt from taxation, and the chief officers or trustees of the association shall be required to make oath as to what part, if any, of the revenues of the association is devoted to private purposes or for profit. * * *"

It is insisted that the word "same," in the last sentence quoted, refers to the word "proceeds," and not to the word "property," which precedes it in the same sentence.

The purpose of the section and the context show that this construction is not correct. The object of the act, as stated in its title, was to exempt real estate, not personal property, from taxation. The language of the section, when considered as a whole, shows that the intention of the legislature was to exempt the real estate from taxation where it, or the proceeds arising from it, are devoted exclusively to charitable or educational purposes, and, where only a part of the real estate or its proceeds is used for such purposes, to exempt the real estate to the extent that it or its proceeds are used for such purposes. The whole of the proceeds arising from the rent of the houses and lots in question being used exclusively for the purposes of the seminary, the houses and lots were exempt from taxation under section 457 of the Code, as amended.

The remaining question to be considered is the demurrer to the bill.

The bill was filed to enjoin the city of Staunton from collecting taxes upon property

which, we have seen, was exempt from taxation by a constitutional act of the legislature. The right to enjoin the collection of a tax assessed upon property which is exempt from taxation seems to be well settled. Mr. High, in his work on Injunctions (3d Ed. § 530), says that: "An important exception to the general doctrine of noninterference by injunction against the collection of the revenue because of illegality in the tax is recognized in that class of cases where the relief is sought against a tax assessed upon property which has been exempted by law from taxation. Indeed, the exception has been so uniformly recognized as to become itself a governing rule in the class of cases now under consideration, and it may be laid down as the established doctrine of the courts that the attempted enforcement of a tax upon property which has been exempted by proper legislative authority from the burdens of taxation constitutes a grievance of so irreparable a nature as to merit preventive relief. And where an act of the legislature held by the court to be constitutional exempts certain property from taxation, an injunction will be allowed against the enforcement of a tax upon such property." See, also, section 536. *City of Petersburg v. Petersburg Benev. Mechanics' Ass'n*, supra; *Railway Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747; 1 Bart. Ch. Prac. (2d Ed.) 483.

We are of opinion, therefore, that there is no error in the decree appealed from, and that it must be affirmed.

Affirmed.

(99 Va. 662)

MILLER v. MILLER.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

WILLS—CONSTRUCTION—INTENTION OF TESTATOR.

Testator bequeathed a life estate in all his property to his wife, with remainder to his brother, and directed his executor to support B., a minor, so long as she should remain a member of testator's family, or until she should become 21 years of age. At the time of the drawing of the will, testator's family consisted of himself, his wife, the brother, and B. *Held*, that B., not having left the home, was entitled to support until she was 21, although the wife had died, and the brother had come into possession of the estate.

Appeal from circuit court, Augusta county.

Actions by Lottie Bowen against Joseph Miller, and by the administrator of Christina Miller against Joseph Bowen, and by Lottie Bowen against Joseph Miller. The actions were tried together, and from the decree Lottie Bowen appeals. Modified.

J., J. L. & R. Bumgardner, for appellant. Curry & Glenn, for appellee.

KEITH, P. Noah Miller died in December, 1895, leaving a will, which is as follows:

"I, Noah Miller, being of sound mind and disposing memory, and knowing the uncer-

tainty of human life, do make and declare this, my last will and testament, revoking all others, in manner and form as follows, to wit:

"(1) I appoint my brother, Joseph Miller, as the executor of this, my last will and testament.

"(2) I will and direct that my said executor shall dispose of all the surplus hay and grain, if any, on hand, and apply the proceeds thereof to paying my part of just debts as soon after my decease as he can.

"(3) I direct that my executor shall take proper care of Lottie Bowen, supplying her with comfortable wearing apparel, food, etc., as long as she remains a member of my family, or until she becomes to be twenty-one years of age. I desire to be distinctly understood that her support shall cease as soon as she arrives at the age of twenty-one years.

"(4) I will and bequeath to my beloved wife, Christiana Miller, my entire interest in my real estate, and also in my personal property, as long as she remains my unmarried widow, or until her decease, should that occur before she marries. Should she marry, then she forfeits her entire interest to the property, and after her death or marriage the entire property, both real and personal, reverts to my brother, Joseph Miller. I desire to be understood that my brother, Joseph Miller, is to manage the business on the farm just as it has been done during my natural life.

"In witness whereof I have hereunto set my hand and seal this the 14th day of December, 1895. Noah Miller. [Seal.]"

Some time in 1898, his widow, Christiana Miller, died, and Joseph Miller, the testator's brother and executor, became entitled to the whole estate of Noah Miller, real and personal, in accordance with the terms of the will.

A short time before the death of Mrs. Miller, Lottie Bowen, who is named in the will of Noah Miller, by her father, as next friend, filed her bill in chancery to have her rights under the will of Noah Miller ascertained.

The administrator of the widow, Christiana Miller, brought a chancery suit against Joseph Miller and others, and Lottie Bowen also brought an action of trover against Joseph Miller for the recovery of a horse. The last-named case seems, by consent, to have been heard along with the chancery suits. The commissioner in chancery made one report covering all three cases, and they are all disposed of in the decree appealed from, which decides that Lottie Bowen is not entitled to recover the horse for which she sued at law, and that Christiana Miller's administrator do recover of Joseph Miller, executor, the sum of \$144.10, with interest from July 10, 1898.

The controversy as to the ownership of the horse and the decree in favor of Christiana Miller's administrator are below the jurisdiction of this court. The subjects involved in these suits have no connection with each

other, nor with the suit of Lottie Bowen, brought to establish her rights under the will of Noah Miller. They were heard together and disposed of by the same decree from motives of convenience and economy, and with these observations we shall dismiss them from further consideration.

The principal suit presents questions of interest by no means easy of solution.

Lottie Bowen came, when a child of tender years, to live in the family of Noah Miller, who seems to have treated her with kindness and affection. In his will he directs his executor to take proper care of her, "supplying her with comfortable wearing apparel, food, etc., as long as she remains a member of my family, or until she becomes twenty-one years of age." About three years after the death of the testator she went upon a visit to her father, in Albemarle county, and upon her return with her father after an absence of a few weeks Joseph Miller refused to receive her, stating that her father could take better care of her than he could. During her absence Christiana Miller died, and under the terms of Noah Miller's will his whole estate, real and personal, had passed to his brother, Joseph. The commissioner to whom the case was referred finds that neither Lottie nor her father ever abandoned or renounced the provision made for her in the will, and that Lottie was entitled to recover the sum of \$10 per month from the death of Mrs. Miller until she becomes 21 years of age, and the court decreed accordingly.

We do not think the evidence shows any act upon the part of Lottie Bowen which should defeat or impair her right to recover. It is true that the provision is made for her as long as she remains a "member of my family," and it may be that, if she married, or refused to remain a member of the family, and her father had failed or declined to exercise his parental authority to induce her to return, or had forbidden her to return, the executor might well have taken the position that he was ready to comply with the will, and to provide for her as a member of the family, but that he was under no obligation to commute her clothing and support into a money equivalent. But no such case is presented. This girl, with the consent of Joseph Miller and Christiana Miller, went upon a visit to her father. After a few weeks she was willing to return, and her father showed his approval of her return by going with her. Joseph Miller, who had become vested with his brother's whole estate, and charged with Lottie's maintenance, refused to receive her. He seeks now to justify his conduct by the interpretation which he asks the court to place upon the will of Noah Miller.

We agree with counsel for appellant that the question to be decided is, "How long is the executor required, under the will, to continue to provide for Lottie?" that it is only by virtue of the directions given to him by the will that the executor owes any duty to

her, and that we must endeavor to ascertain from the will itself the intent of the testator upon this point.

It is clear that the provision is to terminate when the beneficiary attains the age of 21 years. It seems that the testator expected that Lottie should continue after his death to remain with, and be provided for as a member of, his family, but it is not reasonable to suppose that he meant that her support should be withdrawn upon her ceasing to be a member of his family if the cessation of that relation was brought about without fault on her part, but by the arbitrary act of his brother, who thereby relieved himself of a burden upon the estate bequeathed to him. When the will was written, the family of Noah Miller consisted of himself, his wife, his brother, and Lottie Bowen. He, of course, did not intend that the provision for Lottie should end when the family as then constituted ceased to be. It could not come into existence under his will until after his death, and upon his death in literal strictness "his" family passed out of existence. Did it cease upon the death of his widow? We think not. When the testator uses the term "my family," he is speaking of a conception in his own mind—an entity, so to speak—different from and independent of the units of which it was composed. He could not have intended doing, on so solemn an occasion, the vain thing of making a provision which should be dependent upon the continuance of his family as it was then composed; and it clearly appears from his will that he contemplated that the support provided might continue for a number of years, and was to be unconditionally determined only when Lottie reached the age of 21. Within that time he must have known that death would not improbably still further diminish the family circle from which he was shortly to disappear. Had he foreseen the death of his wife, can we believe that he would have regarded it as the total extinction of his family, and as the event which was to terminate his bounty? His wife might have survived until Lottie became 21 years of age, or might have died immediately, and in fact did die within three years after the execution of the will. Why should the bounty to Lottie end with the death of his wife? It was in no degree made dependent upon services rendered or to be rendered by her to his wife, or to any one else. It was a spontaneous benefaction, which he contemplated might continue until she became 21 years of age, but was to cease unconditionally at that time. Nor do we think, for like reasons, that the death of Joseph Miller would affect Lottie's right.

We are of opinion that there is no error in the decree of the circuit court. It may happen, however, that from some supervenient cause the provision made in the will may be forfeited, and to provide for such a contingency the decree will be amended by reserving leave for any party to apply for any relief

to which he or she may be entitled, and, as amended, affirmed.

Affirmed.

(49 W. Va. 647)

MARTIN v. KESTER et al.

(Supreme Court of Appeals of West Virginia. Sept. 7, 1901.)

INJUNCTION — RESTRAINING SALE UNDER TRUST DEED—CROSS BILL—EXECUTION OF DECREE—SPECIAL COMMISSIONER—APPEAL.

1. M. conveyed 211½ acres of land in trust to secure K. the payment of a note for \$5,000, the note containing a provision that it was to be subject to any credit to which the maker might show he had paid on said claim or debt upon a fair adjustment of all matters between them. D., the trustee, proceeding to sell the land under said deed of trust, was enjoined by M. on the ground, among others, that he did not owe K. anything on settlement, and prayed for a settlement to be had between them to ascertain his indebtedness, if anything, to K. Defendants filed an answer in the nature of a cross bill, alleging prior liens on said land by judgments against M., and making the judgment creditors of M. parties to the suit, and praying for a convention of the lien creditors, and to ascertain the amounts and priorities of the liens. *Held*, the court did not err in permitting the answer and cross bill to be filed.

2. In such case, where the court has taken jurisdiction to make settlement between the parties, and to ascertain the liens and priorities thereof, and to decree sale of the land to pay the liens, it is proper to appoint a special commissioner to execute the decree of sale.

3. And in such case the court will exercise a sound discretion in the appointment of such special commissioner, whether it be the defendant trustee or another person.

4. It is not sufficient to reverse a decree that it is erroneous. Error must appear to the prejudice of the party complaining thereof.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county; J. M. Hagans, Judge.

Action by Charles T. Martin against Samuel O. Kester and others. Decree for defendants, and plaintiff appeals. Modified.

W. Scott, for appellant. Lewis O. Lawson, for appellees.

McWHORTER, J. On the 7th day of May, 1888, Charles T. Martin executed to Lemuel D. Jarvis, trustee, a deed of trust on a tract of 211 acres of land in Harrison county to secure to Celia Kester the payment of a note of \$5,000 of even date with the trust deed. Afterwards Sherman O. Denham was substituted as trustee in place of Jarvis, who had died. Trustee Denham advertised to sell the land under the trust deed, when Martin filed his bill in the circuit court of Harrison county enjoining the sale, on the grounds that the title to the tract of land was not in plaintiff when he executed said deed of trust, and that the trust deed was void for uncertainty as to the debt secured; that whether plaintiff owed anything under said trust depended on a settlement of many transactions and many accounts that were still unsettled between the parties, alleging that he was not indebted to Celia Kester one cent on any account;

facturers or the business of manufacturing is denied by the plaintiff in error upon the ground, among others, that the capital stock of corporations and the capital of individuals engaged in manufacturing are taxed by the state upon the ad valorem system, and that, where such tax can be levied, a license tax cannot be imposed.

By section 1 of article 10 of the constitution it is provided that taxation, except as thereafter provided, whether imposed by the state, county, or corporate bodies, "shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value." By section 4 of the same article the general assembly is authorized to levy a tax upon incomes, upon licenses to persons engaged in certain designated employment, and upon all other business which cannot be reached by the ad valorem system.

Under these provisions of the constitution the general assembly has no power to levy a license tax upon any employment or business other than those named in the fourth section, except in cases where such business cannot be reached by the ad valorem system. Whether a business can or cannot be reached by the ad valorem system is a question primarily for the legislature; and its determination of the question cannot be held to be erroneous, unless it is manifestly so. *Morgan v. Com.*, 98 Va. 812, 815, 35 S. E. 448; *Com. v. Moore & Goodsons*, 25 Grat. 957.

The general assembly, for state purposes, does not impose a license tax upon the business of manufacturers, but imposes a property tax upon the capital stock of joint-stock companies and the capital of individuals engaged in such business. Acts 1889-90, pp. 201, 214, etc.

As long as the general assembly continues that method of taxation for state purposes, it is a conclusive determination that such business can be reached by the ad valorem system, and, if it can be, and is so reached by that system for state purposes, it must be so reached when taxed by municipal corporations, for the legislature has no power under the constitution to impose a license tax, or to authorize a municipal corporation to do so, upon any business other than those specifically mentioned in section 4 of article 10 of the constitution, except where it cannot be reached by the ad valorem system.

The legislature having no power to authorize the council of the city of Lynchburg to levy a license tax upon the business of manufacturing, the ordinances imposing such a tax must be held invalid and void.

The capital stock of the joint-stock companies and the capital of the partnership in question not being assessed with a license tax, nor liable to such assessment, they were liable to, and ought to have been assessed with, a property or ad valorem tax, as provided by sections 4, 5, and 6 of the ordinance of the city council imposing a tax upon property which, as we have seen, was clearly

broad enough to embrace them, and to require their assessment for taxation.

The judgment complained of must, therefore, be reversed, and set aside, and this court will enter such order as the circuit court ought to have entered.

Reversed.

WHITTLE, J., absent, decided case in lower court.

(99 Va. 620)

DAVIS et al. v. ANDERSON.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

CONTRACTS — CONSIDERATION — CREDITORS — MORAL OBLIGATION — PAST CONSIDERATION — CONVEYANCES — TITLE — LIEN — ENFORCEMENT — IMPRACHMENT.

1. A contract founded on a good, but not on a valuable, consideration is voluntary, and void as to creditors.

2. A moral obligation must be one which has been once a valuable consideration, but has ceased to be binding from some supervenient cause, in order to be sufficient to sustain a conveyance.

3. A past consideration, which imposed no obligation at the time it was furnished, is insufficient to support any promise.

4. Under Code, § 2459, providing that every conveyance which is not on a consideration deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made, where a brother indebted to insolvency, after suit brought, devests himself of all his property by a deed to his sister, based on past services alleged to have been rendered by her for their mother, which services were not shown to have been rendered at the brother's request, express or implied, such sister takes no title.

5. A grantee in a deed, whose rights are subordinate to those of the grantor's creditors, cannot impeach the proceedings of a court of chancery to enforce a lien on the property conveyed in an independent suit, however irregular such proceedings may have been.

Appeal from circuit court, Rockbridge county.

Action by Fannie L. Anderson against Samuel A. Davis and another for the partition of certain land. From a judgment in favor of plaintiff, defendants appeal. Reversed.

J., J. L. & R. Bumgardner, for appellants. C. S. W. Barnes, for appellee.

WHITTLE, J. In June, 1890, Lucy F. Weeks brought an action of assumpsit in the circuit court of Rockbridge county against James T. Freeman, a nonresident, and caused to be issued an ancillary attachment, which was levied July 2, 1890, upon an undivided moiety of 116 acres of land, the property of the defendant.

On July 23, 1890, Freeman executed a deed by which he conveyed his interest in the land to his sister, Fannie L. Anderson, "in consideration of the care and attention of my mother, Lucy Freeman, who has been blind for the last ten years, to me fully paid by Fannie L. Anderson, * * * the receipt of which is hereby acknowledged." This deed

was acknowledged in substantial compliance with the requirement of the statute, and admitted to record.

The defendant Freeman appeared, and pleaded to the action, and, upon the issue joined, a verdict and judgment were rendered against him at the November term, 1890.

No further proceedings were had upon the attachment, and no memorandum was left with the clerk to be recorded and indexed, as required by section 3566 of the Code.

In a suit in chancery, brought afterwards to enforce her lien, the property was sold, and purchased by the plaintiff, Lucy F. Weeks, and she, having become the owner of the other moiety, sold and conveyed the entire tract of 116 acres to appellants Samuel A. Davis and William J. Hite. Thereupon Fannie L. Anderson filed a bill in equity against the appellants Davis, Hite, and Lucy F. Weeks, in which she alleged that before Lucy F. Weeks had acquired any lien upon the undivided moiety of her brother, James T. Freeman, complainant had become the bona fide purchaser thereof for valuable consideration, and without notice, and vouched the deed of July 28, 1890, to sustain the allegation. She insisted that she was not a party to the suit in which her property was sold, and not bound by any of the proceedings therein. A paper purporting to be the answer of Davis and Hite, denying generally the allegations of the bill, was copied into the record, but seems never to have been formally filed, and was not noticed in any of the decrees in the cause.

The bill prayed for partition of the land, and that appellants be required to account to the plaintiff for the rents and profits of her moiety thereof during the time they were respectively in the possession and enjoyment of the same.

The commissioner to whom the case was referred reported that the land was not susceptible of convenient partition in kind, and ascertained the amounts for which the defendants were respectively liable to the plaintiff for its use and occupation.

Exceptions were taken by the defendant to the report, which the court overruled, and the report was confirmed. The plaintiff was declared entitled to an undivided moiety of the land, which was decreed to be sold for partition, and the amounts ascertained to be due by the defendants to the plaintiff for rents and profits were decreed against them respectively.

From that decree this appeal was allowed.

A number of questions have been raised and discussed by counsel, chiefly affecting the regularity of the proceedings on the attachment and in the suit in chancery in which the property in controversy was sold; but the view which this court takes of the matter renders it unnecessary to notice them in detail.

The real question involved is whether the consideration in the deed from Freeman to his sister was a valuable consideration or

merely a meritorious consideration. If the former, she was clearly entitled to the relief accorded by the decree of the trial court, but, if the latter, it is equally clear that she was not so entitled, as against the creditor of her grantor. Section 2459 of the Code provides that "every gift, conveyance, assignment, transfer, or charge, which is not upon a consideration deemed valuable in law, * * * shall be void as to creditors whose debts shall have been contracted at the time it was made."

A deed founded upon a good, but not upon a valuable, consideration is considered merely voluntary, and, while binding between the parties, is void as to creditors. *Ohit. Cont. 28*. For a moral obligation to be sufficient to sustain a promise or conveyance, it must be one which has once been a valuable consideration, but which on account of some rule of law was not binding upon or enforceable against the party, e. g. from infancy or like cause, or which had ceased to be binding from some supervenient cause, as the act of limitations, the intervention of bankruptcy, and the like. But a past consideration, other than of the class referred to, which imposed no legal obligation at the time it arose, will support no promise whatever. *Eastwood v. Kenyon*, 11 *Adol. & E.* 446; *Earle v. Oliver*, 2 *Exch. 71*; *Olark, Cont. 201*.

There is not a suggestion that the alleged past services of the grantee for her afflicted mother, the sole consideration for the deed in question, were rendered in pursuance of a contract between the grantor and herself. Such an allegation, if proved, would have presented quite a different question. But the case under consideration is one in which a brother indebted to insolvency, after suit brought, divests himself of all the property which he owns within the jurisdiction of the court by a deed to his sister, based upon past services alleged to have been rendered by her for their mother. The services were neither alleged nor proven to have been performed at the request of the brother, express or implied. Such a consideration is in no sense a valuable consideration, and the grantee in the deed occupied the position of a volunteer, and not of a bona fide purchaser for value. There was no legal obligation resting on either the son or the daughter to care for and support their mother, and the high moral obligation to discharge that duty was as incumbent upon the one as the other.

A past consideration which did not place the grantor under a legal obligation at the time the services are alleged to have been rendered cannot be regarded a sufficient consideration to sustain a deed from an embarrassed debtor to his sister, executed after legal proceedings had been commenced by a creditor to subject the property to the payment of his debt.

While bona fide purchasers for value are a highly favored class, and courts of equity are always solicitous to uphold their rights, it would be indeed a dangerous precedent to

enlarge the doctrine so as to embrace in that category allenees of debtors whose memories have been refreshed and consciences quickened into action and a recognition of past moral considerations moving from near relations only after suit brought to subject their property.

This court, in the recent case of *Stoneburner v. Motley*, 95 Va. 788, 30 S. E. 364, quotes with approbation the language of *Wightman, J.*, in *Beaumont v. Reeve*, 8 Q. B. 488, that "a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise," and adds: "It is clear that, independent of the express promise on the part of the son, made after the services were rendered, there could, in this case, have been no recovery upon the original cause of action, for it rested upon no consideration from which the law would have implied a promise to pay, and therefore the subsequent promise is insufficient."

Occupying the position of a volunteer, had *Fannie L. Anderson* been made a defendant to the chancery cause in which the land was sold, her deed would have interposed no valid defense. Her rights, therefore, under said conveyance, being subordinate to those of the creditor of her grantor, she cannot be permitted to impeach those proceedings in the independent suit which she has brought for that purpose, however irregular they may have been.

For the foregoing reasons the decree complained of must be reversed and annulled, and an order will be made here dismissing appellee's bill, with costs.

Reversed.

(99 Va. 658)

HOUCK'S ADMR et al. v. KERFOOT'S ADMR et al.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

RES JUDICATA—INTERLOCUTORY DECREE—ADJUDICATION—CONCLUSIVENESS.

Where, in a suit for an accounting between the joint owners of real estate, various interlocutory decrees spoke of the owners as "partners," and the account as the "partnership account," the words being used indifferently, such decrees were not res judicata of the existence of a partnership in a subsequent suit.

Appeal from circuit court, Rockingham county.

Action by Andrew Houck's administrator, widow, and heirs against J. C. Woodson and others. From a decree declaring certain moneys subject to the liens of Dunham & Kerfoot, plaintiffs appeal. Affirmed.

John E. Roller, for appellants. Yancey & Haas, for appellees.

HARRISON, J. This cause was before us in 1895, the controversy then being as to the validity of the two judgments in favor of the firm of Dunham & Kerfoot, obtained in 1858, against Andrew Houck. These judgments were resisted upon the grounds (1) that they

were barred by the statute of limitations, and (2) because of the alleged laches of the creditor in prosecuting his claims.

These contentions were decided adversely to the appellants, and the decree of the lower court declaring both judgments to be valid and subsisting liens against the real estate of Andrew Houck, deceased, was affirmed. *Houck v. Dunham*, 92 Va. 211, 23 S. E. 238.

By decree of November 1, 1897, a fund of \$568, with interest from November 6, 1889, ascertained to be in the hands of John E. Roller, special receiver, was declared to be a real fund, arising from the rentals of the real estate of Andrew Houck, deceased, subject to the liens of the Dunham & Kerfoot judgments; and the special receiver was ordered to pay the same to the administrator of the surviving partner of that firm, after first deducting a fee of \$150 allowed counsel and the unpaid costs of the suits.

From this decree the cause is again before this court, the contention now being that the fund in question is not a real fund, that the real estate from which it arose was partnership property of Andrew Houck and Alfred Sprinkle, and the rentals thereof personalty, which should pass into the hands of the administrator of Andrew Houck, to be distributed in equal proportions to all of his creditors.

It appears that by deed dated April 8, 1855, George Miller and wife conveyed to Andrew Houck and Alfred Sprinkle two houses and lots in the town of Harrisonburg. The language of this deed is apt, and such as is usually employed to create in the grantees of a deed a joint ownership in the property conveyed. There is not a word used by the draftsman which suggests that the parties occupied or intended to assume the relation of partners; nor does it appear that a partnership of any kind existed between them either before or after the date of the deed in question.

There is no direct or affirmative proof tending to show an intention on the part of the grantors to hold these two houses and lots as partnership property, or to use the same for any partnership purpose.

It appears that in 1856 Andrew Houck conveyed all of his estate, including his interest in these houses and lots, to a trustee, for the benefit of his creditors. It further appears that Andrew Houck died about 40 years ago, that shortly thereafter Alfred Sprinkle died, and that their respective estates have since been continuously the subject of litigation. It appears that there are pending not less than five chancery suits for various purposes in connection with the settlement of these estates, and involving many questions of controversy. One or more of these causes involved a settlement of the accounts between Andrew Houck and Alfred Sprinkle, growing out of their joint ownership of the two houses and lots in question.

In the absence of other evidence to support the contention that this real estate was part-

nership property of a firm composed of Andrew Houck and Alfred Sprinkle, appellants rely upon certain recitals in the decrees and other proceedings had in the several chancery causes mentioned, and chiefly upon the proposition that the question is res adjudicata under the decrees of April 19, 1884, November 5, 1887, and October 28, 1889.

There was a settlement to be had between the estates of Andrew Houck and Alfred Sprinkle involving the purchase money paid by them, respectively, upon their joint purchase of the houses and lots, and the rents arising from the same. The several commissioners, in dealing with these matters, would speak of the firm of Houck & Sprinkle and the partnership accounts of Houck & Sprinkle, and the decrees, following the language of the commissioners, would use the same description; but it is apparent that this was done without reference to the technical meaning attached to the terms employed. The decrees and other proceedings frequently speak of Houck & Sprinkle as joint owners of the houses and lots, the terms "partners" and "joint owners" being sometimes indifferently used in the same decree.

The decrees relied on were interlocutory, and do not constitute an adjudication of the question that a partnership existed between Houck & Sprinkle with respect to their ownership of these houses and lots. The adjudication of a question is the deliberate action of the court upon that question. It is clear that no such question was ever considered by the court until the decree appealed from was entered.

The fund in controversy arose some years after the death of Andrew Houck, it being conceded that it represents his share of the rentals of the two houses for the two years beginning April 1, 1865, and ending April 1, 1867. The administrator of Andrew Houck could, therefore, have no interest in the fund. If any one could claim the fund as against the judgment lien creditor of Andrew Houck, it would be his widow and heirs, and, although they are parties to these proceedings, they are not here complaining.

There is no error in the decree appealed from to the prejudice of appellants, and it must be affirmed.

Affirmed.

(99 Va. 638)

VIRGINIA-CAROLINA RY. CO. v. BOOKER.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

EMINENT DOMAIN-RAILROADS-CONDEMNATION PROCEEDINGS-PERSONS ENTITLED TO COMPENSATION.

1. Where, pending the hearing of exceptions to the commissioners' allowance of compensation in condemnation proceedings by a railroad, the land was conveyed, the owners of the land at the time the commissioners' report was confirmed were entitled to compensation, and not

the owner at the time proceedings were commenced.

2. Where, pending the hearing of exceptions to the commissioners' allowance of compensation in condemnation proceedings by a railroad, the land was conveyed and partitioned, and after the partition the railroad company purchased the right of way across part of the land, on the company paying the sum allowed by the commissioners into court, and entering on the property on the confirmation of the report, it was error to allow the owners of the tracts over which the right of way was not purchased compensation from the fund in court in excess of the value and damage of their property.

Error from circuit court, Washington county.

Condemnation proceedings by the Virginia-Carolina Railway Company against W. O. Booker. From a judgment fixing the compensation to defendant, plaintiff brings error. Reversed.

White & Penn, for plaintiff in error. Daniel Trigg, for defendant in error.

CARDWELL, J. In the year 1888 the Abingdon Coal & Iron Railroad Company commenced proceedings in the county court of Washington county to condemn a right of way through certain lands of W. O. Booker. July 20, 1888, the commissioners appointed to ascertain what would be a just compensation for the land proposed to be taken and the damages to the residue of the tract reported that 5.99 acres of "cleared land" would be taken for the roadbed and right of way, which they valued at \$50 per acre, aggregating \$299.50, and that the damages to the residue of the "cleared land" would be \$750; that 13.68 acres of the "knob land" would be taken, of the value of \$2.50 per acre, aggregating \$34.20; and that the damage to the residue of the "knob land" would be \$250,—making the total damages assessed \$1,333.70. Exceptions were indorsed on the report by counsel for W. O. Booker on the ground that the damages assessed were inadequate, but no action was taken upon the exceptions or the report for nearly 12 years. In the summer of 1890, W. O. Booker contracted to sell his farm, through which the railroad's right of way was sought to be condemned, and on January 15, 1891, conveyed the same to the purchaser, the Litchfield Land Company. February 15, 1891, the Abingdon Coal & Iron Railroad Company entered upon the land, and began grading its roadbed, no objection being made by any one; but soon thereafter all work on the line of the road was discontinued, and the enterprise apparently abandoned. All of the property of the Abingdon Coal & Iron Railroad Company was sold under deeds of trust, and the purchasers organized the Virginia Western Coal & Iron Railroad Company, and by an act of the legislature approved March 1, 1893, the name of this new company was changed to Virginia-Carolina Railway Company. At the second December rules, 1897, of the circuit court of Washington county, certain stockholders of the Litchfield Land

Company filed a bill to have its real estate partitioned among its stockholders, and the charter of the company revoked and annulled. Accordingly, commissioners were appointed, the real estate partitioned, and by a decree of May 6, 1898, the report of the commissioners as to the partition of the real estate was confirmed, and the charter of the company revoked and annulled. In this partition all the "cleared lands" were given to H. C. Stuart and the widow and heirs of W. A. Stuart, deceased, and the "knob lands" to Mrs. C. P. Booker and T. P. Trigg and associates; Mrs. Booker having acquired the rights of her husband, W. O. Booker, in the lands. February 1, 1900, H. C. Stuart and the widow and heirs of W. A. Stuart, deceased, sold and conveyed to the Virginia-Carolina Railway Company the right of way for its railroad as located and graded through the lands partitioned to them, and on March 6, 1900, the Virginia-Carolina Railway Company paid into court the sum of \$1,333.70, the amount of damages ascertained by the commissioners in their report of July 20, 1888.

Additional exceptions on behalf of W. O. Booker were filed on April 18, 1900, to the commissioners' report, and when the case came on to be heard by consent of all parties in interest at the May term, 1900, of the county court, the matter was submitted to the judge of the county court for decision, subject to the right of appeal, but only two questions were raised and considered by the court, viz.: First, who is entitled to compensation, etc., for the "cleared lands" of the Booker farm taken by the Virginia-Carolina Railway Company for its purposes? and, second, what interest should be allowed upon the compensation, etc.? The county court, by its order made June 27, 1900, directed that one-third of the \$1,333.70 paid into court by the Virginia-Carolina Railway Company be paid to Mrs. C. P. Booker, with interest thereon from February 15, 1891, and that one-sixth of the \$1,333.70, with like interest, be paid T. O. Trigg and associates.

This judgment having been, upon a writ of error awarded the Virginia-Carolina Railway Company, affirmed by the circuit court of Washington county, it is before us for review upon a writ of error awarded by one of the judges of this court.

It is manifest that the order of the county court complained of is based upon the view that the fund paid into court by plaintiff in error belonged to the stockholders of the Litchfield Land Company in proportion to their respective holdings, and that they were entitled to their respective interests in this fund as of February 15, 1891, when the Abingdon Coal & Iron Railroad Company went upon the land and began grading its roadbed.

Nothing whatever is said in the deed from W. O. Booker to the Litchfield Land Company conveying the lands through which the railroad's right of way runs about compen-

sation for the land proposed to be taken as the railroad's right of way and damages to the residue of the tract; nor did the Litchfield Land Company ever treat this claim for damages as an asset of the company. The conveyance from Booker to the Litchfield Land Company is a simple conveyance of the land, without reference to compensation or damages by reason of the proposed railroad, and the partition of this land among the stockholders of the land company was made without reference to such compensation in damages.

Title to land condemned in Virginia for public purposes remains in the owner until judgment of the court in which the condemnation proceedings are pending confirming the report of commissioners as to damages assessed, and payment of the money to the party entitled or into court. Code Va. § 1083.

Where there are exceptions to the report, the party seeking to condemn the land may pay the money into court, and may thereupon enter into and construct its works upon and through that part of the land described in the commissioners' report. Section 1081, Code. But this gives the party condemning no title to the land until there is a final judgment of the court fixing the amount of compensation, and the payment of same to the party or parties entitled or into court. Section 1083, *Id.* Robinson v. Crenshaw, 84 Va. 348, 5 S. E. 222.

Arising, doubtless, out of diverse statutory provisions in the various states touching condemnation proceedings under the right of eminent domain, there is some conflict among the authorities as to party entitled to compensation, where there has been a sale of the locus in quo pending condemnation proceedings.

In discussing this question, Lewis, in his work on Eminent Domain (section 318), says: "The right to compensation is a personal claim, and, after it has once accrued, does not pass by a deed of the land. When land is occupied wrongfully, or by mere consent of the owner, express or implied, no right or title to the land so occupied passes, and a subsequent deed by the owner vests the entire estate in the grantee, and such grantee, in the absence of any reservation, is entitled to just compensation for the land so occupied. The grantor in such case, who has not consented to the occupation of his land, may recover for all damages sustained up to the time of the deed, to be estimated as in an action of trespass."

In section 627 this learned author further says: "Where a party, having power to acquire property for public use, enters upon and occupies property for the purpose of appropriating it to such use, without having complied with the law, a conveyance of the property pending such occupation will vest the right to compensation in the grantee, whether the entry was with or without consent. The authorities are by no means har-

monious upon this proposition, but it is supported by the greater number, and by the general rules which govern the acquisition of interests in real estate."

In *Carli v. Railroad Co.*, 16 Minn. 260 (Gil. 234),—a very similar case to this,—the court said: "If the proceedings to condemn the property were completed, and the company acquired the title to the easement or right of way over the locus in quo before the execution of the deed, Carli [grantee] would take the premises subject to the right of the company, and the damages would inure to the owner of the land at the time the right vested in the company; but, if the proceedings were not completed, but inchoate, and the company did not acquire title to the easement prior to the execution of the deed, the premises passed to Carli, and he became the owner, and the right to damages was in him as an incident to the ownership." See, also, *Meginnis v. Nunamaker*, 64 Pa. 374.

We have no case in Virginia adjudicating this precise question, but it clearly appears to be the policy of our statutes on the subject that, until the person or corporation entitled to acquire property for public use has so far progressed in condemnation proceedings, and against the will of the owner, to take immediate possession thereof, no right to compensation for the land proposed to be taken and for damages to the residue of the tract accrues to the owner; and his conveyance of the locus in quo, in the absence of any reservation, carries with it to the grantee the right of compensation for the land taken, etc., when there has been a confirmation of the report of commissioners, and payment to him or into court. As has been stated, there was no reservation in the conveyance of the locus in quo from W. O. Booker to the Litchfield Land Company of the right to compensation for the land proposed to be taken for the right of way of the Abingdon Coal & Iron Railroad Company, and at no time did the Litchfield Land Company treat this claim to compensation for the railroad's right of way as an asset, but submitted to a partition of its land among its stockholders without any reference to it whatever.

The right of way and roadbed were taken into consideration by the commissioners, and partitioned, as were other portions of the lands of the Litchfield Land Company. In doing this the commissioners doubtless equalized the rights of all parties concerned, giving to each that to which each was entitled. The "cleared lands" were allotted to the Stuarts, and the "knob lands" to Mrs. Booker and Trigg and associates, and this partition was acquiesced in by the parties, and confirmed by the court. By it the right of compensation for the land proposed to be taken for the railroad's right of way and for damages to the residue of the lands passed to the parties, respectively, as an incident of ownership of the lands partitioned to each; so that, when the condemnation proceedings

had so far progressed as to give to the plaintiff in error the right of immediate entry upon the land against the will of the owner, these parties to whom the lands had been partitioned became entitled, respectively, to the compensation fixed by the commissioners in their report of July 20, 1888. The Stuarts became entitled to the compensation for the "cleared lands" taken, and to the damages to the residue of the "cleared lands," and Mrs. Booker and T. P. Trigg and associates to the compensation for the "knob lands" taken, and to the damages to the residue of the "knob lands." Plaintiff in error having acquired by purchase from the Stuarts a right of way for its railroad through the "cleared lands," appellees were only entitled out of the fund paid into court March 6, 1900, by plaintiff in error, to the compensation fixed by the commissioners' report for the "knob lands" taken, and as the damages to the residue of the "knob lands."

The judgment complained of will therefore be reversed, and annulled, and the cause remanded, to be further proceeded with in accordance with this opinion.

Reversed.

(99 Va. 646)

TRAMMELL v. ASHWORTH.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

VENDOR AND PURCHASER—BOUNDARIES— MISREPRESENTATION—RESCISSIO —EVIDENCE—APPEAL.

1. Where a sale of real estate was set aside for the vendor's misrepresentation, and a decree entered that the notes given for the price should be rescinded, and the cause be referred to a commissioner to take the accounts rendered necessary by the decree, a motion to dismiss an appeal by the vendor from the decree, on the ground that the appeal bond was not executed within one year from the date of the decree, should be dismissed, inasmuch as the decree was not final in character.

2. Where a vendor of real estate stated to a vendee, prior to the sale, that the boundary line would fall a certain distance from the house, pointing out the place where it would be, and subsequently the vendor undertook to place a fence nearer the house than the line pointed out by him, when the vendee called his attention to the fact that it was not where he had said the line would be, and he then placed the fence where he pointed out the line, the latter location should be established as the true boundary line.

3. A vendee of a house and lot sued to set aside the sale thereof on the ground that the vendor had informed her, prior to the sale, that her boundary line would fall at a certain place, and that the vendor informed her that a chimney in the hall of the house was more than two feet distant from a partition wall, so that the partition might easily be moved two feet, and the hall be enlarged, both of which representations were false. *Held* that, inasmuch as the representations were of such character that the truth or falsity was apparent, no rescission should be allowed.

4. Where a vendee of a house and lot occupies the same for a considerable time after the purchase, she may not thereafter be allowed rescission of the contract on the ground of false representations by the vendee as to where the boundary line would fall, and the distance be-

self, payable to Haberfield. His writing Haberfield's name on the back of it gave it the false and fraudulent appearance of having been negotiated by Haberfield. It is not necessary to set out in what particular acts the forgery consisted, but all the ingredients of the offense must be set out with certainty and precision; and at common law the elements of it are writing, an evil intent, and a false making of such writing. 8 Am. & Eng. Enc. Law, 500, 501. To this the statute adds uttering, or attempting to employ as true, a forged writing, knowing it to be forged. All these requirements are met by the indictment, and the demurrer was properly overruled.

The alleged misconduct of the jury consists of a number of incidents or transactions, the most of which occurred on the 4th day of July, 1900, after the completion of the argument and retirement of the jury. Prior to that time there were some acts on the part of jurors about which complaint is made. W. O. Ewing says that on or about June 30th he saw two or three of the jurors leave the others, and pass into a cigar store or confectionery, owned by S. P. Hubbs, where they remained for a short time out of the custody and hearing of the officer in charge. Hubbs says two of them came into his store, and one purchased cigars, and the other chewing gum; that no other persons were in there at the time; that no conversation occurred between him and them except what was necessary to effect the sale of the articles mentioned; that the other jurors and the deputy sheriff in charge were outside, immediately in front of the storeroom door, and not more than three or four feet distant therefrom; that he and the jurors were in plain view of the remainder of the jurors and the deputy; and that on other occasions he made sales of tobacco to one or more of the jurors under the same circumstances. Charles C. Newman states that on a day prior to July 4th, and during the trial, he saw two of the jurors about 75 feet from the others on the street, and, in passing, one of them asked him if he was the person who was going to take them to dinner, to which he replied "No," and directed them to cross the street to where the others were standing. Juror Fox says he was one of the men referred to by Newman, and that the jury were passing up the street, he and his comrade being the last two in the column, and that as the jury crossed a certain avenue he and the juror with whom he was walking passed Mr. Newman, and said other juror said to him, "Hello, are you going to take us to dinner?" to which Newman replied, "Oh, I guess not." This affiant says he and the other juror were in the rear, but not apart from the main body of jurors. He does not remember the name of the other juror. Deputy Sheriff Kidder, who was then in charge of the jury, says that as they came out of the court-house yard two of the jurors were slightly in ad-

vance of the others and started quartering across towards Tomlinson avenue, possibly 25 feet, when he called to them that they were getting on the wrong side of the street, and they at once joined the main body. He admits the passing of remarks between one of them and Mr. Newman. It appears that during the afternoon of July 4th Deputy Kidder had six of the jurors at the camp ground until 5 o'clock, while the others were with Deputy Sheriff Bowman, who had them in the court-house yard from about 4 o'clock until 4:30, and after 7 o'clock all of the jurors were in the court-house yard, in charge of four deputies. Mrs. C. C. Burley says the jurors in the court-house yard on that afternoon were commingling indiscriminately with and talking to persons not jurors, in such manner that the officers could not have heard what was said, and on one occasion or more some of them walked to the fence, and talked to persons several minutes, in the absence of the officers, and out of their keeping. Jurors Lowery and Britt say that they and jurors Buzzard, Koontz, Culley, and Lyons were the only jurors in the court-house yard on that occasion. All of these except Koontz state in their affidavits that while they were there no person approached any juror, that the six jurors were not separated from each other, that they were not without the hearing or beyond the control and custody of the officer, and that none of them walked to the fence and held conversation with any one. Bowman and Koontz say nothing about what occurred there. On the evening of July 4th, while all the jurors were in the court-house yard, except Fox, whom one of the deputies took to the barber shop, it is said by G. C. Knight that Koontz and one other juror to him unknown separated themselves from the other jurors and the sheriff, and engaged in conversation with a person to the affiant unknown, for several minutes, and without the hearing of the sheriff. The other juror concerned in this was Culley. Koontz says that the man with whom they were talking was a Mr. Addis, and that while the jurors were sitting in a sort of circle about 15 or 20 feet back from the fence, Deputy Kidder in charge of them, he and Culley were sitting near the fence, and Addis came up, and was introduced by Culley to him, after which they spoke a few words about the weather and the crops, and affiant told Addis he was on a jury, and not permitted to talk, to which Addis replied, "All right," and walked off, and about that time Kidder called them back to the other jurors. Culley's statement of the incident is substantially the same. Kidder says he heard the conversation, and states it in substance as given by Koontz and Culley. Bowman says he was present, and saw Addis come up to the fence, and it looked as if he was about to begin a conversation, when Kidder, observing it, attracted the attention of Koontz and Culley, and they came back; but no conver-

sation occurred, for they were all within hearing, if any had occurred. Juror Boerner saw the three parties together at the fence, but does not know whether they were talking, for he was engaged at the time in conversation with some of his fellow jurors; but he saw one of the deputies close to them, and remembers that he called them back. He says they were not out of the hearing of the deputy, for the latter was close to them, and very near the fence himself. Others of the jurors who were there deny that they had any conversation with any person, and that they were separated from their fellows, or out of the hearing of the officers. Elmer Pratt, in an affidavit filed in rebuttal, says he saw a juror standing at the front fence of the court-house yard, talking to a man standing on the outside, and they were 60 feet or more away from the officer and other jurors, and he was closer to the persons talking than the officer, and could not hear what was said, and that the conversation lasted more than five minutes. He fails to state at what time of the day this occurred. O. A. Jenkins, on the morning of July 4th, saw Fox and one other juror separate themselves from the others and the officer, in front of a wagon shop on the street, and converse with persons unknown to affiant for a considerable time, at a point at least 200 yards distant from the officer and other jurors. As to this Kidder says Riggs took a step or two, as if to go in a direction different from that pursued by him, saying he wanted to get some cigars, but was called back by him before he had proceeded any considerable distance; that he remembers seeing no person closer to Riggs than 50 feet at that time. Juror Jones states the incident as given by Kidder, and says Riggs never spoke to any stranger at that time, and that he saw no person or persons there other than the jurors. Fox and Riggs, in a joint affidavit, state the circumstance as given by Kidder and Jones, and say they had no conversation there with anybody other than the jurors, and have no recollection of seeing any other persons near the wagon shop at that time. Jurors Lyons and Koontz state it as given by the other jurors and Kidder. Charles C. Newman says that on the morning of July 4th, as the jurors in charge of Bowman approached him on the street, one of the jurors walking in the rear stopped, and entered into conversation with a stranger; that the sheriff did not notice the occurrence until they reached the place where affiant was standing; that then he halted the other jurors, and waited until the conversation was finished; and that he could not hear the conversation, and is satisfied the officer did not, for the latter was further away from the juror than he was. The juror was Fox, and he says the conversation was about a business matter. He owed the man with whom he was talking, Mr. Arn, some money, and, after they had talked about it, Fox said, "I am on this case, and as soon

as I get off I'll fix it up," to which Arn replied, "That will be all right." He says he told Bowman they had been talking about a hay transaction; that the deputy and other jurors stopped as soon as the conversation began; that Bowman took a step or two towards him and Arn; that the conversation did not last more than a minute, and could have been heard by Bowman and the other jurors, as they were not more than eight or ten feet away, and the conversation was in such tone of voice that they could easily have heard every word, and that nothing was said in connection with the case. Arn states the incident as given by Fox, and says that nothing was said about the case, and he did not know at the time, nor until after his affidavit was taken, what case the jury were trying. Bowman says he heard every word of the conversation, and gives it substantially as stated by Fox and Arn. On the night of July 3d a fire occurred in Moundsville, and all of the jurors, in charge of Deputy Kidder, went to it. Kidder says he took them to a secluded corner of a yard surrounding a stable; that at the time there were but two other persons in the yard, and not a word passed between them and any of the jurors; that while there William Fitzsimmons came along, and asked Fox if the jury was through, and Fox replied that they had been adjourned over until Thursday morning, and Fitzsimmons went on; that the jury were kept together in a compact body, and later, other people coming in the vicinity, he took the jurors to a more secluded place, away from the crowd, and shortly afterwards took them to their boarding house; and that during the night there was no separation of the jury, and no conversation had with anybody except the few words spoken between Fitzsimmons and Fox. Fitzsimmons says he said to Fox, in substance, "How do you happen to be here, or are you through the case?" to which Fox replied, in substance: "No, we are not through. The case was given to us for a while to-night, but we found we could not quite agree, and we were adjourned over by the judge until Thursday." He says he then turned the conversation to the subject of the fire, and had spoken a word or two, when Kidder appeared, and called the jurors away to another place. He says Kidder, Fox, and the other jurors were at the fire, among the people who were gathered there. Fox says Fitzsimmons said to him, "How did the case go?" to which he replied, "We have not decided it yet," and then Kidder called them away to another place. This, he said, was all the conversation, and that the jurors were not among the crowd of people at the fire; that the deputy kept them in secluded places, and that they were not at the fire more than 20 or 30 minutes. The affidavit of Howard E. Fahnestock was taken and offered after the counter affidavits of the state had been filed, but the court refused to permit it to be filed, because

it was not in rebuttal, and was indefinite, mentioning no names nor date, nor showing affirmatively that no officer was present on the occasion referred to. His affidavit is, in substance, that one day before the 4th day of July, and during the trial of Cotts, he saw the jurors enter the court-house yard, and walk to about the center of the lot, and then two of the jurors, falling to find chairs there, walked away from the rest of them a distance of 75 or 80, or perhaps 100, feet, and out of the hearing of the rest of the panel, to the fence, where they picked up two chairs near the fence, and engaged in conversation with a party of four or five persons not belonging to the jury, and continued the conversation while he walked a considerable distance, which is not given in feet, or in any other way to reasonably indicate what it was.

At common law the rule requiring the jury to be kept together applied to civil as well as criminal cases, and was much more rigid and exacting than that now generally obtaining in felony cases. The reason of the rule was twofold. It was intended to prevent intemperance on the part of the jury, and accelerate the finding of a verdict; and to this end, unless permitted by the court, they could not have meat, drink, fire, or candle until they reached an agreement, and a violation of the rule in this respect was punishable by fine. The other purpose was to prevent them from having communication with any of the parties interested, and from receiving any fresh evidence in private, and any violation of the rule in these latter respects vitiated the verdict. 3 Bl. Comm. 376; 4 Bl. Comm. 361. Section 6 of chapter 159 of our Code provides that: "After a jury in a case of felony is impaneled and sworn, they should be kept together and furnished with suitable board and lodging by the sheriff or other officer until they agree upon a verdict or are discharged by the court." The law concerning the separation and misconduct of jurors in this state, as well as in others, is exhaustively reviewed in *State v. Cartwright*, 20 W. Va. 32, in which the opinion of the court was delivered by Judge Snyder, and the law, as enunciated in that case, has been adhered to in all cases subsequently decided by this court. In that case the court held that the mere separation of the jury, after they had been impaneled, without the attendance of the officer, or misconduct of the jury in the presence of the officer, though improper and irregular, is not a sufficient cause for setting aside the verdict; and especially in cases not capital, if the court is satisfied that the prisoner has sustained no injury from such separation or misconduct. But where there has been an improper separation or misbehavior of the jury during the trial, if the verdict is against the prisoner, he is entitled to the benefit of the presumption that the irregularity has been prejudicial to him, and the burden of proof is upon the

prosecution to show beyond a reasonable doubt that the prisoner has suffered no injury by reason of the separation or misbehavior; and, if the prosecution fails to do this, the verdict should be set aside. This is also held to be the law in *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799, and *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982. In *State v. Robinson*, 20 W. Va., at page 760, 43 Am. Rep. 799, Judge Johnson says: "The reason why the jury is required to be kept together, deprived of social intercourse, not even allowed to visit their families without the attendance of an officer, is because it is regarded to be absolutely necessary to the due administration of justice; that in a criminal trial, where a man's life or his liberty is committed to the keeping of a jury of his peers, it is right that they shall be kept absolutely free from all outside influence, which might prejudice his case with the jury, and do him injury." While it is important that the jurors, in the exercise of the grave duty intrusted to them, should keep their minds free from business and social intercourse to the end that they may the more carefully and effectually deliberate, it is clearly still more important and necessary, not only to the rights of the prisoner, but also to the dignity of, and maintenance of due respect for, the court and the administration of justice, that the jurors abstain, and be required to abstain, from doing any act, or putting themselves in any situation, which might prejudice the case they have under consideration; and for the doing of unnecessary acts, although not such as would warrant the setting aside of the verdict, but, nevertheless, of such character as clearly to excite suspicion or fear, and thus bring reproach upon the administration of justice, jurors so acting, and officers having charge of them, permitting such conduct, ought to be fined. A fair test of whether or not the act of a juror amounts to misconduct is whether it was a necessary act or the result of a mere accident or misapprehension. It cannot be said, and is not claimed, that there was any necessity for a division of the jury in this case on July 4th, when one half of them were taken to the camp ground and the other half to the court-house yard or elsewhere. Nor can it be said that it was necessary or accidental that these jurors were taken to view the fire. These acts were deliberate and voluntary on the part of both officers and jurors, for which they deserve to have been severely reprimanded by the court. It is just and fair to them, however, to say that clearly they intended no wrong, and their improper acts were accompanied by no evil intent. But they should have remembered that the law, as well as the instructions of the court, required the jurors to stay together, and the officers to keep them together, until they should agree upon a verdict, or be discharged by the court. It may be said that there can be no separation, within the legal meaning of the term, as long as the jurors

are in charge of officers. This may be true, but it is undoubtedly true that there may be misconduct on the part of both jurors and officers; and, if juries may be divided up and separated under the charge of several deputies, without any necessity therefor, it amounts to a practical evasion of the statute, and an open violation of the letter of the law, if not, indeed, the spirit of it as well. As to the other instances of alleged misconduct, it seems that the officers endeavored to do their duty, for in each case the officers warned the offending jurors, reminded them of their duty, and required them to desist, except, possibly, in one or two instances.

What has been said about the conduct of these officers and jurors must not be taken, however, to mean that there was such a separation or misconduct of the jury as to render the verdict vicious. To warrant the setting aside of the verdict, it is not enough, as we have seen, that there has been a mere separation of the jury, even without attendance of the officer, or that there has been misconduct of the jury in the presence of the officer. In the present state of the law, such separation or misconduct only raises a presumption in favor of the prisoner that the irregularity has been prejudicial to him, and throws upon the prosecution the burden of showing beyond a reasonable doubt that the prisoner has suffered no injury by reason of the separation. This rule is too firmly established in this state to be overthrown or departed from, and too well understood to permit any difference of opinion about it. Although in Pennsylvania, as appears from *Alexander v. Com.*, 105 Pa. 1, and in Missouri, as shown in *State v. Igo*, 21 Mo. 459, and in Iowa, as appears from *State v. Allen*, 39 Iowa, 52, and in South Carolina, as appears from *State v. Way*, 38 S. C. 347, 17 S. E. 39, different rules obtain. The law, as adhered to in this state, governs in New Hampshire, Wisconsin, Indiana, Arkansas, and some other states. *State v. Prescott*, 7 N. H. 287; *Keenan v. State*, 8 Wis. 132; *Creek v. State*, 24 Ind. 151; *Cornelius v. State*, 12 Ark. 610; *Stanton v. State*, 13 Ark. 319; *Coker v. State*, 20 Ark. 58. In *State v. Cartright*, supra, Judge Snyder holds this to be the proper rule as ascertained from the position generally taken by the American courts and the policy of the law. Another important principle, applicable to this and every other similar case, was settled in the *Cartright Case*, and that is that, while the testimony of jurors respecting their conduct should be received with great caution, they are, nevertheless, competent to disprove or explain any fact, misconduct, or irregularity to which they have been parties, and from which, without explanation, the presumption of the impurity of the verdict arises; but their testimony cannot be received to show by what motives they were actuated, or that any admitted fact, misconduct, or irregularity had no influence or effect in producing the verdict, nor to

impeach their verdict, but only in support of it. This rule was also followed in the cases of *State v. Robinson* and *State v. Harrison*, supra. This court has laid down no positive general rules concerning the conduct of jurors other than these two, but there is a sort of admission running through all of the cases that, if one or more jurors separate themselves from the others, but are attended by an officer, such fact does not amount to a separation of the jury in the legal significance of the term. In syllabus 3 of the *Cartright Case* the court uses this language: "A mere separation of the jury, after they have been impaneled, without the attendance of the officer." Hence the improper separation contemplated in the rule there laid down, and from which it is held that a presumption of the impurity of the verdict arises, is not a separation of jurors attended by an officer, but of jurors who are not so attended. In *State v. Robinson*, supra, the court, as shown by the syllabus and opinion, seem to have attached great weight to the fact that the two jurors who went into the water-closet, in which there were strangers, were not accompanied by the officer. In *State v. Hall*, 31 W. Va. 505, 7 S. E. 422, Judge Johnson says, at page 508, 31 W. Va., and page 423, 7 S. E.: "The preponderance of the affidavits clearly shows that the juror was at no time out of sight of his fellow jurymen, nor out of sight of the officer in charge, and spoke to no one. This was not a separation of the jury." From this the natural inference is that, if the officer had attended them, their action would not have been deemed a separation. In *State v. Harrison*, supra, the court evidently regards it as important that the sheriff went with the juror into the hall leading to the closet, and saw that no one was in the hall, satisfied himself that no one was in the closet, and, upon returning to bed, listened until the juror returned. If the purpose of keeping the jury together is only to keep them free from all outside influence which might prejudice the case of the prisoner, it would be immaterial whether the jurors are kept in a compact body or divided, each part being under the care of an officer, if the officer permitted no person to approach or communicate with the jurors under his care, nor permitted them to hear or see anything calculated to influence them in arriving at a verdict. Such a separation, if unnecessary, would be improper, as giving rise to suspicion and criticism, but not an improper separation within the meaning of the rule laid down by this court, such as would invalidate the verdict. In *McCaul's Case*, 1 Va. Cas. 271, Judge Nelson says one view of the subject was that the law required the jury to be kept entirely inaccessible, so that communication with them would be impossible; and that the other was that mere separation, unless it be proved that there has been some conversation or tampering with a member of the jury, shall not vitiate the verdict; but he said the

court was not called upon to decide between the two views, and would decide only whether the separation in that particular case should overthrow the verdict.

Proceeding now to consider, in the light of the foregoing principles, the specific acts complained of in this case, and giving credit to the testimony of the jurors and officers, it is found that the incident first mentioned by Mr. Newman was harmless, even if he is correct in all he says about it. The remark of the juror to him could not have influenced his verdict, although it was improper, as showing a want of decorum on the part of the juror. There is a preponderance of evidence in behalf of the prosecution as to the distance of these two jurors from the main body of jurors on that occasion, showing that Mr. Newman is probably in error as to the distance. The division of the jurors on the 4th day of July was an impropriety on the part of both jurors and officers, because it was useless, unnecessary, and violative of the law and instruction of the court; but it did not amount to an improper separation raising a presumption against the purity of the verdict. Notwithstanding the division, all the jurors remained in the care, custody, and charge of proper officers, and under the principles and precedents established by this court it did not constitute a separation of the jury. Nor was it such misbehavior as is likely to have affected the verdict to the prejudice of the prisoner, and therefore raise a presumption in his favor. But, if it were such misbehavior, the presumption is repelled and fully rebutted by the testimony of the jurors and officers, all of whom, with one or two exceptions, say that in neither of the parties of jurors did any of them hold any conversation that afternoon with strangers or persons not jurors. Nobody testifies that anything occurred at the camp ground which might have influenced the six jurors who went there, and all of them say they did not separate from each other, nor talk to anybody, nor go out of the hearing and custody of the officer. As to those who were at the court house, only Mrs. Burley, and possibly Pratt, testify to any misconduct. Against these two witnesses stand the affidavits of five of the six jurors who were there. The nature of the conversation had by Koonitz, Culley, and Addis at the fence in the evening is disclosed. Three witnesses give the conversation in full, and they agree as to what it was, and it was clearly of such character as could not have affected the verdict in any way. But for this explanation, however, the fact that the conversation took place between these parties would have necessitated the setting aside of the verdict, because the presumption would be that it was a conversation such as might have influenced the jurors. It made it necessary for the prosecution to show that it was not such a conversation. This has been shown beyond a reasonable doubt, and the verdict

cannot be set aside on account of this transaction. These observations apply also to the conversation between juror Fox and Mr. Arn. Even if it occurred out of the hearing of the officer, as is claimed by Mr. Newman, the conversation was harmless; but the act of the juror was improper, and, unexplained, would have been cause for setting the verdict aside. The presumption that anything occurred at the fire except the indiscreet remark of juror Fox to Fitzsimmons, even if the latter understood and remembered it correctly, is precluded by the testimony of Fox and Kidder. It is not claimed that any person other than Fitzsimmons spoke to any of the jurors on that occasion, and what he said to this juror was certainly harmless, and could not have influenced him one way or another in respect to the verdict. What he says Fox said to him, while improper and indecorous, if true, although in answer to a question, was clearly not, in any sense, the exercise of any outside influence upon him. It was the act of the juror himself, and not the act of some other person likely to have affected his verdict. The natural inclination being to answer a question propounded, it is quite probable that the disclosure of the attitude of the jury, if made, was merely a thoughtless remark, and free from any wrongful intent. As to what occurred at the cigar store, all of the testimony offered comes from persons who were not jurors, and the affidavit of Hubbs is more satisfactory than the other, for it states the transaction in detail, and gives the particulars of it, while the other is general. It is unnecessary to determine whether the jurors, while in the store, were out of the hearing of the officer, and therefore had separated themselves from the jury in the technical sense of that term, for it is made certain by the affidavit of Hubbs that nothing occurred in the store that could have influenced them in reference to the verdict. Against the testimony of Mr. Jenkins, the record shows the affidavits of the officer, the two jurors concerned, and three other jurors, making six persons, whose testimony gives the occurrence in front of the wagon shop an entirely different character from that given to it by Jenkins, thus showing that he must have been under a misapprehension as to what happened there. The affidavit of Fahnestock was properly excluded because of its indefiniteness. It should have shown who the jurors in question were, or to whom they talked, or when it occurred, so the prosecution could have had some fact by which to follow up, identify, and explain the fact or contradict the testimony. In *Cornelius v. State*, 12 Ark. 810, there was evidence that some of the jurors had been seen, during the trial, separated from their fellows, and walking in the street; but it did not appear who they were, and the court held that it should have been shown who they were, for without that information the

state could not have negated the presumption of influence.

It may be remarked, supplementarily, as applicable to at least two of the circumstances relied upon by the plaintiff in error as misconduct on the part of the jury, that this court has decided, in the case of *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, that a "mere business conversation by a juror with another person, entirely foreign to the case on trial, in the presence and hearing of the sheriff and other jurors, will not avoid the verdict"; but in the opinion the court characterizes it as reprehensible in a sheriff in charge of a jury to allow conversation or transaction of business between jurors and other persons. To some other incidents so relied upon the decision of the court in the case of *State v. Belknap*, 39 W. Va. 428, 19 S. E. 508, is applicable. It is held that: "If the court can see that the officers who had the jury in charge kept them together within the practical meaning of the rule, and have not spoken to them themselves, nor suffered any other person to speak to them, touching any matter relative to the trial, until they have returned again into court, that is sufficient, although it may be that in leaving the court house and returning they were separated somewhat more than is usual, and passed within hearing of persons talking on other subjects." Thus, applying the rule sanctioned by this court, allowing jurors to testify, within certain limits, in support of their verdict, and adhering to the law as heretofore established and followed in this state respecting the conduct of jurors as affecting the verdict, the conclusion is irresistible that the court below did not err in refusing to set aside the verdict and grant a new trial because of the alleged separation and misconduct of the jury. There is no error in the judgment, and it must be affirmed.

(49 W. Va. 709)

STATE v. CARTER.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

GRAND JURY—SPECIAL JUDGE—VACATING APPOINTMENT—DE FACTO OFFICER.

1. Section 3, c. 157, Code, requires all grand jurors to be drawn from the list and box prepared and preserved for the purpose in the manner provided by law, except that, when the grand jurors so drawn and summoned fail to attend, the court, under section 4, shall direct the sheriff to summon any qualified persons to serve as grand jurors, whether included in the prepared list or not.

2. The absence of a special judge, or his refusal to hold court when present, vacates his continuance in office, as well as the appearance of the regular judge, without an order to this effect; and the absence of the regular judge justifies the election of some other person to hold the court, when there is no other person present authorized or willing to do so.

3. A judgment given or an act done by any person by authority or color of any office is valid and binding, though it may afterwards be decided or adjudged that he was not law-

fully elected or appointed, or was disqualified to hold the office, or that the same had been forfeited or vacated.

(Syllabus by the Court.)

Error to circuit court, Kanawha county; Frank A. Guthrie, Judge.

George Carter was convicted of murder, and brings error. Affirmed.

J. W. Kennedy, A. C. Blair, and F. L. Beardsley, for plaintiff in error. R. H. Freer, Atty. Gen., and Alex Dulin, for the State.

DENT, J. George Carter obtained a writ of error to a judgment of the criminal court of Kanawha county sentencing him to death for murder. He relies specially on two grounds of error, as follows:

1. That the grand jury was improperly selected from the bystanders. Section 4, art. 3, Const., provides that "no person shall be held to answer for treason or other crime not cognizable by a justice, unless on presentment or indictment of a grand jury." Section 39, art. 6, Const., requires the legislature to provide by general law for the summoning and impanelling of grand juries. The legislature, to meet this requirement of the constitution, enacted chapter 157 of the Code. Section 2 provides the manner of preparing and preserving the jury lists, ballots, and box. Section 3 provides that "all grand jurors shall be selected by drawing ballots from said box in the manner prescribed in this chapter, and the persons whose names are written on the ballots so drawn shall be returned to serve as grand jurors." These three sections are mandatory on both the criminal and the circuit courts as to the manner in which the grand jurors shall be selected and summoned. Section 4 authorizes the court, when the grand jurors so selected and summoned fail to attend, to "direct the sheriff to forthwith summon as many others as may be necessary, whether their names are in such list or not, but who shall in other respects be qualified to act as grand jurors." This is the only instance in which the courts are authorized to omit the drawing from the prepared list and box. In such case the sheriff may summon qualified grand jurors from among the bystanders, sufficient to constitute a grand jury. The plea rejected in this case alleges that the grand jurors were selected from among the bystanders, but fails to show that there was not a necessity for so doing by reason of the nonattendance of jurors drawn according to the provision of the statute. It is fatally defective, and was properly rejected. But, if the plea did so allege, it would amount to nothing more than an allegation that such grand jurors were temporarily and technically disqualified from serving as such because not drawn from the box. Section 12 provides that "no presentment or indictment shall be quashed or abated on account of the incompetency or disqualification of any one or

more of the grand jurors who found the same." There is no pretense that the grand jury was fraudulently or corruptly impaneled to secure the indictment against the prisoner, or that they were not in all other respects fair, impartial, and qualified grand jurors.

2. That the judge who presided at the trial was improperly selected at a time when there was already a special judge to try the case. The record shows that on the 5th day of January, 1901, George W. McClintic was chosen to hold the court during the absence of the judge. On the 7th day of January, 1901, an order was entered rejecting the plea, and setting the case for trial January 9, 1901; but the record does not show who presided at this time, nor on any of the intervening dates from the 5th to the 9th, and the presumption must be that the regular judge did so. The appearance of the regular judge would vacate the office of the special without an order to that effect, and, if he was again absent on another day, a new election for a special judge would be necessary. The record does not show that George W. McClintic was a special judge, either de jure or de facto, on the 9th, when E. M. Keatly was selected, in the absence of the regular judge, to hold the court. The objection to him has no just foundation. When a special judge fails to attend, or, being present, declines to hold court when he should do so, he thereby vacates his office, except, possibly, as to any unfinished business in his hands; and another person may be selected to hold the court in lieu of the regular judge then absent. The election of a special judge is merely for the time being, or for the disposition of a particular case or cases. Section 15, c. 7, of the Code provides that "all judgments given and all acts done by any person by authority or color of any office, or the deputation thereof, under the restored government of Virginia or of this state before his removal therefrom, shall be valid, though it may afterwards be decided or adjudged that he was not lawfully elected or appointed or was disqualified to hold the office, or that the same had been forfeited or vacated." This provision is very broad, and renders any judgment of any person acting in good faith in color of office, without objection, valid and binding. It is for the protection of the public, and the due and proper administration of justice, and to prevent slight and capricious objections from interfering therewith after an otherwise fair hearing and trial of any matter has been had. It is, however, unnecessary to invoke this provision in this case for the reason that, so far as the record discloses, E. M. Keatly was duly and properly elected special judge.

The objection that the prisoner was not present on the 23d day of February, 1901, when a motion was made in his behalf before the regular judge to set aside the ver-

dict, is wholly untenable, as such judge had no jurisdiction to entertain or consider such a motion. The record shows that the special judge took the oath required by law. The word "law" includes both the constitution and the statute. The judgment is affirmed.

(49 W. Va. 453)

STATE v. CHILTON.

(Supreme Court of Appeals of West Virginia.
June 11, 1901.)

SECRETARY OF STATE—SALES OF STATE BOOKS—LIABILITY FOR PRICE—SALES ON CREDIT—PUBLIC OFFICERS—UNAUTHORIZED ACTS.

1. The secretary of state cannot sell the books of the state on credit, and, if he does, he is accountable for their proceeds as if sold for cash. But he is not responsible for those books deposited in lots with booksellers for sale on commission, unless he receives the money, or is chargeable with negligence in some way respecting them.

2. A practice, for some time prevalent in the office of the secretary of state, of selling state books on credit, gives no warrant for such credit sales.

3. An agent cannot sell on credit, unless so authorized by his power of attorney, or by the fixed usage of trade in reference to the article sold, and such usage cannot prevail contrary to such power of attorney or the law, and, moreover, such usage must be brought home to the knowledge of the person affected.

4. Acts of a private agent may bind the principal where they are within the apparent scope of his authority, but not so with a public officer, as the state is bound only by authority actually vested in the officer, and his powers are limited and defined by its laws.

5. A state is not bound by the unauthorized acts of public officers. Their misconduct is no estoppel against the state.

(Syllabus by the Court.)

Error to circuit court, Kanawha county; F. A. Guthrie, Judge.

Action by the state against William E. Chilton. Judgment for the state for a less amount than the sum claimed, and it brings error. Reversed.

E. P. Rucker, Ex Atty. Gen., and L. C. Anderson, for the State. Chilton, MacCorkle & Chilton, for defendant in error.

BRANNON, P. The state brought an action of debt upon the official bond given by William E. Chilton as secretary of state, charging that he had sold books of the state, and failed to account for their proceeds, to the amount of \$7,000, and had received taxes upon state seals amounting to \$3,000, and failed to account therefor. Chilton pleaded that he did not owe the sums alleged in the declaration. Chilton tendered \$6,490 as in full of his liability, which the state declined to accept. A jury was waived, and the case was tried by the court, and upon the evidence the court found that Chilton owed the state only the sum tendered, and rendered judgment for the state for the sum tendered, and the state brought the case to this court.

The bill of exceptions says that the state

"offered in evidence the report of W. E. Chilton, as secretary of state, showing that he had received, including interest thereon, on account of state seals, the sum of \$2,060.64, and on account of books which had been sold by W. E. Chilton the sum of \$4,429.42, including interest, which two sums, with interest thereon up to this date, as claimed by the plaintiff, amount to \$6,490.06; and thereupon the plaintiff offered evidence to prove that while said Chilton was secretary of state he had sold books to sundry persons, amounting to the sum of \$1,828, which said books so sold had been accounted for by the said Chilton as secretary of state, and the amounts of said sales had been charged on his books as secretary of state against persons to whom they had been sold, but that said Chilton had not received the money therefor. It is further proved that it has been the custom of the office of the secretary of state to sell books in this way to customers, and leave the accounts to be collected by subsequent secretaries of state; and that in making such sales of books on credit the said Chilton had followed the usual rule and custom, which had obtained for many years in the office of the secretary of state. And thereupon the state, by its attorney, contended that the amount of such sales, to wit, said sum of \$1,828, shall be paid to the state by the defendant, but the defendant maintained that he, having not received the money for said sales, was not chargeable with said sums, and the court decided and held that under the evidence and the law the defendant is not chargeable with the amount of said sales, the proceeds of which had not come into his hands, and thereupon decided and held that the true amount of the claim of the plaintiff against the defendant was said sum of \$6,490.06, to which ruling and action of the court the plaintiff objects and excepts, and prays that this, its bill of exceptions, be signed, sealed, and saved to it; which is accordingly done." The circuit court rejected this evidence offered by the state because the court was of opinion that by law the defendant was not chargeable with the amount of sales where he had not actually received the money. In this opinion we by no means concur. We hold that the secretary of state has no color of authority to sell state books on credit. If he does, he must account for the money as if he had received it. Under chapter 15, § 5, Code 1891, he may deposit with booksellers books in lots for sale on commission, and he is not accountable for them except for negligence causing loss to the state; but that is not a sale. It is not shown that such was the liability in this case. It is not shown, as it must be to exempt him from liability, that the books were put in the hands of booksellers as mere depositaries, as allowed by the statute. That is the only case where the secretary is not at once accountable where books go out of his custody. On

the contrary, it is shown that he sold to sundry and divers individuals, by single books, on credit. After making such provision as to deposit of books with booksellers for sale, the Code section closes with the following separate and additional provision: "The secretary may himself sell any of said reports. The proceeds of all sales shall immediately be paid into the treasury." What could more plainly require cash sales? This court cannot give legal sanction to loose practice in a public officer, inevitably resulting in loss to the treasury, where strict accountability is prescribed by statute as well as common law. Secretary Chilton may have, in so doing, followed in the steps of predecessors in office, and made no personal gain, and meant no wrong; but it was his mere personal favor to individuals, mere unauthorized credit to them, and fosters a practice that will inevitably end in loss to the state, as would be the case in this instance, as the fact that the books were to so large an amount unpaid for indicates very strongly that the accounts for them against individuals are uncollectible to a great extent. Whether they are solvent or insolvent accounts is no matter. The state is not bound to look to the purchasers of the books. It cannot be required to go into the various counties before justices to collect these small debts here and there over the state. The secretary let the books go from the state's possession, and must account for their prices. He cannot sell without cash payment. Who can construe this statute to mean anything else? Did the legislature mean anything else? Did it mean to let a secretary sell books all over the state, and compel the state to hunt up purchasers, or sue them before the justices? An agent of even an individual cannot sell on credit unless he has authority. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; 1 Am. & Eng. Enc. Law, 1014. Much less can a public officer agent, acting only under the statute. "Grants of power to public officers are usually subjected to strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied. Such an officer can create rights against the state or other public authority represented by him only while he is keeping strictly within the limits of his authority as so construed." *Mechem*, Pub. Off. 511. As to the force of an agent's act to bind his principal in favor of third persons, there is a marked distinction, from public policy, between a private agent and a public one. In the case of a private agent, his act for which the principal has apparently given authority is good; while in the case of the public agent the government is bound only by the authority it has actually given its officer. "This rule is indispensable to guard the public against loss and injury from the fraud, mistake, or rashness and indiscretion of their agents." *Story*, Ag. (9th Ed.) § 807a;

Mechem, Pub. Off. 512; *Mayor, etc., v. Eschbach*, 18 Md. 276; *Delafield v. State*, 26 Wend. 192. If the state is not bound to innocent third parties for the unwarranted act of an agent, how much less is it bound as between it and the agent himself.

But it is suggested that the secretary followed the practice of his predecessors in office. The books say that an agent cannot sell on credit without authority, unless such is the usage of trade. By this usage of trade the law means a particular thing. It means usage fixed in the commercial law, a usage recognized by it in what is known as "trade," not some instances of action by an agent, one public officer. That makes no usage of trade. But an all-sufficient answer to this point is that the statute means a cash sale only, and no usage can violate fixed provisions of a power of attorney or statute. *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; 1 Am. & Eng. Enc. Law, pp. 1001, 1062. Infinite authority exists for the law proposition that the powers and duties of all governmental officers "are limited and defined by laws," by statute where one exists, as in this case. It is the sole criterion of authority, and no custom can enlarge or vitiate it. *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169. This usage theory was assigned in the case just cited to bind the government to commercial paper accepted by the secretary of war, as it had been the custom for the secretary to make such acceptances; but the court repudiated the doctrine upon the fixed principle that such custom could not prevail against law. The court said that such unauthorized acts by an officer, however frequent, could not stand as a foundation for the authority assumed. Such a practice—I will not call it "custom or usage"—such a personal practice of individual secretaries cannot be upheld by this court, because contrary to the plain import of the statute, and calculated to encourage loose official practice, entailing loss on the state. There is no need or justification for it. Another reason against the recognition of this practice is that, to be good, even as to an individual principal, it must be brought home to the knowledge of that principal. *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686. How will you bring it home to the state? To what officer? To the governor or auditor? Surely not. To the secretary himself? A public officer cannot ratify expressly his own unauthorized act, and surely cannot do so by such mere implication. *State v. Hays*, 52 Mo. 578; *Delafield v. State*, 26 Wend. 192. Having no power to make credit sales, by his own knowledge that he did make them, neither he nor his predecessors could by that knowledge ratify the acts to protect themselves against the state demands. Estoppels do not generally bind a state; that is, estoppel by conduct of its officers. "Clearly, the state cannot be estopped by unauthorized acts of its officers." *Bigelow, Estop.* 341; *U. S. v. Kirkpatrick*, 9 Wheat. 735, 9 L. Ed. 199.

This is even true as to third parties, and more so as to officers themselves. Speaking of usage, it must, to be good, be a usage of trade connected with the sale of the particular article, one authorizing its sale on credit; but when the nature of the thing forbids credit you cannot justify it by usage, even if no statute forbade it. As in the case of *Delafield v. State*, just cited, it could not be contemplated that state bonds should be sold on credit, so it cannot be thought that the legislature intended to allow single books to be credited out over the state. *Story*, Ag. § 78. Upon these principles we are compelled to reverse the judgment, set aside the circuit court's finding for the defendant, and remand the case for retrial, with direction to admit the said evidence, as it constitutes, in the opinion of this court, ample ground of recovery by the state, and for further proceedings according to the principles of law above stated.

DENT, J. (concurring). There is not the slightest evidence offered in this case tending to show loss to the state through Mr. Chilton having followed the usual custom of his office in extending temporary credit to the state's customers. The sole question seems to be whether the present secretary of state should receive the state's money from the state's customers to the relief of his predecessor, or whether Mr. Chilton should be required to pay over the same in the first instance, and look to such customers for reimbursement. Had there not been a change of political administration, the former course would have been, no doubt, pursued, for it is much easier not to extend customary courtesies to our political opponents than our political friends, especially if the exigencies of politics appear to require a public exhibition of strict and unbending adherence to law broken in its letter, though without apparent detriment or loss. If Mr. Chilton extended credit alone to responsible persons, neither he nor the state can lose anything thereby. If he extended credit to irresponsible persons, he must bear the loss. For this reason I concur in the reversal of this case, that there may be a full investigation, and the loss, if any, may be placed where it ultimately belongs, without further litigation.

(61 S. C. 448)

RIGGS v. HOME MUT. FIRE PROTECTION ASS'N OF SOUTH CAROLINA.

(Supreme Court of South Carolina. Aug. 22, 1901.)

PLEADING—DEMURRER—PRACTICE—INSURANCE—ACCORD AND SATISFACTION—RELEASE—FRAUD.

1. It is a sufficient compliance with Cir. Ct. Rule 18 (33 S. E. viii.) declaring that when a demurrer is interposed, the ground on which it is made must be reduced to writing by the counsel submitting the same, or taken down by the ste-

nographer under the direction of the court, to serve a written demurrer stating that the complaint does not state facts sufficient to constitute a cause of action, and then to submit at the hearing the specific grounds of objection in writing.

2. Where assured accepts from an insurance company less than the amount called for by the policy in satisfaction of a loss, he cannot thereafter sue the company for the balance under the policy without repaying or offering to the company the amount so paid, though he alleges the amount was accepted by reason of the fraud and false representations of defendant's agent.

3. The doctrine that payment in part of the amount due on a contract at or after maturity does not operate as satisfaction of the whole does not apply to an unliquidated loss under an open insurance policy.

Appeal from common pleas circuit court of Dorchester county; Watts, Judge.

Action by O. R. Riggs against the Home Mutual Fire Protection Association of South Carolina. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The following is a copy of the complaint:

"The plaintiff above named, complaining of the defendant above named, alleges: (1) That the defendant at the times hereinafter mentioned was, and now is, a corporation duly created under and by virtue of the laws of the state of South Carolina, and as such can sue and be sued, plead and be impleaded, in the courts of this state and the United States. (2) That by virtue of the authority granted it through its charter and the by-laws formed for the governance of its business, the defendant is empowered to insure against damage or loss by fire the buildings and contents of the buildings of its members. (3) That on the — day of —, A. D. 1896, plaintiff applied for and was admitted into the membership of and obtained insurance against loss by fire upon his stock of general merchandise in his storehouse in Ridgeville, state and county aforesaid, to the amount of \$1,500, in said defendant's corporation, in consideration of payment by plaintiff of the regular membership fee and premium charged upon said amount of insurance; and on the — day of —, A. D. 1897, the plaintiff obtained additional insurance upon said stock to the amount of \$500 in said defendant corporation in consideration of payment by plaintiff of the premium charged upon said amount of insurance; and the defendant, by its agent, duly authorized thereto, made its policies of insurance, in writing, for said amounts, and thereby insured the plaintiff against loss or damage by fire to the amount of \$2,000 of his said stock of general merchandise. (4) That at the time of making said insurance, and from then until the fire hereinafter mentioned, the plaintiff had an interest in the property insured, as owner thereof, to an amount greatly exceeding the amount of said insurance. (5) That on the 27th day of November, 1897, said storehouse and said stock of general merchandise were totally destroyed by fire,

which did not happen from any of the causes excepted in said policies of insurance. (6) That the plaintiff duly fulfilled his obligations as a member of said association and all the conditions of said insurance policies, and in accordance with their requirements gave to the defendant due notice and proof of the fire and loss aforesaid, and duly demanded payment of the said sum of \$2,000. (7) That at the times hereinbefore and hereinafter mentioned, Thos. F. Harmon was the general agent of said defendant. (8) That on or about the 15th day of January, 1898, the said Thos. F. Harmon, general agent of the defendant, offered to pay to this plaintiff, in satisfaction of the amount due on said policies of insurance, the sum of \$1,000, wantonly, maliciously, and with intent to defraud, falsely representing to this plaintiff that the said defendant was insolvent, stating that the said defendant would be forced to go into the hands of a receiver should the plaintiff persist in demanding the payment of the full amount due him by said defendant, and that, should a receiver be appointed for the said defendant, the plaintiff would not realize ten cents on the dollar for his claim. (9) That the plaintiff, on account of the said false representations and statements, and for no other reason, agreed to receive in settlement of the said sum of \$2,000, due him by said defendant, the sum of \$1,000, and did, in accordance with such agreement, receive from said defendant the sum of \$1,000 in satisfaction of the full amount due him, and delivered up the said policies of insurance to the said Thos. F. Harmon to be canceled. (10) That plaintiff is informed and believes, and so avers, on information and belief, that the defendant was at the time of the aforesaid settlement, and is now, solvent. Wherefore plaintiff demands judgment against said defendant: First, for the sum of \$1,000, with interest at the rate of seven per cent. per annum from the 15th day of January, 1898; second, for the costs and disbursements of this action; third, for such other and further relief as may be just."

The defendant filed the following demurrer: "The defendant demurs to the complaint herein on the ground that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action against this defendant." The demurrer was sustained on circuit by the following order: "This case comes on for hearing on the demurrer of the defendant that the complaint does not state facts sufficient to constitute a cause of action against the defendant. The defendant bases the demurrer on the following grounds: (1) That it appears on the face of the complaint that the plaintiff's claim against the defendant had been paid and discharged before the commencement of this action. (2) That it does not appear from the complaint that the plaintiff had rescinded the contract under which he received payment and satisfaction of his

claim against the defendant, and had returned or offered to return to the defendant the \$1,000 received by him from the defendant in payment and satisfaction of his said claim before the commencement of this action. (3) That the plaintiff cannot maintain this action, because it does not appear that he had returned or tendered to the defendant the sum of \$1,000, paid to the plaintiff by the defendant, and accepted by the plaintiff in satisfaction and discharge of his claim, before the commencement of this action. After hearing argument by counsel for plaintiff and defendant, I have concluded that the demurrer should be sustained on the three grounds set out above. It is therefore ordered that the demurrer of the defendant be sustained, and that the complaint be dismissed."

Plaintiff appealed on following exceptions: "You will please take notice that, in pursuance of our 'notice of intention to appeal,' herein heretofore served upon you, we herewith submit the following 'exceptions' to the order of Hon. R. C. Watts, made on May 23, 1900, and will move the supreme court at its next sitting to reverse and set aside such order upon the grounds set out in such 'exceptions': (1) Because it is respectfully submitted that the presiding judge erred in not holding and deciding that the demurrer interposed by the defendant was too general and indefinite, it failing to set out wherein such complaint did not state facts sufficient to constitute a cause of action. (2) Because the presiding judge erred in not holding and deciding that the complaint herein was upon the original contract of insurance, and as such set out facts sufficient to constitute a cause of action. (3) Because the presiding judge erred in not holding and deciding that, as the complaint set out the original contract, the receipt of a less sum than that contracted for thereby, and a release obtained by fraud, it did set out facts sufficient to constitute a cause of action. (4) Because the presiding judge erred in not holding and deciding that the release set out in the complaint was not a new and original contract between plaintiff and defendant, and that no rescission thereof is necessary if the same be a nullity, and therefore need not be alleged. (5) Because the presiding judge erred in not holding and deciding that it is not necessary that a creditor who claims under an admitted contract for a greater liquidated sum, and who takes in composition a lesser sum, should pay back the sum received before bringing suit, and that it was therefore not necessary to allege the same. (6) Because the presiding judge erred in holding and deciding that it appeared on the face of the complaint that the plaintiff's claim had been paid and discharged before the commencement of this action, and in sustaining on such ground the demurrer herein."

Bellinger & Behre, for appellant. Mower & Bynum, for respondent.

McIVER, C. J. This is an appeal from an order sustaining a demurrer to the complaint, based upon the ground that it does not state facts sufficient to constitute a cause of action. The "case" contains the following statement: "A demurrer was interposed as set out in the 'case,' and duly served on plaintiff's attorneys, who returned the same the next day, with the following indorsement: 'Returned because demurrer does not state wherein the complaint is insufficient,' signed by plaintiff's attorneys." The case was heard by his honor, Judge Watts, on the 23d day of May, 1900, "at which time the three grounds of demurrer were presented in written form." The judge ruled that the demurrer was in proper form, and he made an order sustaining the demurrer, from which plaintiff appeals on the several grounds set out in the record. For a proper understanding of the questions presented by this appeal, copies of the following papers as set out in the record should be incorporated by the reporter in his report of the case, to wit, the complaint, the demurrer, the order of the circuit judge, and the exceptions thereto.

The first exception raises a question of practice, which will first be disposed of. Prior to the comparatively recent amendment to rule 18 (33 S. E. viii.) of the circuit court, it was not necessary to make any statement in writing when a demurrer was interposed to a complaint upon the ground that the facts stated therein were not sufficient to constitute a cause of action, and the effect of that amendment was simply to require the demurrant to state, in writing, "wherein the pleading objected to is insufficient"; but the rule, as amended, does not state, in express terms, when this must be done, though the language used necessarily implies that it may be done at the hearing below,—“the grounds upon which said motion is made must be reduced to writing by the counsel submitting the same, or taken down by the stenographer under the direction of the court.” This language shows clearly that, if the grounds are reduced to writing at the hearing, either by the counsel or the stenographer, that will be sufficient; and this, as we understand, has been the uniform practice ever since the rule was amended. This is what was done in the present case, as is shown by the fact that the grounds are incorporated in the order from which this appeal was taken. And as the object of the amendment was to make it appear to this court what points were considered and passed upon by the court below, we think that the requirements have been fully met in this case. The first exception is therefore overruled.

The other exceptions need not be considered seriatim, as they substantially raise the single question whether a person holding two policies of insurance, such as those described in the complaint, amounting in the aggregate to the sum of \$2,000, can, after receiv-

ing the sum of \$1,000 in satisfaction of the full amount, and delivering up to the agent of the insurance company the said policies of insurance to be canceled, in pursuance of an agreement to that effect, maintain an action upon the said policies, without first paying back or tendering to the insurance company the amount so received by him under said agreement, even though he alleges that he was induced to enter into such agreement and to carry out its terms by the fraud and false representations of the agent of the insurance company. This question has been conclusively determined adversely to the view contended for by appellant by the decision of this court in the recent case of *Levister v. Railway Co.*, 58 S. C. 508, 35 S. E. 207, where this court held that one who has sustained injuries by the alleged negligence of a railway company, and, for a valuable consideration, has released the company from all liability therefor, cannot maintain an action for damages sustained without first returning, or offering to return, the consideration so received, even though he alleges that such release was obtained by fraud. It is true, as contended for by counsel for appellant, that in the case cited the action was *ex delicto*, while here it is *ex contractu*; but it is an entire mistake to suppose that this court either said or implied that the rule there laid down applied only to cases of tort, and not to cases *ex contractu*. On the contrary, this court, after laying down the fundamental principle based upon the plainest principles of justice and fair dealing,—that it would be fraud to allow a person, after executing a release of all claims against another in consideration of a sum of money paid to him, to repudiate the obligations which he assumed by executing the release, and at the same time retain the benefits which he received by executing the release,—and after stating that the authorities elsewhere are in conflict, proceeds to cite our own case of *McCorkle v. Doby*, 1 Stro. 396, 47 Am. Dec. 560, which was an action *ex contractu*, and not an action *ex delicto*, and to quote therefrom as follows: "It is generally affirmed, as a rule, that fraud avoids all contracts; but it would be more correct to say fraud makes all contracts voidable, for it is at the option of the party to be affected by the fraud whether or not he will treat the contract as void and rescind it. The right to rescind, however, is subject to this restriction: that if, after the discovery of the fraud, one party still avails himself of the benefit of the contract, or permits the other to proceed with the execution of it, he will thereby be held to have waived the tort and affirmed the contract,"—citing the case of *Campbell v. Fleming*, 1 Adol. & E. 40, which was a case *ex contractu*. It is quite clear, therefore, that there is no foundation whatever for the assumption that this court, in *Levister's Case* recognized any such distinction as that contend-

ed for by counsel for appellant, but that, on the contrary, the decision in that case was based upon a fundamental principle founded in the plainest principles of justice, and alike applicable to cases *ex contractu* as well as cases *ex delicto*.

Some of the exceptions make the point that under the old rule, established as far back as Lord Coke's time, in *Pinnel's Case*, 5 Coke, 117, the payment of a less sum than the whole amount due, at maturity or afterwards, cannot be a satisfaction of the debt. That rule has been the subject of much comment, and dissatisfaction with it has been expressed by several judges. But in this state it has been expressly recognized in several cases. *Eve v. Mosely*, 2 Stro. 203; *Hope v. Johnston*, 11 Rich. 135, and others; and must still be recognized by us, if it is applicable to the present case, though in one of our cases (*Bolt v. Dawkins*, 16 S. C., at page 214) it is spoken of as "an artificial rule, which has no foundation in reason, and ought not to be extended." But this ancient rule has been modified in several respects, as may be seen by consulting the notes to the case of *Cumber v. Wane*, 1 Smith, Lead. Cas. marg. p. 357, and the note appended to the case of *Hope v. Johnston*, supra, by that accomplished reporter and learned lawyer the late James S. G. Richardson. The modification to which we desire to call special attention (if, indeed, it can be properly termed a modification) is that it is now well settled that it applies only to liquidated debts, and has no application to unliquidated claims; and this, it seems to us, is implied by the very terms of the rule, for, if the claim is unliquidated, it cannot be known with any certainty what is the amount really due, whereas, if the claim has been liquidated by the agreement of the parties, there can be no dispute as to the amount really due at the time of the making of the contract. Thus, in the first volume of that valuable work now in the course of publication, *Cyclopedia of Law and Procedure*, at page 329, in an article prepared by that distinguished text writer Judge Seymour D. Thompson, it is said: "Where a claim is unliquidated, or in dispute, payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction, as the rule that the receiving of a part of the debt due under an agreement that the same shall be in full satisfaction is no bar to an action to recover the balance does not apply where the plaintiff's claim is disputed or unliquidated,"—citing a number of cases, among which is *Baird v. U. S.*, 96 U. S. 430, 24 L. Ed. 703, in which the late Chief Justice Waite, in delivering the opinion of the court, says: "It is, no doubt, true that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole, unless made and accepted upon some new consideration; but it is equally true that, where the debt is unliquidated, and the amount is uncertain, this

rule does not apply. In such cases the question is whether the payment was in fact made and accepted in satisfaction." So that the only remaining inquiry is whether the plaintiff's claim was liquidated or unliquidated. If it was the latter,—as we think it was,—then the plaintiff cannot invoke the rule first considered; for, as we have seen, it does not apply to such a case. The precise nature of the policies sued upon does not appear, as copies of the policies are not set out as exhibits to the complaint, as is usually done, for the obvious reason that he alleges in his complaint that upon the payment of the sum of \$1,000, which he agreed to receive in full satisfaction of his claim, he delivered up the said policies of insurance to the agent of the insurance company to be canceled, and it is but reasonable to assume that they were canceled. We can only determine, therefore, whether these policies were "open policies," which are most commonly used, or "valued policies," by an inspection of the terms in which they are described in the complaint; and we do not find there a single allegation which would impart to these policies the character of valued policies, but, on the contrary, they appear to have been open policies, such as are ordinarily in use. For the difference between these two kinds of policies, see 13 Am. & Eng. Enc. Law (2d Ed.) at page 102 et seq. It is there said that by an "open" policy "the amount of liability is left 'open,' to be determined according to the actual loss, either by agreement of the parties, or upon proof in compliance with its terms, or with the rules of evidence." Whereas "a 'valued' policy is one in which the amount payable in case of loss is fixed by the terms of the policy itself, as where property is insured, valued at, or 'worth' a specified amount." And on the next page, in speaking of the "test of valued policy," it is said: "While the words 'valued at,' etc., are generally used in such a policy, any language disclosing the intent of the parties that proof shall be required of the value of the property in case of loss is sufficient to constitute a valued policy." Now, the allegations of the complaint, so far from showing that these policies contain any such language, rather implies the contrary; for it is alleged in the sixth paragraph of the complaint that the plaintiff gave to the defendant "due notice and proof of the fire and loss," as required by said policies. It is clear, therefore, that the allegations of the complaint fail to show that these policies were "valued" policies, or were anything more than the usual "open" policies. It follows, therefore, that the claim of the plaintiff, as shown by his complaint, was nothing more than an unliquidated claim, the amount of which had never been adjusted or ascertained either by the agreement of the parties or otherwise; and hence the ancient rule, derived from Pinnel's Case, has no application to this case. While, therefore, the allegations of the complaint may be suffi-

cient to show that the plaintiff once had a good cause of action against the defendant, yet as it shows also that such claim has been fully satisfied and discharged, by agreement between the parties, just about two years before this action was commenced, there was no error in sustaining the demurrer. The judgment of this court is that the order and judgment of the circuit court be affirmed.

(51 S. C. 426)

PHILLIPS et al. v. YON et al.

(Supreme Court of South Carolina. Aug. 20, 1901.)

GUARDIAN AND WARD—PURCHASE OF LAND BY WARD—PAYMENT THEREFOR—EVIDENCE—ACCOUNTING—ESTOPPEL—FRAUD—LACHES.

1. Real estate belonging to an intestate was sold, and purchased by the guardian of certain of the heirs. The record of the guardianship was destroyed during the Civil War, and the guardian testified in a suit by the wards to compel him to account that he paid for the land with his own Confederate money, but Confederate money was not in circulation in that locality at the time of the alleged payment, and the officer to whom he claimed to have made the payment was absent at the time. The guardian's testimony as to the terms and time of the sale was contradicted by other evidence, and he was shown to have made admissions that he had paid for the land by receipting for the interest of his wards in the proceeds of the sale. The condition of the estate was such that the wards were entitled to the proceeds of the sale of such lands. *Held* sufficient to show that the lands were acquired with the interest of the wards in the father's estate, and not by the money of the guardian.

2. A judgment is admissible to prove a collateral fact as against parties who were not parties to such judgment.

3. A guardian purchased lands belonging to the deceased father of his wards in his own name, and paid for the same by receipting for the purchase price as funds belonging to his ward. Thereafter the wards were parties in proceedings to marshal the assets of the father's estate for the payment of debts, and they failed to call the court's attention to the fact that the guardian was in possession of such lands, though lands set apart to the wife of the deceased as her distributive share and all the estate's assets were applied to the payment of testator's debts. *Held*, that a court of equity would not interfere after a long lapse of time to compel the guardian to account for the purchase money of such lands.

Pope, J., dissenting.

Appeal from common pleas circuit court of Orangeburg county; Townsend, Judge.

Suit by Minerva O. Phillips and others against Benjamin A. Yon and others to compel the said Yon to account as guardian. From a judgment in favor of defendants, plaintiffs and defendant children of Paul D. Jeffcoat appeal. Affirmed.

Izlar Bros. and J. A. Muller, for appellants. Raysor & Summers, J. Wm. Thurmond, and Samuel Dibble, for respondents.

GARY, A. J. The record contains the statement that this action was commenced by the plaintiffs on the 25th day of November, 1896, against Benjamin A. Yon, as

guardian of the plaintiffs Minerva C. Phillips, Frances A. Corbett, Allen U. Jeffcoat, and of their brother, Paul D. Jeffcoat, who died before the commencement of this action. The widow and adult children of Paul D. Jeffcoat, deceased, are made parties plaintiff, and the minor children are made defendants. After the commencement of the action the defendant Benjamin A. Yon died, leaving of force his last will and testament, which was duly admitted to probate, and Ollin C. Salley and Holly J. Salley, the executors therein named, qualified, and are now such executors. The summons and complaint of the plaintiffs were thereupon amended, and said executors and the widow, Anna M. Yon, and Benjamin T. Yon, the only child of the testator, were all made parties defendant, and the action was continued as though these persons had been original parties. The executors filed to the amended complaint substantially the answer filed by the said Benjamin A. Yon. The widow, Anna M. Yon, and also the child, Benjamin T. Yon, answered the amended complaint. The latter, being an infant, answered by his guardian ad litem, filing a formal infant's answer. On notice served by the attorneys representing Benjamin A. Yon, his testimony was taken de bene esse. The special referee, Anrew C. Dibble, after a general statement of the case, finds the facts and reports his conclusions of law as follows:

"During the early part of 1860, Benjamin A. Yon was duly appointed the guardian of the persons and estates of the plaintiffs Minerva C. Phillips (then Minerva C. Jeffcoat), Frances A. Corbett (then Frances A. Jeffcoat), and Allen U. Jeffcoat, and also of Paul D. and Samuel B. Jeffcoat, all of whom were then minor children of Urbane E. Jeffcoat, who died about the year 1858; and upon such appointment the said Yon duly qualified as such guardian, and assumed the management of the estates of said minors. The proceedings bearing upon the said guardianship were destroyed with the public records at the time of the raid of Sherman's army through this state in 1865, and it has, therefore, been necessary to resort to other methods of proof concerning the guardianship. That the appointment was in the early part of 1860 is evidenced by the fact that Minerva C., who was the eldest of the children, was a month or two over 14 years old at the time, and she was 14 in January, 1860. It would seem also that the appointment was made by the court of equity, in which at the time a suit was pending for a partition of the lands of the said Urbane E. Jeffcoat, and in which suit was also necessarily involved a complete settlement of all the affairs of the estate of said Urbane E. Jeffcoat. This was not an unusual proceeding for that court, which had the jurisdiction to appoint guardians for minors in cases before it; and in this particular case Charles B.

Glover, Esq., the office clerk of the commissioner in equity, mentions significantly the occasion when 'we desired to fix the amount of the bond of the guardian of the children of Jeffcoat.' Besides this, the only return made by Yon, as guardian, since the war, was made to the commissioner in equity in 1866, and from his own testimony it appears that his impression was that he was appointed by the court of equity.

"The next question to be determined is as to what assets or property, if any, came into the hands of the said guardian as a part of the estate of his said wards; or, to push the inquiry further, were there any assets or property which he did not receive for his said wards because of failure on his part to exercise proper diligence in their behalf? These inquiries will not, at present, touch upon that branch of the case which concerns the real estate bid off by Yon at the sale of the lands of the estate of Urbane E. Jeffcoat, the father of said wards, as it is deemed better to consider the questions made respecting the said real estate separately. It will be remembered that at the time of his assuming the guardianship the estate of Urbane E. Jeffcoat, the only source from which it is contended that his wards were to receive property, was in course of settlement in a case then pending in the court of equity, and that this case had not been concluded, nor had all the debts been paid, at the close of the war in 1865. The personal property of the estate in the hands of the administrator, though large, and exceeding \$13,000, was insufficient to pay the debts of the deceased intestate, and this fact was known by the administrator, and was set up by him in said suit; and under these circumstances it is not probable that he would have paid any of the funds in his hands or delivered any of the property of the estate to the guardian, for in the suit then pending it was necessary that he should account for his administration, and an improper disposition of any of the assets in his hands would not have been sustained. I think, therefore, that it is clear that nothing was paid by Livingston, the administrator, to the guardian, Yon, for his wards. Nor is there any evidence that Yon was paid any of the cash received by the commissioner on the sales made by him of the real estate. Nor, under the circumstances, should Yon be blamed or held accountable in any way for losses of assets belonging to the estate of Jeffcoat by either the administrator or commissioner in equity, for the court of equity had assumed the control and settlement of the affairs pertaining to the property of the estate, and the guardian could only await the action of that tribunal, and receive what it should direct be paid to him for his wards.

"And now as to real estate bid off by Benjamin A. Yon at the sale had by the commissioner in equity under the orders of the court in the case above alluded to for the partition

of the real estate of Urbane E. Jeffcoat and the settlement of his estate. As to this land, it is claimed by the plaintiffs that Benjamin A. Yon purchased the property and took title therefor in his own name, and paid the purchase price by receipting to the commissioner for the same upon the distributive shares of his wards. Yon admits his purchase of the property in question, and that he received title thereto in his own name, but contends that he complied with the terms of sale by paying the cash payment from his own funds, and giving bond and mortgage to secure the credit portion, which he also afterwards paid with his own money. He is inaccurate, however, as to many of the details of the transaction. A portion of the lands was sold in April, 1860, and a part in July of the same year. He says that he bought at the first sale. It is conclusively shown that it was the last (in July) when he purchased. He says the terms of sale were one-half cash, and the balance on 12 months' time, whereas the best evidence we have as to this is the bond of Edward Argoe, taken at the same sale, and which, in connection with Argoe's testimony in the case of Dibble, Adm'r, v. Holman, Adm'r, et al., shows that his purchase at the sale amounted to \$3,400, and he paid in complying with his bid about \$251, to pay expenses of sale and papers, and gave his bond and mortgage and personal security for the balance, which amounted to \$3,163.96, which was payable in three equal annual installments payable on January 2d of the years 1861, 1862, and 1863, respectively. This is the only testimony which we have as to the terms of sale for the July sales outside of the statement of Yon above mentioned, and there has been no explanation given why Yon should be required to pay one-half cash, and give bond payable in one year thereafter, while Argoe complied with the terms of the same sale by paying cash sufficient to pay expenses of sale and papers, and giving bond and mortgage, with personal security, for the balance, payable in one, two, and three years. The terms of the sales in the same case in April were one-third cash, and the balance in one and two years, and it is not strange that in July they should be easier for purchasers; but it is inconceivable that the decree of the court should provide different terms of sale for the two tracts bid off by Argoe and Yon, respectively, on the same sales day. And it would seem that, if Argoe and Yon were dealing with the commissioner upon the same footing in respect to the parcels respectively bid off by them, they would have both been treated the same. Certainly, the commissioner would not have discriminated so heavily against Yon, who had an interest in the sale by reason of his guardianship of the minor children of Urbane E. Jeffcoat. But Yon insists that he paid \$500 in cash, and gave his bond and mortgage for the balance, which he further says that he paid in about one year to the com-

missioner, Jamison, himself, in Confederate money. This, it will be observed, was not even a compliance with the terms of the sales in April, when Yon claims he made his purchase. But it is proven that Confederate money was not in circulation until September, 1861, and not in general use until 1862; and the testimony also show that at the time he claims to have paid his bond and mortgage to Col. Jamison the latter was in Virginia, and the office was in charge of Mr. Glover, his clerk; and Mr. Glover says that he does not remember seeing any Confederate money until 1862, and his impression is that he received no Confederate money while acting as clerk for the commissioner; and, further, that he attended to the general business of the commissioner's office for Col. Jamison in 1860, and a part of 1861,—up to November, 1861,—and during the summer of 1861 he had entire control of the office, Col. Jamison being absent in Virginia.

"It will not be out of place just here to notice the letter of Col. Jamison, the commissioner, which has been admitted in evidence, for it touches upon some of the matters bearing upon the sales made by him of the lands of estate of Urbane E. Jeffcoat, or, more properly speaking, the securities taken by him at such sales; and it is claimed that this letter corroborates some of the points of Yon's testimony. But, in the light of the evidence of Mr. Glover, the office clerk of the commissioner, which bears upon the same matter, and who was probably more familiar with the details than the commissioner himself, as well as the testimony of Daniel Livingston, the administrator, that no money was paid to him by the commissioner, and also the testimony of Bean touching the payment of his bond, which could not have been settled in Confederate money when it was paid, in March, 1861, for no Confederate money had been then issued, it is evident that Col. Jamison is mistaken in many of the particulars stated by him as facts; and, to read the letter as a whole, it seems clear that he was only giving impressions of a memory which he states himself is very bad, and of matters which, in the main, it appears, had been managed by his office clerk, Mr. Glover, and not by himself. But there are other circumstances which the evidence discloses which bear upon Yon's purchase now under consideration. The sales were had under a decree of the court of equity in the case of A. E. Gleaton and Wife v. Paul Jeffcoat and Others. The bill in this case was filed January 16, 1860, and it was for partition, as we learn from the deed of the commissioner to Yon. The case, as we have seen, was for a division of the lands of Urbane E. Jeffcoat, deceased. The administrator of his estate, Daniel Livingston, was made a party, and answered, and it was made to appear that the personal estate, though large, was insufficient to pay debts. A portion of the real estate of intestate—three

tracts—was sold in April, 1860; and the other lands,—two tracts,—excepting 263 acres set off to the widow, were sold July 2, 1860. Previous to the July sales, the said 263 acres was allotted to the widow, Julia F. Gleaton, at an appraisement of \$2 per acre, made by commissioners. The administrator, Daniel Livingston, says, 'It was then expected that she would get some money besides from the sale of the lands or to equalize her share; that the widow's share was for her thirds after the debts were paid.' The widow went into the possession of this land set off to her, and it was not sold under any decree in that cause. It was also believed, at the time of the sales of the lands, that it would take about \$2,000 to settle the debts which would not be paid by the personal estate. The sales of real estate in April, 1860, amounted to \$1,795, and those in the July following to \$4,405. With this showing as to the condition of the estate at that time, it is not strange that the court should authorize the widow to receive real estate to the amount of only \$528 upon her distributive share; and, having done this for her, it was only just and equitable that the decree should provide for the children of the intestate, from the sales of the real estate, at least a sufficient sum to give them their shares upon a like basis, as to amount, as hers; and when it is remembered that the parties were in a court of equity, there can scarcely be any doubt that such a provision was made in favor of the Jeffcoat children. And with this condition of affairs it is easy to understand how Yon, whose bid was \$1,005, and within the amount his wards were to receive from the real estate sales to equalize them with their mother, should, instead of drawing the cash from the commissioner, receipt to him for the amount as guardian of the said wards. But, in addition to the circumstances above stated, there is the testimony of several witnesses as to statements and declarations of Yon, made by him at different times, and which bear upon the nature of his purchase of the land in question. It is not necessary to go into the details of this testimony here. To sum them up, these statements and declarations were to the effect that he settled for the land in question by receipting to one Jamison for it; that it belonged to the Jeffcoat heirs; that he could not sell it, and make a good title to it; that, if the Jeffcoat children pressed him for the land, they would recover it. These witnesses, it may be noted, were of ordinary intelligence, and some of them could not write their names; but, when their evidence is considered together with the other circumstances of the case, I am forced to the conclusion that Yon did comply with his purchase of the 364-acre tract, in dispute in this case, by giving his receipt, as guardian, to the commissioner, Jamison, for the amount of his bid, and that he did not pay for the lands with his own funds.

"The public records of Orangeburg district

(now this county) having been destroyed or lost at the time of the Sherman raid through this state in February, 1865, it does not appear that further proceedings, if any, were had in the above-mentioned case of Gleaton v. Jeffcoat, after the sales of the commissioner in 1860. The widow of Urbane E. Jeffcoat, who had, previous to the war, intermarried with Absalom E. Gleaton, who united with her in filing the bill in that case, continued to occupy the 263 acres which had been allotted to her, as has been heretofore stated, and the close of the war found her still in the possession of this land. The administrator, Daniel Livingston, having gone into bankruptcy in 1867, surrendered his administration of the estate of Urbane E. Jeffcoat, and thereupon his assignee in bankruptcy, Philander V. Dibble, was duly appointed and qualified as the administrator de bonis non of said estate; and on August 9, 1869, the said Philander V. Dibble, as such administrator, filed a bill on the equity side of the court of common pleas for this county against Elias O. Holman, administrator of Casper Staley, who claimed to be an outstanding creditor of said estate, and Daniel Livingston, the former administrator, and the said Absalom E. Gleaton and his wife, the widow of the said intestate, and the children of the said intestate, for the marshaling of the assets of said intestate's estate, and an accounting from the said Daniel Livingston of his administration, to call in creditors, and for general relief. The proceedings in this case show that the estate at this time was wholly insolvent, but one cannot read the record without being strongly impressed with the view that this condition was the result of the war. Under the decree of the court in this case, the land which had been allotted to the widow in the case of Gleaton v. Jeffcoat, in 1860, was ordered sold, and the proceeds were applied to debts. The securities taken by the commissioner in that case on the sales of real estate in 1860 were also collected as far as practicable, and the amount realized paid to creditors; but there was no question made in this case of Dibble v. Holman as to the purchase of Benjamin A. Yon, or as to any amounts or property received by him as the guardian of the children of Urbane E. Jeffcoat. In 1866, Yon made a return as guardian of the Jeffcoat children, as has been noticed before in this report. This return was made to the commissioner in equity, and was for 1865, and reported no receipts, and only payments to the commissioner for his fees for taking the return. Yon made no return after this, as he was advised by the probate judge that it was not necessary. He did not remember whether or not he made returns during the war. He claims, however, that he paid out considerable sums for the education and maintenance of his wards, and that he also paid for his appointment as guardian,—all from his own funds; but he has not made any statement whatever

of the amounts. On the other hand, the testimony shows that the children were maintained and supported by their stepfather and their mother, and that they received very little education, and in two instances, at least, this was paid for by their mother in bacon and corn. One of the before-mentioned wards of the said Benjamin A. Yon, Samuel B. Jeffcoat, died when he was about 15 years old, intestate, and left surviving him as the heirs at law and distributees of his estate his mother, the before-named Julia F. Gleaton, and his brothers and sisters hereinbefore mentioned. Julia F. Gleaton is also dead, and left surviving her her husband, Absalom E. Gleaton, and her children Minerva O. Phillips, Frances A. Corbett, and Allen U. and Paul D. Jeffcoat. The said Absalom E. Gleaton is also dead, but the testimony does not state who are his heirs and distributees. Another of the wards of the said Benjamin A. Yon, and also one of the heirs at law and distributees of said Julia F. Gleaton, as well as of Samuel B. Jeffcoat, his brother, namely, Paul D. Jeffcoat, died May 1, 1896, intestate, leaving surviving him as the heirs at law and distributees of his estate his widow, Bartine H. Jeffcoat, and fourteen children, namely, * * * and Lee D. Jeffcoat, the last-named of whom died on May 5, 1895, when an infant; and all the others of said children, excepting the four first named, are minors. It does not appear that there has been any administration upon the estate of any of the deceased parties above named. In September, 1896, the aforesaid Benjamin A. Yon departed this life, leaving of force his last will and testament and as the devisees of his estate thereunder his widow, Anna M. Yon, and his son, Benjamin T. Yon, who is a minor. His said will was duly admitted to probate in the probate court of this county on September 16, 1896, when Olin C. Salley and Holly J. Salley, named therein as executors, duly qualified as such, and are still such executors.

"Upon the facts above set forth, my conclusions are:

"(1) That, the purchase price of the 364-acre tract described in the complaint having been paid by Benjamin A. Yon, receipting as guardian for his wards, the children of Urbane E. Jeffcoat, deceased, for the amount of his bid on the distributive shares of his wards, the said real estate thereupon became impressed with a trust in favor of his said wards. *Richardson v. Day*, 20 S. C. 418; 9 Am. & Eng. Enc. Law, 148; 10 Am. & Eng. Enc. Law, 35, 41, 42.

"(2) The contention that the estate of Urbane E. Jeffcoat was insolvent at the time of the sale of the land does not, as we have seen, conform to the facts of the case, and can have nothing to do with the questions now at issue. Nor did the case of *Dibble v. Holman* settle any of the questions involved in this case. Yon was not a party to that suit, nor was the matter of his guard-

ianship, or the land which he purchased, in any way involved in that action.

"(3) The question, then, is, are the parties now complaining in this suit barred from setting up this resulting trust, which originated in their favor at the time Yon took his conveyance from the commissioner in equity, in 1860? This suit was not commenced until 1896, and it does appear that the parties have been rather tardy in instituting proceedings to assert their rights in this particular. While courts are very indulgent to parties sustaining the relation which these wards did to Yon, in matters of this kind, there must be shown some good reason for such a long delay as has been in this case, before they will sustain and enforce the resulting trust. 10 Am. & Eng. Enc. Law, 50; *Billings v. Clinton*, 8 S. C. 90.

"(4) There can be no doubt, however, under the circumstances of this case, that Yon's estate should be held accountable for the \$1,005, as assets of his wards' estates, of which he got the benefit when he receipted to the commissioner in equity for the same, and that said amount is chargeable against him as received by him at the time of the sale. *O'Neill v. Herbert*, Dud. Eq. 30. He has never been discharged from the guardianship, and lapse of time is no barrier to an accountability. *Nobles v. Hogg*, 36 S. C. 327-329, 15 S. E. 359; *Perry, Trusts*, § 863.

"(5) There should, therefore, be a judgment in this action against the defendants Olin C. Salley and Holly J. Salley, as executors of the estate of said Benjamin A. Yon, deceased, for the shares of the parties before the court and interested in the said \$1,005, and interest thereon. The only payment which is established by the testimony is the \$5 paid by Yon for his return made in 1866, and this should be allowed. As the guardian appropriated the estates of his wards to his own use, and expended none of it for the benefit of his wards, and has failed to file his returns regularly, he should be allowed no commissions; and the interest charged every year necessarily compounds. The said \$1,005, with interest added, and deducting the \$5 payment, now amounts to \$13,094.73. The plaintiffs Minerva C. Phillips, Frances A. Corbett, and Allen U. Jeffcoat are each entitled to a judgment for $\frac{1}{150}$ of this amount, or \$3,229.73, and the estate of Paul D. Jeffcoat, deceased, is entitled to a like amount, to be divided among his heirs at law and distributees according to their rights and interests therein; the widow, Bartine H. Jeffcoat, being entitled to one-third thereof, and the children of said deceased to the remaining two-thirds thereof, to be divided among them equally. As to the share of Paul D. Jeffcoat, deceased, as there has been no administration upon his estate, it may be well to have the same, or such amount as may be collected thereon, paid into court, that his creditors, if any, may be called and heard before a distribu-

tion of this fund is made. The estate of Absalom E. Gleaton is entitled to the other $\frac{2}{150}$ of the \$1,005, and interest, but his representatives are not before the court to receive it.

"(6) The costs of the action should be paid by the defendants Ollin C. Salley and Holly J. Salley, executors as aforesaid, and judgment entered accordingly."

The decree of the presiding judge (omitting that part which recites the facts heretofore set forth) is as follows:

"The special referee has so well stated the names of the parties, and their relations to each other, and the nature of the contention between them, that it has only been necessary for me to state them briefly; and he has made an able report, but I cannot agree with him as to many of his findings of fact, and especially as to his finding on the main point of the case, which is whether Benjamin A. Yon paid for the land in controversy with his own money or receipted for it as guardian. Yon claims that he paid for it with Confederate money of his own during the war, and the adverse claimants contend that he receipted for it as guardian. The special referee finds that Yon receipted for this land as guardian, and bases his conclusion partly, as I understand his reasoning, on a conjecture that the court of equity, in *Gleaton v. Jeffcoat*, probably allowed Yon, as guardian, to receipt for the land, and allowed the widow to have 263 acres set apart to her, supposing that the condition of the estate warranted it; and partly on another conclusion,—that there was no Confederate money to pay for the land at the time, and, even if there had been, the commissioner was not in his office to receive it, but in Virginia, and his clerk cannot recollect even receiving any Confederate money about the time when Yon says he paid the Confederate money; and partly on another conclusion,—that Yon did not purchase at the first sale, as he contended, but at the second sale; and partly on the testimony of certain witnesses who testified that Yon told them at sundry times that he receipted for the land as guardian. From this the special referee concludes that Yon did receipt for the land as guardian. After a careful consideration of the facts, I am forced to a different conclusion. The reasoning by the special referee is very fine and ingenious, and is the exponent of an able intellect, and if the same reasoning were applied to facts, instead of conjectures, the result would be well supported; but such is not the case. As I see it, one supposed fact is reasoned into existence, and then another supposed fact is reasoned into existence and put along with the first one, and so on to the end. Then the alleged admissions and declarations of Yon are called in to conclude the whole matter. To my mind, these alleged admissions are about all the claimants have to stand on, and, aside from the fact that such testimony

is not favored by a court, the alleged admissions in this case are properly subject to much adverse criticism. In the first place, Yon never did mention anything of the kind to his intimate friends, but only to such persons as were akin or very friendly to the claimants, and not very well disposed towards himself. In the next place, he is alleged to have volunteered this information to these people, sometimes in connection with business,—as, for instance, in a land trade,—but invariably in a way which, according to the witnesses, would indicate that he rather preferred than not to make it known to them. And in at least one instance he is said to have made this declaration after he had been sued in this case, and had sworn to the contrary in his answer. Then, again, it seems to me strange that all this occurred so long after the purchase, which was in 1860, and all these conversations are alleged to have taken place in 1895, or about that time, except one with Richard Peel, which is said to have occurred in 1875. From 1860 to 1875 was fifteen years of silence on Yon's part; from 1875 to 1895, there were twenty years of silence. Then he talked very freely, according to the parties, and very soon afterwards this action was commenced. I noticed from the date of his examination that Yon's testimony was taken in 1896, before any of these witnesses were sworn in the case, and he died before they were examined. As to this kind of testimony, the court, in *Billings v. Clinton*, 6 S. C. 102, uses this language: 'Although parol testimony is admitted to establish a trust thus resulting, nevertheless, to divest one of a legal title, and confer it on another, it will not avail, unless it is clearly sufficient for the proposed end. Testimony which, while it may induce doubt, does not satisfy the mind of the actual existence of the fact necessary to establish such trust, will not be enough. The payment of the purchase money on which the claim depends must not be made out by conjecture, but by circumstances which show the fact. If they are loose and equivocal, they will not suffice. See *Lewin, Trusts*, 206; *Hill, Trusts*, 94; *Sugd. Vend.* 174.' The court then continues: 'Conceding to the witnesses who testify to the declarations of Minor the fullest credibility, testimony of that character is not favored by the courts. Mr. Sugden says: "• • • When the evidence is merely parol, it will be received with great caution. Evidence of naked declarations made by the purchaser himself is, as Sir William Grant observed, in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of a declaration." ' Thus far I have considered almost exclusively the testimony of the claimants, which, in my opinion, makes at most a very doubtful case; too

doubtful to produce conviction. On the other hand, the defendants introduce the direct testimony of Yon that he did not receipt for the land, but paid for it with his own money, and explains how he raised the money by selling a tract of land to one Salley. Then there is the evidence furnished in *Dibble v. Holman*. That case was supplemental to the case of *Gleaton v. Jeffcoat*. Both of these actions were brought to settle up the estate of U. E. Jeffcoat. In the case of *Dibble v. Holman* a very searching investigation was made, and all matters unsettled were considered and adjudicated. The administrator of U. E. Jeffcoat, Mr. Livingston, was examined as a witness concerning his estate. Argoe, a purchaser of real estate, was examined, and testified concerning the purchase of the land in dispute by Yon, giving number of acres, and amount of bid by Yon. Jamison, the commissioner, was written to and responded, mentioning specifically that B. A. Yon paid for his land in full. Charles B. Glover, the clerk of the commissioner, was the referee in *Dibble v. Holman*, and made the report in the case. There was certainly a full opportunity in that proceeding for a thorough examination of all matters relating to U. E. Jeffcoat's estate, and I am convinced that everything was fully investigated. The land which had been set apart to the widow in the case of *Gleaton v. Jeffcoat* was taken and sold; and if Yon, in that case, had been allowed to receipt as guardian for his wards, under the supposition that there would be that much going to the wards, then, notwithstanding the receipt, when the court ascertained that the estate was insolvent, and would need that tract also to pay debts, it would have treated it as it did the widow's. This was impossible, however, if Yon did as he testified that he did, to wit, paid the bid with his own money; and we find that this tract was not interfered with. Yon himself was not overlooked, because he was surety for the widow, and was sued, and that appeared in *Dibble v. Holman*. Nor was his purchase overlooked, because Argoe testified about it as a witness before the referee, C. B. Glover. In this connection it must be borne in mind that this case of *Dibble v. Holman* was instituted not quite ten years after the purchase of Yon, when all these transactions were fresh in the minds of all the parties; and, further, that the same persons who are claimants in this action were parties to that action. The court in that case adjudged that the widow was entitled to one-third, and the children (the claimants here) to two-thirds, after the debts were paid. If the children had received \$1,000, no such order could have been made, after selling the widow's 263 acres, as the court did in that case. Having taken away and sold the widow's land, the court would first have made up her share in proportion, and then have distributed the balance one-third to the widow and two-thirds to the

children. I am therefore forced to the conclusion that Yon's indebtedness to the estate, and whether he received anything on account of his wards, was actually examined into and considered. Besides, B. A. Yon, after the war, at one time made an annual return as guardian to the commissioner in equity, covering several years. The report is in the handwriting of Commissioner Jamison, and is sworn to by B. A. Yon. This was during the existence of the court of equity as a separate court, and during the pendency of *Gleaton v. Jeffcoat*, the assets of which were then in charge of the commissioner. The commissioner prepared the report, showing no receipts or expenditures on account of his wards,—a return the commissioner could not have made had Yon been in receipt of the purchase money for the land, and chargeable with the interest thereon. I am therefore of the opinion that B. A. Yon paid for the purchase of the land in question with his own money, and that he did not at any time receive anything on account of his wards; and it is so ordered, adjudged, and decreed. It is further ordered, adjudged, and decreed that the complaint herein be dismissed, and that the plaintiffs, and those of the defendants who joined with them, pay the costs of this action."

The principal question of fact that was in issue is whether Benjamin A. Yon paid the purchase money of the land which he bought in July, 1860, by receipting to the commissioner in equity for the distributive shares of his wards to that extent. It seems to have been the general impression when the lands were sold in 1860 that the proceeds arising therefrom would be more than sufficient to pay the debts, and that a considerable sum would remain for distribution between the widow and children of Urbane E. Jeffcoat. Acting on this belief, the administrator, Daniel Livingston, made advancements in behalf of the estate in excess of its assets, and a tract of land was allotted to the widow as a part of her share in the estate. It is but reasonable to suppose that Benjamin A. Yon and the commissioner entertained the same belief. These and other circumstances, which we do not deem it necessary to mention, in view of the elaborate and well-considered report of the special master, force upon us the conclusion that his finding upon this fact should have been sustained.

We will next consider the effect of the judgment hereinbefore mentioned. In his decree the presiding judge thus states the history of the case in which it was rendered: "In 1859 or in 1860, Absalom E. Gleaton, and Julia, his wife, filed a bill in the court of equity against the children of the intestate for partition of the lands of the estate, making the administrator, Daniel Livingston, a party, who answered, alleging that the personal assets, amounting to some \$13,000, were insufficient to pay the debts of the

estate. * * * After the war the estate of U. E. Jeffcoat was still unsettled, and the administrator, Daniel Livingston, became a bankrupt on his own petition, and retired from the administration, claiming to have expended more than the personal assets of U. E. Jeffcoat in paying his liabilities, having expected reimbursement from the real estate. P. V. Dibble was appointed his assignee in bankruptcy, and also took out letters of administration *de bonis non* of the estate of Urbane E. Jeffcoat, of which he claimed to be a creditor as assignee in bankruptcy of Livingston; and in the year of 1869, as such administrator and assignee, filed a supplemental bill to settle the estate of Urbane E. Jeffcoat, making Holman, a creditor, and the distributees, and the late administrator, Daniel Livingston, parties to the suit. In that case the estate assets were marshaled, the remaining tract of 263 acres of land was sold, and the proceeds, with such sums as were realized from collections by suit of the unsettled bonds and mortgages of purchasers of land, and of some of the sale notes of personal property, were applied to the payment of the creditors of the intestate. The final judgment in the case of *Dibble v. Holman* provided that, after creditors had been paid, if there should be any surplus, it should be distributed one-third to the widow, Julia Gleaton, and two-thirds to the guardian of the children, who were still minors. But the assets were insufficient to pay even the specialty creditors, who received only a small percentage of their claims as proved." There are also other statements in that part of the decree heretofore set out which relate to the settlement of said estate. We do not deem it necessary to discuss the proposition argued by the appellant's attorneys, that the proceedings to marshal the assets and settle the estate of Urbane E. Jeffcoat were in rem, and that the judgment was *res judicata* as to all persons having an interest in the settlement of the estate, though not formally made parties to the record. Even if Benjamin A. Yon should be regarded as a stranger to the proceedings, the judgment was nevertheless admissible in evidence for certain purposes. In 7 Am. & Eng. Enc. Law (1st Ed.) 76, it is said: "All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue, or is, or is deemed to be, relevant to the issue." The court, in *Koogler v. Huffman*, 1 McCord, 495, thus states the rule: "In the argument below, it was contended that the decree and proceedings in the court of equity ought not to be given in evidence, because the defendant was not a party to them; and the general doctrine that judgments cannot be given in evidence, except between parties and privies, was relied on. As to this form of objection, the law is

clear, upon any collateral matter, any judgment or decree may be introduced. All that is meant by the rule is that the rights of a party cannot be determined on conclusively unless he be a party,"—citing *Phillips*, 226; *Gilbert*, 54; *Bull. N. P.* 244; 2 *Esp.* 457.

The children of Urbane E. Jeffcoat, of whom Benjamin A. Yon had been appointed guardian, were made parties to the proceedings to marshal the assets and settle the estate of their deceased father. Some of the children were *sui juris* when the estate was settled. They had notice of the report of C. B. Glover, referee, in which he says: "The proceeds of the bonds and mortgages of the purchasers of said real estate and the tract of land on which the widow now resides constitute the present assets of the estate. * * * The complainant has accounted to me as administrator *de bonis non*, and has in hands as such a cash balance on the 1st day of April, A. D. 1871, of \$781.06, and securities and investments amounting, with such cash balance, to about \$2,100, and these constitute the present assets of the estate. The accounts of the two administrators and a statement of the assets accompany this report. Under the orders of the court calling in creditors of the estate by advertisement, the following claims have been duly proven against the estate of the said Urbane E. Jeffcoat, deceased, viz.: * * * Under the head of 'first, preferred claims,' they amount to \$300; under the head of 'second, specialty claims,' they amount to \$5,673.25; and under the head of 'third, simple-contract claims,' they amount to \$581.92." They also had notice of the decree of the circuit court confirming the said report, and of the order of the court "that the complainant, P. V. Dibble, do pay over to the clerk of this court the sum of \$781.06, and turn over to him also the securities reported in this case as assets of said estate, and that he be then discharged from any other or further accounting for his administration of the estate of the said Urbane E. Jeffcoat, deceased." They had notice, likewise, of what was apparent upon the face of the proceedings, that the estate was hopelessly insolvent. Under the terms of the decree they knew that they were not entitled to any portion of the proceeds arising from the sale of the property until the debts were paid in full, or the assets exhausted in such payment. They either knew, or by the exercise of due diligence could have known, that Benjamin A. Yon bought one of the tracts of land at public outcry, and they either knew, or by exercising due diligence could have known, what became of the proceeds. It should have excited inquiry that the bond and mortgage of Benjamin A. Yon was not reported among the assets of the estate. It should likewise have aroused inquiry as to what had become of the proceeds, when one of the specialty claims reported by the master was that o

P. V. Dibble, assignee in bankruptcy of D. Livingston, former administrator, for balance due on moneys expended for the estate in excess of receipts amounting to \$3,315.30. Under these circumstances it was the duty of the children to have brought to the attention of the court that there were outstanding assets, which, in justice and equity, were first applicable to the payment of the debts. Whether the failure to discharge such duty arose from intention or negligence, it was, nevertheless, an act of wrong. They are now seeking through the aid of a court of equity to have applied to their claims against their guardian assets of the estate to which in morals and equity they have no right. They would thus be taking advantage of their own wrong. This court does not decide that Benjamin A. Yon or his estate has a better right to the money for which he receipted than his wards, but that it will not, under these circumstances, lend its aid. It simply leaves the parties where it finds them. We apply this doctrine more readily on account of the great lapse of time since the transaction took place. These views render unnecessary the consideration of the other questions presented by the exceptions. It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J., concurs in the result. POPE, J., dissents.

(129 N. C. 494)

STATE v. MOORE et al.

(Supreme Court of North Carolina. Sept. 18, 1901.)

LARCENY—INDICTMENT—SUFFICIENCY—EVIDENCE—TRAILING BY BLOODHOUND—ADMISSIBILITY.

1. An indictment charging the larceny of 50 pounds of meat, 20 pounds of flour, 10 pounds of sugar, 4 boxes tobacco, 6 pair drawers, 6 undershirts, of the value of \$50, is not defective in that it contains the article meat, which is not the subject of larceny, and does not state the value of each article, since the other articles are of substantial value, and proof of larceny of any one of them would be sufficient.

2. A second count in an indictment for larceny, alleging the receiving of articles alleged to have been stolen in the first count, of the same valuation, but not stating the quantity and number of pounds, does not render the indictment invalid, since the quantity does not enter into the element of the crime, and cannot in any way prejudice the defendant's defense.

3. An accomplice in a larceny prosecution testified that one of the defendants broke in the window, and then ran across a bridge which spanned a creek, and that he returned and entered the store, being the only one to do so. The state introduced evidence of the conduct of a bloodhound to corroborate such accomplice, to the effect that after scenting at the window and in and around the store on the morning after the larceny, ran to the creek, and then barked and turned back, and thereafter bayed certain other defendants, all of whom were on the ground before and during the trailing of the dog, and quite near him at times, and who did not go in the direction of the creek or bridge the night previous. *Held*, that such evidence

was inadmissible, since there was nothing to connect the circumstance of such baying with the making of tracks at the time the larceny was committed, nor anything to show that the dog scented any that were then made by either of the defendants.

Appeal from superior court, Pitt county; Coble, Judge.

Amos Moore and others were convicted of larceny, and they appeal. Reversed.

The defendants Amos Moore, Ashley Dixon, Jesse Edwards, and Joseph Edwards were tried and convicted upon the following bill of indictment, viz: "The jurors for the state upon their oath present: That Albert Rountree, Amos Moore, Ashley Dixon, Jesse Edwards, Joseph Edwards, John Smith, late of Pitt county, on the 9th day of February, 1901, with force and arms, in said county, 50 lbs. of meat, 20 lbs. flour, 10 lbs. sugar, 4 boxes tobacco, 6 pair drawers, 6 undershirts, of the value of fifty dollars, the goods and chattels of J. C. Gaskins, then and there being found, then and there feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year aforesaid, in said county, the said Albert Rountree, Amos Moore, Ashley Dixon, Jesse Edwards, Joseph Edwards, John Smith, the said meat, flour, sugar, tobacco, drawers, undershirts, of the value of fifty dollars, the goods and chattels of J. C. Gaskins, then and there being found, feloniously did have and receive, well knowing the same to have been feloniously stolen, taken, and carried away, contrary to the statute in such case made and provided, and against the peace and dignity of the state." In apt time defendants' counsel moved to quash. Motion overruled, and defendants excepted. After verdict they moved in arrest of judgment upon the following grounds: (1) That it appeared upon the face of the bill of indictment that there was a fatal defect in the first count, in that it charged the larceny of 50 pounds of meat, 20 pounds of flour, 10 pounds of sugar, 4 boxes of tobacco, 6 pairs of drawers, 6 undershirts, and also that it failed to state the value of each article which it alleges to have been stolen; (2) that the second count charges that the defendants received the said meat, flour, sugar, tobacco, drawers, and undershirts without specifying the quantity and value of each article,—which motion was overruled, and defendants excepted. The state then introduced Albert Rountree, an accomplice, who testified that defendants and himself committed the crime; that on the night of the store-breaking and larceny the defendant Jesse Edwards broke the first window of the store with a piece of scantling, and then ran across the bridge; that witness was at the time of the breaking standing near the store; that defendants Ashley Dixon, Amos Moore, and Joseph Edwards were outside of the store;

that Jesse Edwards came back, and went into the store through the window; that no one went into the store except Jesse Edwards; that Jesse Edwards came out with a sack on his shoulder, divided up what he had in his sack, and gave witness a sack of flour, and divided out the things among the others, and then he left, and did not know what became of the others. It was also in evidence that the next morning several persons, including Moore and Dixon, went to the store, and walked around and inside, viewing the premises from which the articles were stolen. In order to corroborate the witness Rountree (whose evidence was impeached by reason of confession of guilt, and in whose possession alone stolen goods were found, and which was further impeached by reason of his admission upon cross-examination that after his arrest on the Wednesday following, and before he confessed, the magistrate, Sam Laughinghouse, before whom he was taken for trial, gave him whisky, and told him they would turn him loose if he would tell on the other boys, and that Gaskins, the prosecuting witness, had told him afterwards, while in jail, to stick to what he had said, and gave him 10 cents in money and some tobacco, and promised him more money if he would stick to what he had sworn to in the magistrate's court) the state introduced, after exception by defendants, the conduct of a dog called a bloodhound, as testified to by Brinson and Gaskins. That some time during the next day Brinson arrived from Kinston with his dog, and carried him to the window, where he smelt in a basket, and was then carried inside, where he smelt at the window, and around the counters, and when he reached the meat block he barked, and then went to the back door, and smelt the steps, and went to the creek, 18 or 20 feet away, and barked and came back, and then trailed about the door and steps and up the street, going into divers places, and finally went up to Dixon, one of the defendants, and bayed him, and then trailed about, and afterwards went up to defendant Moore, and bayed him. It was also in evidence that said Moore and Dixon were present all the while in the crowd while the dog was trailing, and frequently near the dog, and that the other two defendants Jesse and Joseph Edwards were also there in the crowd near the dog at the time. After verdict of guilty defendants moved for new trial, assigning, among others, as error, the admission as evidence the conduct of the dog, either to establish a circumstance or to corroborate Rountree. Motion overruled, and defendants appealed.

Swift Galloway and A. M. Moore, for appellants. The Attorney General, for the State.

COOK, J. While the bill of indictment is artfully and carelessly drawn, yet no such defect appears upon its face as would author-

ize the court in quashing it or arresting judgment after verdict. In the first count several articles are alleged to have been stolen, and the valuation placed upon them all is fixed at \$50. Among the articles appears one not the subject of larceny,—meat; but all the others are, and are of substantial value, to all or any one of which, if shown to have been stolen, the valuation assigned would attach, and proof of larceny of any one is sufficient. *State v. Martin*, 82 N. C. 672. In the second count the same articles are alleged to have been received, and the same valuation assigned, but the quantity and number of pounds are not stated. Defendants' contention upon that point cannot be sustained, because the quantity does not enter into the element of the crime, nor could it in any way prejudice the defendants' defense. So it is held that charging the larceny of a "parcel of oats" is sufficiently certain. *State v. Brown*, 12 N. C. 137, 17 Am. Dec. 562.

We think the objection taken to the introduction of the conduct of the dog should have been sustained by his honor, and that he erred in admitting it as evidence. We do not base our opinion upon the ground that the dog, being an animal of instinct, and not possessed of reason, and ergo, his conduct would not be a circumstance to be considered in connecting a person with an act, or in corroborating a statement made by a witness, but upon the ground that we fail to see that it was a circumstance which would tend to connect the defendants with the larceny, or that it in any way corroborated the testimony of the witness Rountree. It is a matter of common knowledge that there are many breeds of dogs endowed with special traits and gifts peculiar to their respective kind,—the pointer and setter take instinctively to hunting birds; the hound to foxes, deer, and rabbits,—but we know of no breed which instinctively hunts mankind. Yet we do know that dogs are capable of running the tracks of human beings, as is frequently evidenced by the lost dog trailing his master's track long distances and through crowded streets, and finally overtaking him; which demonstrates the further fact that some distinctive peculiarity exists between different persons which can be recognized and known by a dog. And it is a well-known fact that the bloodhound can be trained to run the tracks of strangers, and in this the training consists only in being taught to pursue the human track. The gifts or powers or instincts being already inherent in the animal, he is induced to exercise them under the persuasive influence and protection of his trainer or master. Once trained in this pursuit, we must assume that his accuracy depends, not upon his training, but upon the degree of capacity bestowed upon him by nature. Experience and common observation show that among dogs of the full blood and full brothers or sisters one or more may be big

proficient, while others will be inefficient, unreliable, and sometimes worthless. Some may be acute to scent, while others will be dull to scent, and incapable of running a "cold" track. Then, again, we may find the most reliable and favorite hound taking the fresher track which crosses his trail, or quitting the "cold" trail of a fox, and following the "hot" track of a deer which he may strike. Likewise the pointer or setter may abandon a "cold" trail of a covey of birds, and follow a "warmer" one upon which he may happen to run. Or the squirrel dog may leave the tree at which he has taken his stand and barked, and go to another, or quit entirely. So it does no violence to common experience to assume that dogs are liable to be deficient in their instincts. Therefore, we frequently hear hunters speak of some dogs as "true" and "staunch," while others will be denounced as "unreliable" or "lars." It sometimes happens that the best trained fox hounds will lead their master into a rabbit chase, or a pointer will hold his master with trembling excitement while he "points" a terrapin. Applying common knowledge and experience, of which the court is justified in taking notice, in connection with the evidence, to the case at bar, we are led to consider whether there is any evidence tending to show that Brinson's dog pursued either one of the tracks made upon the premises at the time of the commission of the crime. After scenting at the window and in and around the store and upon the steps leading to the ground, he went 18 or 20 feet to the creek, and then barked and turned back, which is understood by all followers of hounds to mean that he found he was going the wrong direction, or the track was so "cold" he could not follow it, or that he was scenting for a track, and had failed to find one. In either event it falls to be any evidence that Jesse's track had been identified, or that the dog had discovered any track at all, or, if he had detected a track, it would not follow that it was not made by some person other than Jesse. And if it be that he did discover a track, and it was too cold to follow, a like condition would exist as to the tracks of others, made at or about the same time. This incident tends rather to discredit than corroborate Rountree, for he said Jesse went across the bridge, while the dog went 18 or 20 feet to the creek. Had the dog been tralling Jesse's track, and had Jesse crossed the bridge, the dog would also have gone there, and taken the track back, provided it had not become too cold to follow; or if for any reason he had lost the trail, having once positively identified Jesse's track, then surely Jesse would have been the person recognized and bayed by the dog, to the exclusion of others; while, on the contrary, he bayed two of the persons who did not go in the direction of the creek or bridge, or, if they did, there is no evidence of it, and who were shown to

have been on the premises whence the trail was made that morning a few hours before the dog arrived, and it is not improbable that, had he been pressed or urged, he would have identified each and every one of the persons present at the store that morning. This is a novel feature of evidence in our jurisprudence, and is attended with some danger, and is calculated to excite the superstition of some people that the exercise of that instinctive power, not possessed by human beings, is a supernatural agency in the aid of human justice, to which too great importance may be attached, and against which courts will have to guard when the occasion arises.

There are only three cases cited by the attorney general (and we are satisfied that had there been others they would not have escaped his diligent eye) in which the conduct of a dog has been used as evidence. One is *Hodge v. State*, 98 Ala. 10, 13 South. 385, in which it appears that tracks of a peculiar character, and easily identified, were found near the rear of the house in which the murder was committed; that a dog trained to follow human tracks was put upon them, and tralled by him to defendant's house; that the tracks found at the house of deceased were followed by several persons to the defendant's house, being measured at various points along the route, and at each of such points identified as being made by the same shoes as were the tracks at the place of murder; that the route thus traced by them was precisely that taken by the dog throughout; and that when defendant was soon captured, he had on shoes that made tracks precisely corresponding to those traced by the dog. In that case the court held that the conduct of the dog was competent to go to the jury for their consideration, in connection with all the other evidence, as a circumstance tending to connect the defendant with the crime. In another case, *Pedigo v. Com.*, found in 44 S. W 143, from Kentucky, the court held (Guffy, J., dissenting): "That in order to make such testimony [the tralling of a track by a dog] competent, even where it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party has been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to tralling by the bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend

to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury." The third is *Simpson v. State*, 20 South. 572 (an Alabama case), in which the evidence of trailing by the dog was admitted without objection. In this case there is no evidence to connect the circumstance of the baying of the two defendants, or either of them, with the making of tracks at the time the larceny was committed, nor is there any evidence that the dog scented any that were then made by either of the defendants, nor is there any way to ascertain that fact. The evidence admitted falling to become a circumstance to connect the defendants with the crime, and falling to become a circumstance in corroboration of Rountree's testimony, there was error in admitting it, and there must be a new trial.

(129 N. C. 503)

STATE v. VAUGHAN.

(Supreme Court of North Carolina. Sept. 18, 1901.)

HOMICIDE—EVIDENCE—SUFFICIENCY.

Deceased was killed on a boat where he was employed, in the manner indicated by threats made by accused, who had expressed a desire to get him out of the way, so he could get employment on the boat. Measurement of tracks from the boat, which was moored for the night, corresponded with those of accused. Accused professed knowledge of the homicide, and failed to disclose it until after his arrest, and also destroyed his trousers by burning them before he was arrested; the cause for which he did not explain. *Held* sufficient to require the submission of the question of accused's guilt to the jury.

Appeal from superior court, Hertford county; Allen, Judge.

Drew Vaughan was convicted of murder, and he appeals. Affirmed.

The evidence on which the state relied, and material to be stated, is as follows: J. L. Dosier testified: "On the 26th of January last I was engineer of the steamer Keystone. I knew John Barton, who is now dead. He was fireman on the Keystone. Whitfield was mate on the 26th of January. We got to Murfreesboro at 7:15 p. m. I stayed on the boat 15 minutes. I left the whole crew on board except Henry Pool, Henry Cole, Peter, Bill, John Barton, and George; about all except Whitfield. Henry Pool was one of the crew, but he was not left on board. I got to the boat about 9 o'clock, and found John Barton missing. I looked at the door, and it was closed. I found a stream of blood. I stopped. Then next to the rail I saw something that looked like somebody overboard. Then I opened the door, and found a handkerchief and blood around behind the stovepipe. I also found a pocketknife,—John's knife. Then I found keys and his cap. The blood was in a coagulated condition. The fire went out Sat-

urday night. Shortly afterwards the body was found with \$30 in the pockets in two bags. The body had been out of the water one and a half hours when I saw it. Hammer [produced] belonged to the Keystone. I found it underneath where blood was,—fell through. It was bloody. Barton got the lick in the burr of his ear, and about the temple bone. There was an impression of the hammer on his cap. There were four wounds. Some trickles of blood came from the ear after we took the body out. Whitfield and Barton stayed on the boat Saturday night. Barton stayed underneath, and Whitfield on upper deck." Cross-examination: "Any other hammer of that size would have done the same." Evans testified: "I was company's agent. On night of January 26th I saw John Barton about 8:30 o'clock. Whitfield went with me uptown. About 7:30 next morning I went to the wharf. I went on board, and saw blood near the engine door, saw more blood on the door. The handkerchief was found where the body was pulled around and thrown overboard. The body when raised had blows on the head. The doctor examined the skull; it was not fractured. The hammer had blood on it. It was not in the usual place, having dropped in the fireman's room below. It usually stayed on a shelf in the room where deceased stayed. The blood dried up under the engine, though off from the engine it was cold. It appeared to be fresh blood dried. The tracks were examined outside and measured by me. They led from boat near the engine door on left side,—shoe tracks,—to a fence direct south of boat to a stream which led up old road in direction of Drew Vaughan's house. Sumner measured the tracks also. There was also a woman's track not measured Sunday morning. The track was measured at other places. The man's track was made after a rain, the woman's before. Vaughan's foot was measured,—the width of the heel and the width of the shoe. The length of his shoe compared to a dot with the track, and the heel was the same. The tracks measured led in the direction of prisoner's house. At the pea field could not see it. Went within 140 yards of his house. Woman's track was older; made before the rain." Dr. Gany testified: "I examined the dead body but did not find fracture, but contused wounds, produced by some blunt substance,—a hammer, for example. The lick would produce death. In my opinion those wounds produced death." B. Watford testified: "I knew John Barton and Drew. Had conversation with prisoner about Barton on the 15th of June of last year. I was plowing. I said if it was my mule I would cut his throat. He said if I had the spite against Barton as I had against the mule I would go down there some time, and cut his throat and throw him overboard. He spoke about putting \$50 improvement on his [Barton's] land, and did not get any pay for it. Ir

October he said to me if Barton did not pay him, he was going to have recompense. I have heard him speak of it several times since. He said that Barton had treated him wrong, and that but for him [Barton] he could get regular work on the boat. I have heard him say that Barton kept his money on the boat; that his wife was extravagant, and he kept it himself. Drew Vaughan married my wife's sister. He sent for me. I went to Drew's home Monday morning after the murder. He asked me if I had heard any suspicion about who had killed Barton; then asked me about picking him out a house, when he got ready to buy one." Cross-examined: "I told no one about what prisoner had said to me. Charles Boone was present." L. F. Sumner, constable: "I measured tracks. [Exhibits measure.] The measurement of the track fitted prisoner's foot exactly. The tracks looked like the person was walking fast. On the way to the jail he spoke about his wife saying she burnt the trousers. He said he burnt them up himself." Charles Boone: "I saw prisoner the night Barton was killed. I heard him say in June to Ben Watford that if he had as much ambition as he had against that old man he would go down there and knock him in the head and throw him overboard. I asked him what would become of him [prisoner]. Said Barton answered him saying he didn't care so he got his recompense out of him." Cross-examined: "Spoke of him as old gentleman." Emma Boone: "Before Christmas last, about three weeks before he killed him, he told me to tell John Barton if he did not pay him he would kill him and put him in a hole. Nobody was present but John Robert's wife. I told John Barton." J. C. Carter: "Heard him on 8th January last. He spoke about running on the steamer Keystone. Said Mr. Dee was a good captain. Uncle John would not give me a bit of chance when he ran on the boat with him; said 'he is a mean old rascal.' He cheated me out of \$50. I remonstrated. He said 'I've got no money or nothing, but I'm going to have something.' I heard him speak of John two or three times as a grand old rascal when he ran on the boat." Parker: "I heard prisoner make those statements about Barton. Said old man John was a grand old rascal, and he was going to have his position if he had to kill him. Prisoner said he was going on the boat as foreman November last. In January I was at father's. Drew was in there, and in going on said he wanted money to pay for land; said he was going on the boat." J. P. Hedgepeth: "I knew Barton. I went to the boat Sunday morning, and searched for him and found him. I saw Vaughan on the night of the murder at 8:30. He had his jaws tied up." Sheriff Tayloe: "I heard prisoner make statements several times free from inducements and threats. About the second day after he was put in jail he said he did

not do the murder himself, but knew who did. He said it was Henry Garriss, Henry Pool, and Ben Watford. He said they did it. Prisoner was at the foot of the steps near a cedar tree, heard the scrimmage, and heard the old man when he went overboard, and he then went to his house, and did not come out until next day. He told that to anybody at any time, and told it several times." Ben Watford: "I was near when boat blew for wharf; was then at Hill's store about 12 o'clock that night. I and Henry Garriss and Henry Pool [the parties mentioned to the sheriff by prisoner] did not kill him." Whitfield: "I am mate on the steamer Keystone, and left the boat at 8:30 o'clock to buy provisions. I saw among others Henry Garriss, cook. Then I went to the boat at 20 minutes to 11, and went to my room and went to bed. When I left, I left five deck hands and John Barton. He slept below aft. Next morning some lamps were burning which ought to have been put out. Then I saw some blood." Sumner: "Ben Watford was in Hill's store, and stayed there until 12 o'clock." Hill: "Ben Watford was in my store from 10 o'clock until 12 o'clock." The state rested.

George Cowper, for appellant. The Attorney General, for the State.

COOK, J. Upon the conclusion of the evidence introduced by the state, the prisoner requested the court to charge "that there is no evidence before the jury sufficient to convict the prisoner of the murder," which request was refused, and the prisoner excepted. A verdict of guilty was rendered, motion for new trial, etc., and prisoner appealed. So the question for our determination is presented solely upon the evidence introduced and relied upon by the state, and upon which alone we must presume the jury acted in arriving at their verdict. So we are again confronted with the difficult and serious task of deciding whether the evidence is sufficient to go or be left to the jury, upon which, in some aspect of it, they might reasonably render a verdict of guilty. The finding of the fact at issue, and the weight to be given to the evidence upon which the finding is made, are exclusively within the province of the jury. Whether there is evidence sufficient to be submitted is a question of law to be decided by the court (State v. White, 80 N. C. 462; State v. James, 90 N. C. 702; State v. Brackville, 106 N. C. 701, 11 S. E. 284; State v. Gragg, 122 N. C. 1082, 30 S. E. 306), and with which we now have to deal in reviewing the ruling of his honor in the court below.

Considering the several circumstances testified to by the witnesses collectively, we think they established such a state of facts as warranted his honor in submitting them as some evidence of the prisoner's guilt. Malice is shown from the threats; motive is

shown from his desire to get deceased out of the way, so that he could get employment on the steamer; the killing was done at the place and in the manner indicated by his threats; his presence at the steamer on the night of the homicide is shown by the tracks fitting by measurement his own, and also by his voluntary statement that he was near by and heard the scrimmage, and heard the old man when he went overboard, thus showing an opportunity; his professing knowledge of the homicide, and failing to disclose it until after his arrest and imprisonment; destruction of his trousers by burning them before arrested, and failure to explain the cause. Whether these circumstances formed such an unbroken chain of evidence as to carry conviction of his guilt to a moral certainty or beyond a reasonable doubt rested in the judgment and conscience of the jury, over which the court has no control. There is no error.

(129 N. C. 28)

IVES v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of North Carolina. Sept. 18, 1901.)

INSURANCE—PARTIES TO ACTION TO RECOVER PROCEEDS.

Where a life insurance policy was payable to the wife of the insured, and on the death of the wife before the insured to her children, the personal representative of a deceased daughter, whose death occurred previous to that of her mother, and who left surviving a husband and two children, was the proper party to bring an action for a share of the proceeds, and not the administrator of one of such children.

Appeal from superior court, Craven county; McNeill, Judge.

Action by J. F. Ives, administrator, against the Mutual Life Insurance Company of New York. From a judgment in favor of defendant, plaintiff appealed. Affirmed.

O. H. Gulon, for appellant. Simmons & Ward, for appellee.

CLARK, J. David Brinson in 1845 insured his life in defendant company for the benefit of his wife, Elizabeth, with the following clause added: "And in case of the death of said wife before the decease of the assured, the amount of the said insurance shall be payable after her death to her children, or their guardian, if under age, within 60 days after due notice and proof of the death of said David Brinson." There were six children born of said marriage. The wife of the assured died in 1881. One of her daughters, Mary, predeceased her, leaving two children, one of whom has since died after marrying the plaintiff, who brings this action as her administrator. The assured died in 1899, another of his daughters having died after the death of his wife, but before his death. The defendant company paid the amount of the policy to the four chil-

dren who survived him and the personal representative of his daughter who died after her mother. The plaintiff contends that the daughter Mary, who predeceased her mother, was entitled to share in the proceeds of said policy, and that her two children should have been paid one-sixth thereof, and therefore, as administrator of his wife,—one of said children,—he demands judgment for one-twelfth of said policy. Whether Mary Brinson, who predeceased her mother, had a vested interest in the policy which could not be defeated by her death is an interesting question that could only be determined in an action brought by Mary Brinson's personal representative. Certainly her children, or this plaintiff, as administrator of one of them, could only be entitled, as distributees of Mary Brinson, to any fund collected by her personal representatives. It would be obiter dicta to pass upon the point here attempted to be raised when the only person authorized to recover the fund, if any one, is not a party to the action. The complaint not having stated a cause of action, the court below might have dismissed the action, or this court might do so *ex mero motu*. In adjudging that plaintiff could not recover there was no error.

(129 N. C. 25)

ROUNTREE et ux. v. BLOUNT et al.

(Supreme Court of North Carolina. Sept. 18, 1901.)

RELIGIOUS SOCIETIES—MORTGAGES—ULTRA VIRES—RATIFICATION—POSSESSION OF REALTY—ACTIONS—PLEADING—AMENDMENT.

1. Where the trustees of a church purchase property, giving a mortgage to secure the price, the congregation, by taking possession under the purchase, ratify it, and cannot contest the validity of the mortgage on the ground of ultra vires.

2. Where a church voluntarily surrenders possession of realty claimed by purchase to another, and re-enters under deed and mortgage executed by their trustees, they cannot repudiate the transaction, and hold under their first contract of purchase.

3. Where, in an action for possession of realty, defendants set up a mortgage to plaintiff, and pray its cancellation, plaintiffs may amend by asking a foreclosure of the mortgage.

Appeal from superior court, Pitt county; Hoke, Judge.

Action by C. D. Rountree and wife against Caesar Blount and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

A. M. Moore, for appellants. Jarvis & Blow, for appellees.

DOUGLAS, J. This is an action to foreclose a mortgage given by the defendant trustees upon the church property in their charge. The essential facts appear to be as follows: Some time about the year 1877 the Hickory Hill colored Baptist Church, of which the defendants are trustees, bought the lot in controversy from Charles Rountree,

father of the present plaintiff, for the sum of \$350, payable in installments, and erected a church thereon. The defendants claim that the purchase money has been fully paid, and that they are therefore the owners of the land. The plaintiffs deny that the defendants ever paid for the land. It is admitted that the defendants never received any deed from Charles Rountree, and that the only deed they have to the land is that executed by the plaintiffs. This they seek to repudiate, with the resulting mortgage, on the ground that their trustees had no authority to purchase, that at the time of said alleged purchase they were the equitable owners of said land, and that upon their re-entry thereon they were remitted to their former rights. We do not think that their contentions can be sustained.

It appears from the apparently uncontradicted evidence that on the 12th day of February, 1880, the plaintiffs were in possession of said property, which had been abandoned by the congregation of said church upon being notified of the plaintiffs' claim of ownership; that on said day T. A. Wilks, C. H. Henheran, and Simon Harris, as trustees of said church, purchased the said property from plaintiffs for the sum of \$450, payable in 18 installments of \$25 each, becoming due every three months, received a deed therefor, and executed back to the plaintiffs the mortgage in question to secure the purchase money; that immediately after said purchase, and in consequence thereof, the congregation moved back into said church, and still remain in possession; and that only one of said last-named installments has been paid. The defendant Caesar Blount, referring to the abandonment of the property, testified as follows: "The congregation said that before they would pay any more—having paid it once—they would leave the property, and did go away, and take the bell." Again, on cross-examination, he said: "We moved out because the plaintiff claimed it, and moved back because he told us we could. The entire congregation moved out when the present Mr. Rountree claimed the property, and moved back because he told us we could. After the notes and mortgages were executed, the entire congregation went back into the possession of the church under the contract made by the trustees with plaintiff, to wit, the deed from present plaintiff and the mortgage and notes now sued on."

We agree with his honor that the congregation, by resuming possession and control of the church under the purchase made by their trustees, ratified such purchase, and cannot now be heard to contest the validity of the mortgage on the sole ground that it was ultra vires. The learned counsel for the defendants admits that they cannot repudiate the mortgage and hold the deed, but contends that they can repudiate the entire transaction, and hold under their first contract of purchase. Whatever may have been their

original rights under that contract, which does not appear ever to have been in writing, and which did not pretend to convey the legal title, we do not think that they are now available. At the plaintiffs' demand, they voluntarily surrendered possession, and subsequently re-entered as their vendees. Even if they could now repudiate the deed, which we think they fully ratified, they certainly could not retain possession, and deny the title of him under whom they entered. We think this question is settled by the decision of this court in *Farmer v. Pickens*, 83 N. C. 549. We do not mean to say that a party in possession admits the title of another by taking merely a quitclaim deed, nor even when out of possession, if he does not enter under such deed. The statute of limitations was not available on account of the admitted break in the defendants' possession.

Neither was there error in permitting the plaintiffs to amend their complaint so as to ask for a foreclosure of the mortgage, as no injustice appears to have been done to the defendants. In fact the defendants in their original answer themselves set up the fact of the mortgage, and ask to have it canceled. The judgment of the court below is affirmed.

(129 N. C. 42)

HUGHES et al. v. PRITCHARD et al.
(Supreme Court of North Carolina. Sept. 18, 1901.)

CONTINUANCE—CONDITION OF GRANTING—
BONDS—JUDGMENT AGAINST SURE-
TY—APPEAL.

1. Where, in an action to have defendant declared trustee of realty, and for damages for rents and profits, defendant, to secure continuance, gives bond conditioned to pay plaintiffs such damages as may be recovered for rents and profits received by him, and the recovery for rents and profits is for more than the penalty of the bond, judgment may properly be given for the full amount of the penalty against the surety.

2. Where, in an action to have defendant declared trustee of realty, and for damages for rents and profits, judgment is given against the surety on a bond conditioned to pay such damages as may be recovered against defendant on account of rents and profits received, with stay of execution until the amount due defendant on his plea of betterments is ascertained, an appeal by the surety before the amount of such betterments is ascertained is premature.

Douglas, J., dissenting.

Appeal from superior court, Camden county; Allen, Judge.

Action by Mary E. Hughes and another against D. T. Pritchard and others. From a judgment for plaintiffs, defendant Isaac Burnham appeals. Dismissed.

J. H. Sawyer, for appellant. E. F. Aydlott and John H. Small, for appellees.

CLARK, J. If this were an action of ejectment, and the bond in question had been that required by Code, § 237, the surety thereon would be liable only for rents and profits pending litigation and subsequent to filing

the bond. But such is not the case. The appellant, surety on the bond, correctly states the purport of the litigation as follows in his answer to the motion for judgment on the bond: "The plaintiffs brought this action against the defendant to have him declared trustee for them of two-thirds of the property described in their complaint, and to recover damages for rents and profits during his occupancy of the same." The complaint set out that such wrongful perception of rents and profits had continued since March 8, 1886, and amounted to \$10,000. The prayer for relief is to recover the accrued rents and profits thus taken by the defendant as trustee, and for a reference to ascertain amount of same, and for a decree that defendant was trustee as to two-thirds of the realty, and should convey same to plaintiffs. Complaint, answer, and replication were filed at spring term, superior court, 1896. At trial term in fall, 1896, the defendant asked and was allowed a continuance, but was required to file a bond in the sum of \$500, which he did, with the appellant as surety, which bond is conditioned to pay plaintiffs "such damages as they may recover against defendant on account of rents and profits received by him from the land in controversy." The complaint alleged the receipt of same by defendant as trustee for 10 years, and the recovery thereof was one of the substantive reliefs demanded. At fall term, 1897, the cause was tried, when the jury found all the issues in favor of plaintiffs, and that the rents and profits taken by defendant as trustee had averaged \$400 per annum from January, 1886. Judgment was rendered that defendant was trustee, as alleged in complaint; that he should convey two-thirds interest in the realty to plaintiffs; that they recover the rents, as above stated; and that, after applying a bond for \$2,500, held by defendant against one of plaintiffs (set up by defendant in the answer), the balance due by defendant for rents and profits wrongfully appropriated by him was \$1,046. The defendant then set up a plea for betterments, and plaintiffs moved for judgment on the bond given with appellant as surety at fall term, 1896, when a continuance had been granted the defendant. The court gave judgment thereon, but stayed execution until the amount of allowance, if any, to defendant by way of betterments should be determined. The bond given by defendant with appellant as surety at fall term, 1896, was not the defense bond (under Code, § 237) required as a condition precedent to filing an answer in ejectment, and which would only cover the rents and profits pending litigation. But it was evidently given, and the appellant so avers in his brief, in compliance with the terms imposed on defendant for a continuance at that term, which terms rested in the sound discretion of the judge. The wording of the bond indicates that it was partial security for the rents and profits sued for in

the complaint, alleged to have been converted by defendant in breach of trust,—the bond says "rents and profits received by said Pritchard,"—evidently meaning those already received, as alleged, and sued for. The future rents and profits up to the trial were soon thereafter secured by the appointment of a receiver. It seems to us that the bond given by appellant was additional security for the personal liability already incurred by defendant, and its execution was a condition imposed by the court to balance the favor extended to defendant of not being forced to trial at that term.

The balance of recovery against defendant by reason of rents and profits wrongfully converted by him being adjudged more than the penalty of the bond executed by appellant as surety, the court did not err in giving judgment for full amount of same against surety. His rights are fully safeguarded by the further order staying execution till the amount, if any, found to be due to the defendant on his plea of betterments, etc. (which latter, by consent, is under reference), shall have been credited on the balance of \$1,046 adjudged due by him. As on such reference it is possible the credits allowed defendant for betterments, etc., may exceed the \$1,046 balance adjudged due by him, this appeal by the surety may prove to be entirely unnecessary, and is therefore premature. He should have noted his exceptions, and could appeal only from the final judgment. Appeal dismissed.

DOUGLAS, J., dissents.

(129 N. C. 63)

MITCHELL v. BAKER et ux.

(Supreme Court of North Carolina. Oct 1, 1901.)

CERTIORARI—CASE ON APPEAL—AMENDMENT—LACHES—EXCEPTIONS.

1. Where an appeal is docketed and printed before the call of the district at a certain term, a writ of certiorari will not issue at the succeeding term for an amendment in the case on appeal on a statement from the trial judge that he is willing to make it, because of laches.

2. Under Code, § 550, requiring that exceptions in the case on appeal shall be specifically stated, where there are several propositions of law involved, an exception merely "to the charge as given" will be disregarded on appeal, as too general.

Appeal from superior court, Lenoir county; Allen, Judge.

Action by A. Mitchell against J. F. Baker and wife. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Shepherd & Shepherd, for appellant. N. J. Rouse and J. H. Pou, for appellees.

CLARK, J. The appellant moves for a writ of certiorari for an amendment in the case on appeal, upon a statement from the trial judge that he is willing to make it. The motion comes too late. The appeal was

docketed and printed before the call of the district at last term, and with proper diligence the motion should have been made in time to have the case heard at last term, or at least at the call of the district at that term. It is laches to wait till this term, with the result that if allowed there would be another delay of six months. He who seeks a certiorari must negative laches. *State v. Griffiths*, 117 N. C. 709, 23 S. E. 164; *Peebles v. Braswell*, 107 N. C. 68, 12 S. E. 44.

The sole exception in the case on appeal is "to the charge as given." That this is too general and must be disregarded is apparent upon the face of the statute (Code, § 550), which requires that exceptions shall be specifically stated, and the point has been ruled in over 50 cases, many of which are collected in *Clark's Code* (3d Ed.) pp. 513, 514, 773. The only exception to this rule is when there is only one proposition of law in the charge, but that is not the case here. There being no exceptions in the case on appeal, and no errors upon the face of the record proper, the judgment below is affirmed.

(129 N. C. 30)

FRAZIER v. FRAZIER et al.

(Supreme Court of North Carolina. Sept. 18, 1901.)

MORTGAGES—DEEDS ABSOLUTE—EVIDENCE—SUFFICIENCY.

Where a grantee and his devisees have been in undisturbed possession for years, cultivating and using the land, and there is no evidence that the clause of redemption was omitted from the deed through ignorance, mistake, or fraud, the conveyance will not be declared a mortgage.

Appeal from superior court, Greene county; Moore, Judge.

Action by D. B. Frazier against Penina Frazier and others. From a judgment for defendants, plaintiff appeals. Affirmed.

T. B. Womack, for appellant. H. G. Connor & Son, for appellees.

CLARK, J. To convert a deed absolute on its face into a mortgage it must appear that the clause of redemption was omitted through ignorance, mistake, fraud, or undue influence. There is no evidence of this. On the contrary, the plaintiff's testimony is that he declined to execute a mortgage. To cause a deed to be decreed in trust there must be strong evidence of such agreement, and proof of such intention must be made, not by simple admission of the parties thereafter, but there must be proof of facts and circumstances dehors the deed inconsistent with the idea of absolute purchase; otherwise, the solemnity of deeds would always be subject to "the slippery memory of witnesses." *Kelly v. Bryan*, 41 N. C. 283; *Porter v. White*, 128 N. C. 42, 38 S. E. 24. If the transaction is a sale with power to repurchase, there is no equity to interfere. *Adams, Eq. 111*, and cases there cited. Here such circumstances

are wholly lacking. On the contrary, the grantee went into possession at the end of the year, it being already rented out, and put up buildings, and cleared one-half of the land for cultivation, and he and his devisees have been in undisturbed possession since 1883. There is an allegation that the grantee made a contemporaneous parol agreement to reconvey upon repayment of the purchase money, but there is no evidence of such repayment. The plaintiff relies upon an allegation that the rents and profits should be applied to repayment of the purchase money, but there is no proof whatever of such agreement. In sustaining a demurrer to the evidence, there was no error.

(129 N. C. 34)

BRITE v. MT. AIRY MFG. CO.

(Supreme Court of North Carolina. Sept. 18, 1901.)

CONTRACT—CONSTRUCTION—QUESTION FOR COURT.

In an action for breach of contract in failing to send plaintiff the quantity of goods ordered, the only evidence as to such quantity was defendant's letter stating that the goods would have to be shipped in lots of 70 or 100 tons, and plaintiff's letter of 4 days later that defendant could ship him 65 tons of cotton fertilizer and 5 tons of bone fertilizer. *Held*, that the construction of the contract was a matter of law, and an instruction that there was no evidence that defendant contracted for more than 75 tons was improperly refused.

Appeal from superior court, Pamlico county; McNeill, Judge.

Action by C. E. Brite against the Mt. Airy Manufacturing Company. From a judgment in favor of plaintiff, defendant appealed. Reversed.

W. D. McIver, for appellant. Simmons & Ward, for appellee.

MONTGOMERY, J. The original contract between the plaintiff and the defendant, under which the plaintiff was made the agent of the defendant to sell fertilizers on commission, and for an alleged breach of which by the defendant the plaintiff has brought this action, is in writing, with the exception of the quantity of fertilizers to be sold. Upon the trial the plaintiff introduced a batch of letters from the defendant to prove that the quantity of fertilizers was afterwards agreed to be 100 tons, and he also testified that on December 29, 1895, he wrote to the defendant, ordering 100 tons. In one of the letters referred to, of date December 8, 1895, the defendant wrote: "We will ship you the 100 tons of goods as follows," and then follows the manner and terms on which the agent was to sell to his customers. On the 23d of December, 1895, the defendant in one of the letters said: "We are thinking of sending you the 100 tons." In another of the letters, dated December 31, 1895, the defendant wrote (as the plaintiff testified on the trial, in answer to his letter of the 29th

of the same month): "All right, but we want to ship the goods in one lot from here, as we made prices on a basis of one dollar freight from Baltimore, and we have to ship in lots of 70 to 100 tons to get the rate." On the cross-examination the plaintiff admitted that he wrote to the defendant on January 3d following a letter in these words: "Yours of the 31st received, and contents noted. Will say you can ship me 65 tons of cotton, corn, etc., and five tons of dissolved bone phosphate goods. You can ship them to Newberne, and deliver them to the Eastern Dispatch Line, and then I can take charge of them, and have them shipped where I want them. I have made arrangements to get them shipped from Newberne to where I want them to go, and inclosed find \$5, for which give me credit on my note. Hoping this will be all right. Let me hear from you soon. You can ship any time, but try and ship by the 20th."

Among other instructions asked by defendant's counsel was one that the jury be told that "there was no evidence that defendant contracted for a larger number of tons than 75 tons shipped." The case was made up by his honor, counsel having disagreed, and his honor states that the instruction was modified and given in the general charge. We have examined very carefully the charge, and we find no allusion to the instruction, directly or as a matter of inference. We think it ought to have been given as requested. The entire correspondence, undisputed and admitted, shows what the contract was; and, that being so, its construction was a matter of law. The defendant's letter of December 31st and the plaintiff's letter of January 3d were the termination of the correspondence concerning the quantity to be delivered under the contract, and settled that matter.

The defendant's second and third prayers for instruction were properly refused, and he got the benefit of the fifth in the general charge. New trial.

(129 N. C. 36)

BOWERS v. J. B. WORTH CO.

(Supreme Court of North Carolina. Sept. 18, 1901.)

SALES—CONTRACT—DELIVERY OF GOODS—RECOVERY.

1. Where, in accordance with a contract, a seller delivers a number of bags of peanuts to a carrier under the contract for shipment on the date fixed, the fact that two days later he placed a number of other bags in the car, with the station agent's consent, and the bill of lading was changed so as to include the latter bags, such transaction in no way delaying shipment, will not prevent recovery for the original number of bags, since such transaction did not work any damage to the buyer.

2. The agency of the officers of a railroad company to a consignee after delivery of goods extends only to goods rightfully shipped, and which belonged to such consignee when shipped or delivered for shipment.

Montgomery, J., dissenting.

Appeal from superior court, Halifax county; McNeill, Judge.

Action by J. E. Bowers, trading under the firm name of Bowers & Co., against the J. B. Worth Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. A. Dunn, for appellant. Claude Kitchen, for appellee.

FURCHES, C. J. This is an action for breach of contract in the sale of a car load of peanuts, growing out of the following contract and agreed state of facts: That on October 13, 1899, plaintiff and defendant made the following contract: "Mess. Bowers & Co.: We are in the market for a car of Spanish, and if you have anything to offer, would be glad to hear from you at the lowest possible price. Of course, offer must be for immediate shipment. Truly yours, J. B. Worth Co. Better wire if you can offer anything." To which Bowers & Co. replied by telegram on October 17th: "Can buy car of Spanish at 75 cents. Ship on Saturday." To which telegram defendant replied on same day as follows: "Accept car. Must be clean, dry goods; shipment not later than Saturday." (2) That on the Saturday referred to, being October 21st, the plaintiff did deliver at the warehouse of the Wilmington & Weldon Railroad Company in Scotland Neck, N. C., 223 bags of Spanish peanuts, and took bill of lading for the same, which were consigned to the defendant. (3) That on the 23d day of October the plaintiff, by permission of the agent of the railroad company, opened the car in which the 223 bags of peanuts had been put, and placed therein 83 bags more of Spanish peanuts, and the bill of lading was changed to correspond with the number of bags actually in the car. (4) That said change was without the knowledge or consent of the defendant. (5) The peanuts were tendered to the defendant in Petersburg, Va., and the defendant refused to accept the same. (6) It is admitted that 223 bags is a car of peanuts, and that 256 bags is a car of peanuts. (7) That a delivery of a car of peanuts at any time on Saturday, the 21st day of October, to the railroad company, and taking bill of lading therefor, would be a shipment, within the meaning of said contract, and that they complied with this contract, provided the facts hereinbefore recited do not constitute a breach of said contract. (8) That the plaintiffs are entitled to recover the sum of \$98, with interest thereon from the 21st day of October, 1899, if they have complied with said contract. (9) That the said peanuts left on the first freight train leaving Scotland Neck after Saturday, October 21st, for defendant at Petersburg.

It will be seen that the contract was to ship the peanuts by the following Saturday, which was the 21st day of October, 1899, the contract being made on the 13th of October. It is agreed that 223 bags of peanuts

is a car load, and it is agreed that the plaintiff delivered to the railroad agent at Scotland Neck, for shipment to the defendant, 223 bags of peanuts on Saturday, October 21st, which was in time, and a compliance with the terms of the contract. If nothing more had been done, it is admitted that plaintiff would have been entitled to recover and to the judgment in this case. But it is admitted that on Monday, the 23d of October, and after the 223 bags of peanuts had been placed in the car for shipment, the plaintiff took 33 bags of peanuts to said depot, and, with the consent of the depot agent, put them in the car with those delivered on Saturday, and the bill of lading was then changed so as to include the 33 bags delivered on Monday. It is also agreed that this did not delay the shipment of the peanuts delivered on Saturday. It was admitted and stated on the argument that plaintiff could not recover for the 33 bags delivered on Monday, and that they were not included in the judgment appealed from. Upon the peanuts reaching Petersburg, the defendants refused to receive them. So the case comes down to this: Did the placing the 33 bags on Monday in the car with the 223 bags prevent the plaintiff from recovering for the 223 bags delivered on Saturday? The delivery of the 223 bags on Saturday was a compliance with the contract, and the peanuts at once became the property of the defendant, and he had the right to sue for and recover them in claim and delivery proceedings, and the plaintiff had no more right to them than any stranger would have had. The right he might have had, over that of a stranger to the transaction, was the right of stoppage in transitu; and this he only had in case of insolvency, which is not alleged, and this right has nothing to do with the case before us. Suppose the 223 bags delivered on Saturday had not been put in the car on Monday, when plaintiff delivered the 33 additional bags. Those delivered on Saturday would have been defendant's peanuts, just as much as they were when put in the car; but the 33 bags delivered on Monday would not have been, because defendant had not bought them. The defendant could not have recovered them by action, nor would he have been liable for them until he accepted them. This we think is clearly so, and was substantially admitted on the argument. What difference it makes that the plaintiff, with the consent of the depot agent, was allowed to put them in the car with the 223 bags delivered on Saturday, we are not able to see. If it be contended that the depot agent at Scotland Neck was the agent of the defendant, it might be contended that he accepted the 33 bags, and defendant was liable for them. But if this were so, we do not see how it would affect the right of the plaintiff to pay for the 223 bags delivered on Saturday.

While it is true that the officers of the

railroad company are the agents of the consignee after the goods are delivered, this agency only extends to goods rightfully shipped, and which belonged to the consignee when shipped, or delivered for shipment. They cannot be the agent of a party who does not own the goods, and has no interest in them. So, whatever the depot agent may have done does not affect the case. The judgment should be affirmed.

MONTGOMERY, J. (dissenting). The plaintiffs agreed to sell to the defendants a car load of peanuts, the same to be shipped not later than the following Saturday from Scotland Neck, N. C., to Petersburg, Va. On the last-mentioned day the goods were delivered to the agent of the Wilmington & Weldon Railroad Company at Scotland Neck, the car load consisting of 223 bags. The bill of lading called for 223 bags, and the consignees were the defendants. On the Monday following, and before the first freight train left the station for Petersburg, the plaintiffs, by permission of and with the consent of the freight agent, and without the defendants' knowledge or consent, opened the car, placed therein 33 bags of peanuts in addition to the quantity delivered on Saturday, and the bill of lading was altered so as to conform to the addition to the car load of the 33 bags. Among the other facts admitted, it was agreed that 223 bags of peanuts is a car load, and also that 256 bags is a car load. Upon the arrival of the peanuts at their destination, the car load of 256 bags was tendered to the defendants, and they refused to receive the same. This action was brought by the plaintiffs in a court of a justice of the peace to recover damages for an alleged breach by the defendants of the contract of sale and purchase. The defendants admit their liability, if, as a matter of law, the plaintiffs' act in opening the car, and placing therein the additional 33 bags of peanuts, and the tender of the 256 bags to the defendants, was not a breach of the contract on the part of the plaintiffs. It does not appear from the agreed and admitted facts whether the defendants knew of the change made by the plaintiffs in the original shipment, but, as no reason is given why the defendants refused the same, we must take it that the refusal was because of the act of the plaintiffs in opening the car, and putting in the additional 33 bags, and the tender to the plaintiffs, through the railroad company, of the car load of 256 bags, instead of the original shipment of 223 bags. The contract for the purchase of the peanuts was completed when the plaintiffs on Saturday placed in the car the 223 bags, and the right of property therein passed to the defendants; but when the plaintiffs, with the consent of the carrier, took possession of the car on Monday, and placed therein the 33 additional bags, and the bill of lading altered to meet the added quantity, and the carrier tendered to

the defendants the car-load lot of 256 bags, the defendants had the right to refuse the car load as tendered. The contract, as we have seen, was completed on Saturday, when the 223 bags were delivered to the carrier, and if the defendants had received the car load of 256 bags with a knowledge of the facts, they would have been bound to the plaintiffs for the price of the whole. And this view is in no way inconsistent with the legal effect of the delivery of the 223 bags on Saturday, the completion of the contract, and the passing of the property to the defendants. The plaintiffs, and the carrier's agent, by their interference with the car on Monday, and the tender to deliver the 256 bags in Petersburg, prevented the delivery of the true quantity bought under the contract, and the defendants were not compelled to go into a lawsuit with the carrier to get possession of the 223 bags,—a part of the goods embraced in the bill of lading, and which part was not offered to be delivered; and the plaintiffs, therefore, cannot recover any damages against the defendants for doing what they had a right to do under the circumstances.

(129 N. C. 31)

MOORE et al. v. MUTUAL RESERVE FUND LIFE ASS'N (two cases). TAYLOR v. SAME. ST. JOHN'S LODGE v. SAME. HANCOCK v. SAME. POPE v. SAME. FOY et ux. v. SAME. BARNUM v. SAME. TISDALE et al. v. SAME (two cases).

(Supreme Court of North Carolina. Sept. 18, 1901.)

INSURANCE—FOREIGN CORPORATION—SERVICE OF PROCESS—POWER OF ATTORNEY—REVOCATION.

1. Where a foreign insurance company, as a condition to doing business within the state, authorized service of summons on the insurance commissioner so long as the company had any liabilities remaining unsatisfied in the state, the company cannot make a special appearance in an action on a policy, and have the service of process on the insurance commissioner set aside on the ground that plaintiff has no claim against it for which it is liable, since that is the very question to be determined.

2. Where a foreign insurance company gave a power of attorney to the insurance commissioner, authorizing service of process on him as long as the company had unsatisfied liabilities in the state, the power will not be deemed revoked, the company having admitted outstanding liabilities in the state.

3. Where a foreign insurance company, as a condition to doing business in the state, gave a power of attorney to the insurance commissioner, authorizing a service of process on such commissioner, such power, being contractual in its nature, and given in consideration of the company doing business within the state, was irrevocable.

Appeals from superior court, Craven county; Coble, Judge.

Actions by L. J. Moore, L. J. Moore and others, C. E. Foy and wife, N. Tisdale and wife, N. Tisdale and another, E. H. Barnum, Taylor, Hancock, Pope, and St. John's Lodge against the Mutual Reserve Fund Life

Association. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Simmons & Ward and W. W. Clark, for appellants. Hinsdale & Lawrence, Shepherd & Shepherd, and T. B. Womack, for appellee.

FURCHES, C. J. This appeal involves identically the same question, and no more, than was decided by this court at its last term in *Biggs v. Association*, 128 N. C. 5, 87 S. E. 955, and we are bound to reverse the judgment appealed from in this case, or to reverse the judgment of this court made at its last term. There is no question of the importance of this that may not be sustained by arguments on either side. While the defendant stands before this court just as any other foreign corporation would stand, it does not stand just as an individual would stand. The legislature would have no power to prescribe terms to an individual as to whether he should be allowed to do business in this state. He would have the natural and constitutional right to do business here without the permission or comity of the state. That is not so with the defendant. It had no right to do business here without the permission of the state. This being so, the state had the right to prescribe the terms upon which the defendant might carry on its business here. The state, having this right, prescribed the terms, and the defendant accepted them, and proceeded with its business. The defendant, being permitted, proceeded to make contracts with citizens of the state, and became liable to them under these contracts. One of the provisions upon which defendant was allowed to do business here was that James R. Young, insurance commissioner, and his successors in office, should be constituted its agent, upon whom service of process might be made, and that said agency should continue so long as the defendant had any liabilities remaining unsatisfied in this state arising from or out of its said business of insurance. The plaintiff alleges that the defendant is liable to him for a breach of its contract of insurance,—a liability of the defendant remaining unsatisfied. If plaintiff's contentions are true, there is still a remaining liability of the defendant unsatisfied. The object of this action is to try that very question: Is the defendant liable to the plaintiff upon a breach of its contract of insurance? But the defendant comes into court, makes a special appearance, and in the face of the agreement upon which it was allowed to do business here denies that it has violated its contract with the plaintiff, and therefore plaintiff has no such claim against it as plaintiff alleges, and for that reason—that is, because the defendant says it is not liable to the plaintiff for anything—the action must stop. We cannot adopt such arguments. It was the duty of the state to protect its citizens against such practices as it seems to w

are attempted in this case. It seems to us that the defendant is improperly attempting to evade a liability it has incurred with one of its patrons it had induced to deal with it.

We do not feel called upon to discuss the question of revocability of this power to Young further than to say that the time fixed in the act of the legislature and in the power itself has not yet been reached, as the defendant admits that it still has outstanding liabilities in this state. It is conceded that, as a general rule, a principal has the right to revoke a power of attorney at any time, whether it is in terms irrevocable or not. But to this general rule there are well-established exceptions, as where it is coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of some one or some interest. In our opinion this power falls under this exception to the general rule. It was contractual in its nature, was given upon consideration that defendant should have the right to carry on its business in this state, and for the protection of those who should deal with the defendant. We have not cited authorities, as we find them cited in the case of *Biggs v. Association*, 128 N. C. 5, 37 S. E. 955.

There is error, and the judgment of the court below is reversed. The cases of *Taylor v. Life Association*, *St. John's Lodge v. Life Association*, *Hancock v. Life Association*, *Pope v. Life Association*, *Moore and Wife v. Life Association*, *Foy v. Life Association*, *Barnum v. Life Association*, *Tisdale and Wife v. Life Association*, and *Tisdale and Hackburn v. Life Association*, all involve the same point as that involved in *Moore v. Life Association*, and were argued together, and upon the ruling of the court in the first case (*Moore v. Life Association*), the judgment of the court below is reversed in all of them. Reversed.

(129 N. C. 52)

RICKS v. POPE.

(Supreme Court of North Carolina. Sept. 24, 1901.)

DEED—CONVEYANCE OF FEE—LIMITATION IN DEED—EXEMPTION FROM GRANTEE'S DEBTS—LEGALITY—TENANCY IN COMMON—EJECTMENT.

1. A deed recited that the grantor, in consideration of the sum of \$20 per annum to be paid by the grantee to the grantor so long as the latter should live, did convey to the grantee, his heirs and assigns, a certain tract of land, but that it was agreed that the deed was made in consideration of the land being exempt against all debts of the grantee, but that if he desired to sell the same he should have absolute power to do so. *Held*, that the deed conveyed an estate in fee simple, the clause against liability for the debts of the grantee being incompatible with the grant of the fee simple estate and void.

2. Where a deed recited that the grantor transferred and conveyed the property to the grantee and his heirs and assigns in consideration of the sum of \$20 per year to be paid the grantor as long as she should live, such provisions as to payment did not constitute a lien or incumbrance on the land.

3. One tenant in common may recover in an action of ejectment against a co-tenant.

4. Where the owner of a tract of land conveyed the eastern half to C. and conveyed the western half to I., the deed to I. describing the land by giving certain boundaries, but not containing any beginning point, nor course and distance, C. and I. were not tenants in common, inasmuch as the specific part conveyed to I. could be located by finding the adjacent boundaries called for in the deed.

Appeal from superior court, Edgecombe county; McNeill, Judge.

Suit by John Ricks against Carter Pope. From a decree in favor of defendant, plaintiff appeals. Reversed.

It was admitted that the title was out of the state, and that E. A. Johnson had title in fee at the time she executed to Isaac Pope the deed put in evidence by plaintiff, to wit: "This deed, made on 4th September, 1886, between Elizabeth Johnson, of the first part, and Isaac Pope, of the second part, witnesseth that in consideration * * * Elizabeth Johnson do bargain and sell to Isaac Pope, his heirs and assigns, one-half of my right and interest in a certain tract of land [describing it]. It is furthermore understood and agreed that this deed is made in consideration that the land conveyed be exempted inviolate against all debts now against Isaac Pope or may be hereafter contracted by him, but, should Isaac Pope at any time desire to convey said tract of land, that he shall have absolute power to do so. In witness whereof," etc. "[Signed] Elizabeth A. Johnson. [L. S.]" Duly admitted to probate and registered. Plaintiff then put in evidence a mortgage deed to F. M. Rawlings, conveying the land in dispute to secure a debt of \$200 for cash and store account due on November 1, 1889, with power of sale in case of default in payment of the debt evidenced by a sealed note. Mortgage was duly executed, delivered, probated, and registered. The privy examination of Mrs. Pope was duly taken by a justice of the peace and registered as to Isaac Pope and wife. As to Elizabeth A. Johnson (the same as E. A. Johnson), W. B. Bullock was witness to the mortgage, and it was probated as to E. A. Johnson as follows: "The execution of the foregoing instrument was this day acknowledged before me by W. B. Bullock, the grantor, for the purposes therein expressed. Let the same, with this certificate, be registered. This 29th day of January, 1889." Signed by the justice of the peace. It was adjudged to be acknowledged in due form by the clerk of the superior court, and was ordered to be registered, and was registered. Defendant objected to the mortgage as not being registered as to E. A. Johnson. Plaintiff examined Rawlings, who testified: "I know Bullock was subscribing witness to the mortgage as to E. A. Johnson. He is dead. I know his handwriting." Mortgage admitted in evidence. Witness further testified: "I know the land described

in mortgage,—same land conveyed to Isaac Pope by E. A. Johnson. Isaac Pope went in possession in 1886, when he purchased of E. A. Johnson, and remained in possession until I sold under the mortgage. They never made but one payment on the note of \$200 secured in the mortgage. This was made on January 1, 1890, and was a bale of cotton, paid through a tenant on the land in dispute, worth \$34.20. This is the only payment. I sold the land under mortgage on August 7, 1899, after due advertisement, and plaintiff became purchaser, and I executed and delivered to him a deed for the same. After this the defendant Carter Pope entered upon the land, and would not let plaintiff take possession or come on it." Plaintiff put in evidence deed duly executed and delivered to Rawlings, mortgagee, on August 7, 1899, and duly recorded on October 1, 1900. It was admitted that this deed was in due form, and conveyed title to the land in dispute, provided Rawlings had the right under the mortgage to convey; and it was admitted by defendant that Rawlings had the right to make the conveyance if the mortgage had been duly recorded as to E. A. Johnson, and if Isaac Pope and wife and E. A. Johnson had the power to convey title. There was other evidence offered to show rental value of the land in dispute, and the execution of the mortgage by E. A. Johnson. Plaintiff rested. Defendant moved for judgment as of nonsuit upon the evidence, for that the mortgage as to E. A. Johnson had never been registered, and therefore no title passed to plaintiff. Motion sustained, and plaintiff excepted and appealed from the judgment rendered.

G. M. T. Fountain, for appellant. John L. Bridgers, for appellee.

FURCHES, C. J. This is an action of ejectment, in which the plaintiff undertakes to establish his title to the land in controversy by a deed from E. A. Johnson to Isaac Pope, a mortgage from Isaac Pope and wife and E. A. Johnson to F. M. Rawlings, with power of sale, and a deed from Rawlings, mortgagee, to plaintiff. And it is admitted that E. A. Johnson was the owner of the land at the date of the deed from her to Isaac Pope; that the mortgage from Pope and wife and E. A. Johnson covered and conveyed the land, if Pope and his wife had the right to convey the same; and that the plaintiff has the title if the mortgage to Rawlings conveyed the title to him. But the defendant contends that the deed from E. A. Johnson to Isaac Pope did not convey the title to said land, or, if it did, there were conditions in said deed that prevented Isaac from being able to mortgage the land, and that, although E. A. Johnson joined in the mortgage of Pope and wife to Rawlings, it is ineffectual as to her for the reason that it was never probated, or was not properly probated, as to her. And defendant also in-

sists that if the plaintiff has become the owner of said land he is a tenant in common with him, and that, as this is an action of ejectment, it cannot be maintained; that plaintiff's proper remedy would have been a proceeding before the clerk for partition. We do not think either of the contentions of the defendant can be sustained.

The deed from E. A. Johnson to Isaac Pope is as follows: "Witnesseth, that the said Elizabeth A. Johnson, for and in consideration of the sum of twenty dollars per year,—said amount to be paid annually by said Isaac Pope to said Elizabeth A. Johnson so long as she shall live, and the first annual payment of the sum of twenty dollars being this day acknowledged,—bath agreed and by these presents do bargain and sell, transfer, and convey to the said Isaac Pope, his heirs and assigns, one-half of my right to and interest in a certain tract of land, known as the 'Rose Place,' and purchased of James W. Gardner by said Elizabeth A. Johnson, said to contain eighty-two acres, and lying in the county of Edgecombe and state of North Carolina. The one-half conveyed to Isaac Pope in this deed by Elizabeth A. Johnson being bounded as follows: On the north by the lands of R. H. Gorham, on the east by the lands of Carter Pope, on the south by the county road leading from Battleboro, on the west by the lands of J. M. Cutchin. The western half of said tract of land, or the part conveyed in the deed, being said to contain forty one acres, more or less. It is furthermore understood and agreed that this deed is made in consideration that the said land conveyed in this deed be exempt inviolate against all debts now against Isaac Pope, or may be thereafter contracted by him, but, should said Isaac Pope at any time desire to sell or to convey said tract or parcel of land, that he shall have absolute power to do so. In witness whereof, I have hereunto set my hand and seal the day and date above written. Elizabeth A. Johnson. [Seal.]" This deed was probated and registered in Edgecombe county on the 13th December, 1886. The mortgage from Pope and wife was properly probated and registered as to Pope and wife, but not as to E. A. Johnson. But, if the deed from E. A. Johnson to Isaac Pope conveyed the land to him in fee simple, it was not necessary that E. A. Johnson should have joined in making the mortgage of Pope and wife to Rawlings. And, if it was not necessary for her to have joined in the mortgage, the want of a proper probate as to her did not affect the validity of the mortgage to Rawlings, and he got a good title. The only reason that has been suggested why Isaac Pope and wife could not make the mortgage to Rawlings is that the deed from E. A. Johnson to him did not convey a fee-simple estate, or, if it did, it was incumbered with the payment of \$20 per annum to E. A. Johnson for her life. But we do

not agree to the proposition of defendant that the following language has the effect to defeat the plain and express intention to convey the fee simple, to wit: "It is furthermore understood and agreed that this deed is made in consideration that said land conveyed in this deed be exempted inviolate against all debts now against Isaac Pope, or may hereafter be contracted by him, but, should Isaac Pope at any time desire to sell or to convey said tract or parcel of land, that he shall have absolute power to do so,"—this taken in connection with the contractual part of the deed, which is as follows: "For and in consideration of the sum of twenty dollars per year,—said amount to be paid annually by said Isaac Pope to said Elizabeth A. Johnson so long as she lives, and first annual payment of the sum of twenty dollars being this day acknowledged,—hath agreed and by these presents do bargain and sell, transfer, and convey to the said Isaac Pope, his heirs and assigns," etc. These quotations from the deed from E. A. Johnson to Isaac Pope, in our opinion, undoubtedly conveyed the fee-simple estate to Isaac. And the clause against liability for the debts of Isaac is incompatible with and repugnant to the grant of the fee-simple estate, and is void. *Dick v. Pitchford*, 21 N. C. 480; *Twitty v. Camp*, 62 N. C. 61; *Committee v. Kesler*, 67 N. C. 443; *Blount v. Harvey*, 51 N. C. 186; *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890. Nor do they constitute a lien or incumbrance on the land. *Taylor v. Lanier*, 7 N. C. 98; *Gray v. West*, 93 N. C. 442. One tenant in common may recover in an action of ejectment against a co-tenant. The difference in an action of ejectment against a co-tenant and a stranger is that in the case of co-tenancy the judgment is to be let into possession with the co-tenant, whereas in cases against strangers the judgment is to oust the defendant and put the plaintiff in possession. This learning is too elementary to require citation of authority to support it. But the application of this doctrine is not necessary in this case, as there is no tenancy in common between the plaintiff and defendant, and there was none between Isaac Pope and the defendant. It seems that Elizabeth A. Johnson owned a tract of land containing about 82 acres. This she wished to divide between Isaac Pope and the defendant, Carter Pope. She first conveyed the eastern half to the defendant Carter, and then she proceeded to convey the western half to Isaac, "bounded as follows: On the north by the lands of R. H. Gorham, on the east by lands of Carter Pope, on the south by county road leading from Battleboro, on the west by the lands of J. M. Cutchin. The western half of said tract of land, or the part conveyed in this deed, being said to contain 41 acres, more or less." This deed does not contain a beginning point, nor course and distance, and yet it may easily be located. It lies in Edge-

combe county, N. C., known as the "Rose Place," and purchased of James Gardner, said to contain 82 acres, more or less, and being the western half of said tract, bounded as follows: "On the north by the lands of R. H. Gorham, on the east by lands of Carter Pope, on the south by county road leading from Battleboro, on the west by lands of J. M. Cutchin. The western half of said tract of land, or the part conveyed in this deed, being said to contain 41 acres, more or less." All that a surveyor would have to do to locate it would be to find the adjacent boundaries called for in the deed, and the land conveyed would be located. And one of the adjacent lines necessary to be located would be that of the defendant, Carter Pope. This dividing line severs his land from that conveyed to Isaac Pope, so they are not tenants in common. *Midgett v. Twiford*, 120 N. C. 4, 28 S. E. 626. Therefore, as we are of opinion that the deed from Elizabeth A. Johnson to Isaac Pope conveyed the fee-simple estate, it was not necessary for E. A. Johnson to join in the mortgage to Rawlings. And the fact that the mortgage to Rawlings was not properly probated as to E. A. Johnson did not vitiate the mortgage as to Isaac Pope and wife. And, as the payments to be made by Isaac Pope to Johnson are not liens or incumbrances on the land, there is error in the judgment of nonsuit, which must be reversed.

(129 N. C. 57)

PENDER et al. v. PENDER.

(Supreme Court of North Carolina. Sept. 24, 1901.)

TRUST DEED—PROVISIONS—CONTINGENT REMAINDER—CONVEYANCE—TITLE —FEE SIMPLE.

Certain land was conveyed to a trustee for payment of a debt, "then to convey to M., wife of D., during her life, and at her death to hold it as a residence of D. so long as he resides thereon, and, as soon as he ceases to reside thereon, to convey the lot to the children of M. and D.; and, if any of the children aforesaid shall die leaving children surviving them, such child or children shall stand in the parent's place,—to have and to hold to the said children, as aforesaid, to them and their heirs aforesaid." The debt was paid. D. died. The fee was conveyed to the children of M. and D. subject to the life estate. *Held*, under such trust deed, there was no contingent remainder to the children living at the date of conveyance, and a deed in which M. and the surviving children joined passed a good title in fee simple.

Appeal from superior court, Edgecombe county; McNeill, Judge.

Action by Mary C. Pender and others against James Pender. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

John L. Bridgers and G. M. T. Fountain, for appellee.

CLARK, J. The lot in question was conveyed to a trustee, first for payment of a

debt, which has been long since paid, "then to convey said land to Mary Pender, wife of David Pender, during her life, and at her death to hold it as a residence of David Pender so long as he resides thereon, and, as soon as he ceases to reside thereon, to convey the said lot to the children of said David and said Mary; and, if any of the children aforesaid shall die leaving children surviving them, such child or children shall stand in the place of the deceased parent or parents,—to have and to hold to the said children, as aforesaid, to them and their heirs aforesaid." The debt having been paid, the trustee thereupon conveyed a life estate to Mary Pender. David Pender died in 1897, having ceased to use said lot as a residence many years prior thereto. David and Mary Pender had issue, three children, one of whom died intestate and without issue. The trustee has conveyed to the surviving children the fee, subject to the life estate of their mother. They have, in pursuance of a contract of sale heretofore made, united with their mother in a deed, regular in all its parts, which they have tendered to the defendant, who contracted to purchase the land, but who now declines to accept the deed, upon the ground that under aforesaid trust deed they cannot make him a good and indefeasible title. This presents the sole question in controversy, which comes up on an agreed state of facts, "upon an action submitted without controversy," duly verified, as required by section 567 of the Code.

His honor correctly held that the deed tendered by the plaintiff conveyed "a good and indefeasible title and estate in fee simple, free and clear from all claims, contingent or otherwise," and adjudged that the defendant should accept said deed, and pay the purchase price agreed upon. There is here no contingent remainder to "such children as shall be living" at the death of Mary Pender, or at cessation of the occupation of premises by David Pender. The trust is, after payment of the debt, to Mary Pender for life, with remainder to the children of Mary and David Pender, subject to the latter's right of occupation for a residence. The direction is to convey the land, subject to Mary Pender's life estate, to the children of herself and David when he ceases to occupy the lot as a residence. His death fulfilled that condition, and the trustee thereupon properly executed such deed to the children. The condition that "if any of the children, as aforesaid, shall die leaving children surviving them, such child or children shall stand in the place of the deceased parent or parents," speaks of the date when the conveyance, subject to the mother's life estate, should be made,—i. e. on the cessation of David Pender's occupation of the premises. The deed then made to the two surviving children, the other having died intestate and without issue, was an exact and

faithful compliance with the terms of the trust. The provision that if any of the children should die leaving children, such children shall represent their parents, has no application here, for there were none such, and could not, even if the date of the conveyance had been still in the future, have turned this limitation into one to "such children as shall then be living." It is not a contingent remainder to those then living, but is a provision that the share of those deceased shall go to their children. The case falls under the class of cases represented by *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 80, and has no analogy to the line of cases of which *Williams v. Hassell*, 78 N. C. 174, is an exponent. No error.

(129 N. C. 50)

CONNOR v. DILLARD.

(Supreme Court of North Carolina. Sept. 24, 1901.)

PURCHASE-MONEY BOND—ACTION TO FORECLOSE—JURISDICTION—CHANGE OF VENUE.

1. Under Code, § 190(3), providing that application for the sale of real estate on foreclosure may be made in the superior court of the county where such real estate, or some part thereof, lies, it was error to refuse to remove to the county where the land was situated an action brought in the county of the defendant's residence, to enforce payment of a bond given for part purchase money of land; the parties having agreed to enforce the payment only out of this particular land.

2. An appeal from an order refusing to remove a cause to another county for trial, taken at the time of the entry of the order, is not premature.

Appeal from superior court, Wilson county; Coble, Judge.

Action by H. G. Connor, executor, against Ed. Dillard. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jacob Battle and B. H. Bunn, for appellant. H. G. Connor & Son, for appellee.

OLARK, J. This is an action brought in Wilson county to enforce payment of a bond given for part purchase money of the Floyd tract of land, lying in Nash county, with an allegation in the complaint and an agreement of record in this action that it was stipulated in the contract of sale that payment should not be coerced out of any other property of the defendant, and the complaint asks only that judgment be "enforced by execution against said Floyd tract." The bond is one of a series secured by mortgage, though the complaint is not in form for the foreclosure thereof. The defendant moved to remove to Nash county, under section 190(3) of the Code. The motion should have been granted, because the action is "substantially for the foreclosure of a mortgage" (*Fraley v. March*, 68 N. C. 160), and the judgment could be enforced only by subjecting a particular tract of real estate in another county. The enforcement of the judgment against that land is the sole object of the action.

Manufacturing Co. v. Brower, 105 N. C. 440, 11 S. E. 813. If the action had been for a mere personal judgment, though on a mortgage note, it could have been brought where plaintiff resides, and docketing the judgment would not convey to plaintiff any estate in debtor's land. **Gammon v. Johnson**, 128 N. C. 64, 35 S. E. 185; **McLean v. Shaw**, 125 N. C. 491, 34 S. E. 634. In **Baruch v. Long**, 117 N. C. 509, 23 S. E. 447, the motion to remove was made under subsection 1 of this section 190, and it was held that the lien of a docketed judgment was not such "estate or interest" in realty as entitled the defendant to remove the action to the county where such judgment was docketed. That action was a creditors' bill to set aside as fraudulent certain judgments suffered by defendant, and certain transfers of property by him. The proceeding was not, as here, to enforce collection under the judgment lien, which is in the nature of a statutory mortgage (**Manufacturing Co. v. Wilcox**, 111 N. C. 42, 15 S. E. 885), but was calling in question the bona fides of the judgments and transfers. This in no wise affected the enforcement of the lien, nor required the examination of title to realty, but was a personal action against the defendant, calling only for the investigation of his conduct in suffering such judgment, not its lien and effect, if valid. This appeal was not premature. **Roberts v. Connor**, 125 N. C. 45, 34 S. E. 107. In refusing to remove there was error.

49 W. Va. 630)

BAILEY et al. v. CALFEE et al.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

ENFORCEMENT OF TRUST—LACHES—MULTI-FARIOUSNESS—EVIDENCE—APPEAL—REVIEW.

1. S. purchased at judicial sale certain lands, the property of J. M. B., at the price of \$3,040, on the 6th day of February, 1886, which sale was confirmed February 9, 1886. On the 13th day of March, 1886, S. sold the property to C. and B. for the said sum of \$3,040 and the additional sum of \$1,919, the amount of judgment liens held by S. against J. M. B., which constituted the next lien on the lands so purchased after the \$3,040, and was to be paid when demanded by S. On the 12th day of June, 1886, under writ of possession issued from the court in which the sale was made, the possession was delivered by the sheriff to C., as assignee of S., the purchaser. J. M. B. left the property, leaving C. in possession, and lived elsewhere until his death, which occurred January 10, 1890. On the 9th of January, 1892; J. M. B., in his own right, and as administrator of J. M. B., deceased, and J. A. B. and others, infant children of Julia B., deceased, by J. M. B., their father and next friend, filed their bill and first and second amended bills, alleging that S. had, by verbal agreement with the owner, J. M. B., purchased the land for the benefit of J. M. B., and held same in trust for him, and that C. and B. had, with the consent of S., purchased from J. M. B., at the price of not less than \$7,000, which, after paying S., the residue was to be paid to J. M. B.; also that 200 acres of the land purchased by S. had been sold by J. M.

B. by oral contract, for \$1,500, to Julia B., who had fully paid for and was in possession of same; that J. M. B. in his sale to C. and B. reserved from said sale the 200 acres so sold to Julia B., and another tract known as "Piney Hills Tract"; and praying that the sale to S. be held to be a mortgage, and that C. and B., having fraudulently obtained the legal title to the 200 acres and the Piney Hills tract, be held as trustees holding the legal title of the 200 acres for the plaintiffs (the children of Julia B.) and of the Piney Hills reservation for the heirs of J. M. B., deceased; that C. and B. be required to convey the 200 acres to the infant plaintiffs, or to pay them \$1,500 and rents and profits; that they be required to convey to the heirs of J. M. B., deceased, the Piney Hills tract; that said heirs recover the rents, issues, and profits thereof while in possession of C. and B.; that the administrator of J. M. B., recover from C. and B. the residue of the purchase money due on said land; that the dower of S., the widow of J. M. B., in said lands, be assigned to her; and that S. be compelled to account for moneys received by him on account of deductions made by creditors of J. M. B., which were made for the benefit of J. M. B., the owner of the lands sold. *Held*: (1) The bill and amended bills are multifarious; (2) a court of equity will refuse to grant relief to plaintiffs in such case after such unexplained delay in bringing their suit.

2. A case in which the evidence does not sustain the allegations of the bills.

3. Where the issues in a cause are questions of fact depending upon the testimony of witnesses, the appellate court will not disturb the decree of the circuit court, unless it is clearly contrary to a decided preponderance of the testimony in the case.

(Syllabus by the Court.)

Appeal from circuit court, Mercer county; Joseph M. Sanders, Judge.

Bill by James M. Bailey and others against William D. Calfee and others. Decree for defendants. Plaintiffs appeal. Affirmed.

Boggess & Boggess, for appellants. Johnston & Hale, for appellees.

McWHORTER, J. On the 29th September, 1866, Philip P. Bailey conveyed to John S. Douglass and Henry S. Calfee, trustees, certain property, including his interest, in a certain survey of 1,700 acres of land, to secure certain debts therein described. Afterwards Philip P. Bailey conveyed the said survey of 1,700 acres to John M. Bailey, trustee. John S. Douglass advertised to sell said land under said deed of trust, and in March, 1877, said John M. Bailey enjoined the sale by bill filed in the circuit court of Mercer county. In said injunction suit a decree was rendered in 1885 for the sale of said land by said Douglass, trustee. Said trustee sold the land as directed, and reported the sale, and on the 9th of February, 1886, there being no exceptions to the report of sale, said report and sale were confirmed by the court; H. W. Straley being the purchaser of the land, from which there had been several tracts excepted, thereafter sold at the price of \$3,040. On the 9th day of June, 1886, the court awarded a writ of possession for said land to the purchaser, Straley, which was duly executed on the 12th day of June, 1886, by the sheriff of Mercer

county placing William D. Calfee, assignee of the purchaser, H. W. Straley, in possession of said land. On the 9th day of January, 1892, James M. Bailey, in his own right and as administrator of John M. Bailey, deceased, and John A. Bailey, Robert L. Bailey, Della C. Bailey, Roy D. Bailey, Frederick Bailey, infant children of said James M. Bailey, who sued by their father as next friend, filed their bill in equity, alleging: That John M. Bailey paid to P. P. Bailey all the purchase money for said land, except that he was to pay off a certain debt due to Shumate's executors, and secured by said deed of trust executed by said P. P. Bailey, which was a lien on the land. That when John M. Bailey found that a sale of his land was inevitable, and being indebted to H. W. Straley, he made an arrangement with Straley to buy the said land with the understanding and agreement that the land was to be resold by said Bailey; said Straley to be repaid all of his money due him on the land, and the overplus to be paid to said Bailey, or, at any rate, Straley was to permit Bailey to resell the land, and have the benefit of all the money it would bring over and above the amount due by said Bailey to Straley, the latter preferring the money to the land, and being willing in the transaction to do anything he reasonably could to aid the said Bailey under the circumstances. Said Straley became the purchaser at the sale made by Douglass, the trustee. Said Bailey continued to reside on the land for some time, until he made an arrangement with W. D. Calfee to sell him the land at a price much greater than the nominal price paid by said Straley. In this trade Calfee was to pay off the amount due by Bailey to Straley, and to pay off other large amounts agreed on between them, and especially was he to pay to the children complainants the amount due them as thereafter stated, and Calfee was to make a settlement with John M. Bailey of all the numerous transactions. That very close and confidential relations existed between said Bailey and Calfee, being near relatives, and Bailey reposed the utmost confidence in Calfee. That Calfee took possession of the land shortly after the arrangement, and Bailey moved off, and Bailey died intestate, without having made any settlement with Calfee. Said Calfee, by some arrangement, let R. H. Bailey have a part of the land, and they (Calfee and R. H. Bailey) made an arrangement by which they agreed to pay, and did pay, or arranged with Straley, the amount due him by said John M. Bailey, which arrangement with Straley was reduced to writing, and, the original being in the hands of Straley, a copy would be filed with the bill, marked "H." That plaintiffs were informed that said Straley, in making said arrangement, understood that he was acting in good faith towards John M. Bailey; that he was but the nominal owner, the real trade having been made with said

John M. Bailey in pursuance of said understanding between Straley and Bailey. That plaintiff James M. Bailey married the daughter of P. C. Honaker, of Bland county, Va., who was the mother of the infant plaintiffs, and that she died in the year 1882. That she inherited from her father a valuable tract of land in Bland county. That she sold said land with the understanding with her husband that the proceeds should be invested in other lands, and with her husband she bought of said John M. Bailey 200 acres of said P. P. Bailey land, to be cut off the west end of the piece by a line agreed upon between them. James M. Bailey and wife took possession and moved onto the land, improved the house, and lived there until her death. Then, with his small children, James M. moved to, and moved his home to, his father's, until his second marriage, in January, 1886. That James M. Bailey and his wife paid said John M. Bailey in full for said land out of the proceeds of the sale of said lands in Bland county, and said John M. Bailey applied same to the liquidation of liens on his said land, and said John always recognized the said part of the land as the property of plaintiff's wife, and after her death as belonging to her children. That John M. Bailey was essentially a just and honest man, and, being embarrassed and burdened with debts, it was always a matter of special solicitude with him to secure to infant dependents their rights in said land, and did arrange to secure them in this way. That when Calfee purchased the land of John M. Bailey he expressly contracted and agreed with said Bailey that he would pay the children (infant plaintiffs) for said land. That defendants Calfee and R. H. Bailey both knew all about the fact that the children owned the land, and that they, and each of them, had full knowledge of their said equity. That said infants are entitled to the legal title to said land, and ask for same, and in default thereof, if deemed more equitable, that they be decreed \$1,500 against said Calfee and R. H. Bailey, one or both. That said R. H. Bailey, under an agreement between himself and Calfee, was in possession of said 200 acres of land. That the widow of John M. Bailey was made a party defendant to the bill in order that she might assert or relinquish her dower in said land. That, according to the legal intent and meaning and equitable status of said portion, Straley, under his purchase from Douglass, trustee, held said land as an implied trustee for the benefit of John M. Bailey as to the overplus over and above the amount really due said Straley. Then said Calfee and Bailey are equitably due said John M. Bailey, administrator, all the purchase amount yet paid on said land, and are both implied trustees, holding said 200 acres for the benefit of the infant plaintiffs; if not, then they are equitably bound to pay them the said sum of \$1,500, with interest. That plaintiffs were

unable to give the exact amounts of the aggregate to be paid by Calfee to John M. Bailey for the land, but that it was \$7,000, and not less, and would be supplied by proof, or the witness of commissioner's report. That Calfee and R. H. Bailey had not actually paid full value for said land, and called on them to show what they had actually paid on the purchase money, when, and to whom so paid. And allege that in said sale by said John M. Bailey he reserved and excepted therefrom a portion of the tract on the north side, known as the "Piney Hills," and prayed that all proper decrees be entered enforcing plaintiffs' rights and equities in the case, that all proper accounts be entered and taken, and for general relief.

Defendants W. D. Calfee and R. H. Bailey demurred to and answered said bill, denying all the material allegations thereof; denying that they purchased from John M. Bailey, but that they purchased alone from H. W. Straley for the sum of \$4,959,—the amount he paid, \$3,040, and \$1,919, the amount of Straley's judgments against said John M. Bailey; averring that on the 18th of March, 1888, they purchased the land from H. W. Straley, and that, after the sale was confirmed to Straley, he took possession, and when respondents bought from Straley they took possession, and have ever since remained in possession, and that shortly after Straley purchased, and about the time respondents purchased from Straley, John M. Bailey removed from the land to the city of Bluefield, where he resided at the time of his death, which occurred on or about January 10, 1890; denying that there was any arrangement or understanding with John M. Bailey in regard to the purchase; denying that James M. Bailey and his wife, or either of them, ever paid John M. Bailey for a portion of said land out of the proceeds of her Bland county land, and denying that John M. Bailey always recognized said portion of land as the property of plaintiff's wife, and after her death as belonging to her children; denying that they had knowledge of any equities in the infant plaintiffs; denying that they, or either of them, had any arrangement, agreement, or understanding with John M. Bailey, or any knowledge of any on the part of H. W. Straley. Plaintiffs filed their amended bill, referring to their original bill, making it a part of the amended bill, and correcting same, alleging that some time before the sale by trustee Douglass John M. Bailey entered into a distinct agreement with H. W. Straley that he should become the nominal purchaser of said land at the nominal sum of \$3,040; that by said agreement the beneficial or equitable title and interest was to remain in said John M. Bailey; that the legal title, if conveyed to Straley, was only to secure him for any part of said \$3,040 paid or advanced by him on the Shumate debt; that, relying on said agreement, said John M. Bailey was induced to allow

Straley to become the ostensible purchaser of said land for the insignificant sum of \$3,040; that said land was worth, at a low estimate, \$10,000; that said Bailey, if he had not relied on said agreement, could readily have found a purchaser at the price of \$10,000, and would have done so, but did not want to sell at any price, and entered into the agreement with Straley in order to gain time to pay off the indebtedness against him, and retain his farm; that Straley has never at any time had any interest in said land except as trustee; that, while plaintiffs did not charge actual fraud on the part of Straley in the matter, they charged that he, by making an absolute deed for said lands to Calfee and R. H. Bailey, had rendered it possible for them to perpetrate the grossest fraud, and alleged that Calfee and Bailey had resorted to every possible contrivance to cheat and defraud plaintiffs and the heirs and widow of John M. Bailey, and charged that Straley, by his said act, was guilty of constructive fraud; alleged that no pretense or claim was ever set up by Calfee or Bailey, in the lifetime of said John M. Bailey, that they had purchased the land from Straley; that they at all times prior to the death of John M. Bailey admitted and claimed to have purchased same from John M. Bailey, and that they had agreed to pay him for said land the sum of \$7,000, not including the 200 acres mentioned as belonging to the infant plaintiffs as paid for by their mother, and laid off to them, and possession taken by James M. Bailey and wife about 1881, and also not including a certain part known as the "Piney Hills," said tracts being specifically reserved in the contract of sale between John M. Bailey and Calfee and R. H. Bailey; that after the death of John M. Bailey defendants William D. Calfee and R. H. Bailey induced Straley by false and fraudulent representations to make to them an absolute deed for said land, with the intent and for the purpose of defrauding plaintiffs and the heirs of John M. Bailey out of what justly belonged to them, and to fraudulently defeat the widow's (Sarah Bailey's) right of dower in said lands; that said John M. Bailey, relying on the honesty of Calfee and Bailey, neglected to have his contract of sale with them reduced to writing; that said Calfee and Bailey, after the death of John M. Bailey, seeing that they could obtain apparently a good title, offered every inducement to Straley to make them an absolute deed for said land, and that finally Straley was induced to make said deed; that at that time Calfee and Bailey had full and complete knowledge that said Straley held said land as trustee for said John M. Bailey, and they had full knowledge of the circumstances as to the agreement between said John M. Bailey and Straley; that Calfee and Bailey, since the death of John M. Bailey, have been guilty of the grossest and most palpable frauds, and resorted to any device known in

their efforts to cover up the true nature of the agreement between themselves and John M. Bailey and between said John M. Bailey and Straley, and to prevent a full investigation of the matter by the courts; that, to prevent plaintiffs from instituting and prosecuting this suit they have threatened to involve them in protracted litigation over pretended claims; that said defendants have for the same purpose asserted large debts due them by the estate of John M. Bailey, amounting to several thousand dollars; that said debts have no existence in fact, and allege that said defendants are due said estate large amounts outside of the purchase money due by them for the land; that John M. Bailey in his contract with Calfee and Bailey reserved said 200 acres belonging to infant plaintiffs, and pointed out to them the exact boundary line between the 200 acres and the lands he sold Calfee and Bailey, and they knew exactly the claim of plaintiffs at the time of the contract; that by their deed from Straley defendants acquired no title except the naked legal title; that, in so far as it conveys the 200-acre tract, said Calfee and Bailey hold it in trust for the infant plaintiffs, who are entitled to a decree for conveyance of the legal title to them; that for the time defendants have been in possession of the 200 acres infant plaintiffs are entitled to rents and profits; that Calfee and Bailey are trustees for heirs of John M. Bailey, deceased, of the Piney Hills land, and said heirs entitled to a conveyance of the legal title thereof; that under the contract of sale made between John M. Bailey and Calfee and Bailey, upon the payment by them to John M. Bailey's administrator of the \$7,000, with interest, they would be entitled to the lands, subject to the dower of Sarah Bailey, the widow; that of said purchase money there is still due and unpaid, principal and interest, between \$5,000 and \$6,000, which is a lien on the lands; and pray that Calfee and Bailey be compelled to convey to the infant plaintiffs the 200 acres, and account to them for the rents and profits thereof; that the heirs of John M. Bailey recover of Calfee and Bailey the tract known as the "Piney Hills," and that same be conveyed to them, and that they recover the rents and profits, and that the administrator of John M. Bailey recover of them the residue of the purchase money due on said land, and that the lien therefor be enforced against said land, and that the dower of said widow, Sarah Bailey, be assigned to her, that all proper accounts be taken, etc., and for general relief. Defendant H. W. Straley filed his separate demurrer and answer to the amended bill, denying positively each and every allegation of the amended bill; alleging any agreement or contract between John M. Bailey and himself, or any interest of said Bailey in the purchase by respondent at the sale made by Douglass, the trustee; averring that it was a sale at public auction; that respondent was the

purchaser at the sum of \$3,040, being the highest bid; that he received a conveyance therefor after a due confirmation of the sale by the court; that he purchased in his own right, for his own purpose, in his own name, and for his own benefit exclusively; that he paid a fair price,—more than was bid for it by any one else; denies that John M. Bailey had any interest of any kind whatever in said purchase, or in the land either at the time of said purchase, before, or after, under any agreement, contract, or understanding with respondent; denies that John M. Bailey could have procured a purchaser of said land at \$10,000; that respondent sold said land, after he purchased it, to his co-defendants Calfee and Bailey, and conveyed the same to them; that the sale was bona fide, and in good faith; and denies that he was guilty of any fraud, either actual or constructive, in making said sale or conveyance of said land to Calfee and Bailey; denies that he held the title in trust for John M. Bailey; avers that the sale by Douglass was made under deed of trust made by P. P. Bailey to secure certain debts therein mentioned before the land was purchased by John M. Bailey; denies all allegations of fraud or unfair dealing. Defendants W. D. Calfee and R. H. Bailey also filed their joint answer to said amended bill, referring to their answer to the original bill, and making it a part of their answer to the amended bill, and deny positively all the allegations of the amended bill charging them with knowledge of any interest that John M. Bailey had in the purchase by Straley, or that they purchased from John M. Bailey, or that he had any interest in the land whatever after the sale to Straley, and denied all allegations of fraud; averred that they purchased from Straley alone in good faith, and had no knowledge of any interest of John M. Bailey in the lands, or any interests of the infant plaintiffs, or reservation of "Piney Hills" or the 200-acre tract; deny all of the general and specific charges of fraud in regard to their efforts to prevent investigation in the courts of the dealings between them and the said Bailey and Straley touching said land transaction.

Sarah Bailey filed her answer to the amended bill, admitting its allegations, and claiming dower in the lands as the widow of John M. Bailey; averring that Straley was only the ostensible purchaser, and held the land as trustee, while John M. Bailey was the real owner of the equitable estate in said lands; that Calfee and Bailey acquired nothing but the legal title by their conveyance from Straley; that, having failed to comply with their contract of sale made with John M. Bailey, respondent is entitled to dower in kind in said land, at any rate to a gross sum in lieu of dower, and to a distributive share of the personal estate of John M. Bailey when same is collected; and prays that such proceedings be had as will secure to her her interests, etc.

Plaintiffs filed their second amended bill, referring to and making a part thereof their former bills, and alleging that the plaintiffs children of Julia Bailey are infants; that in 1879 and 1880 their mother made two oral contracts with John M. Bailey, whereby she purchased from him about 200 acres of the west end of his farm; that for the purchase made in the spring of 1879 she was to pay \$600, and for that in the spring of 1880 she was to pay \$900, aggregating for the entire purchase \$1,500; that the price of \$1,500 was paid in full by Julia a short time after the purchase was made, and the land purchased by her was laid off to her by said John M. Bailey by metes and bounds; that in pursuance of said verbal contract she took possession of the land so purchased, and remained in possession until her death, and that her husband and children remained in possession after her death; that said Julia made valuable improvements of said land so purchased by her; that by her said purchase under said oral contracts she became the full and complete owner of the equitable title to said land in fee simple; alleges an agreement and an arrangement made on the day of sale by Douglass, trustee, between John M. Bailey and H. W. Straley, that when Douglass offered the land for sale Straley was to bid it in for Bailey; Straley was to hold the legal title as security for certain debts that he held against John M. Bailey; that Straley was to execute certain notes to John S. Carr, Anderson Shumate, R. A. Shumate, and J. H. Dare for the amount of the deed of trust debt, less the deduction mentioned; that Straley was to hold the legal title as security for the debts he alleged to be due him, and as security for the Shumate debt or notes, if he should have them to pay, and the equitable title was to remain in John M. Bailey; that he (Bailey) was to resell the land, or a part of it, and pay off the Straley and Shumate debts, and retain the balance of said land; that the land was bid in by Straley under this agreement and understanding; that Calfee was a party to the agreement, and was to buy the farm from John M. Bailey upon terms thereafter to be agreed upon, and arrangements were made with R. A. Shumate, acting for himself and Anderson Shumate and Dare and John S. Carr, whereby, under the arrangement that the land was to be bid in for John M. Bailey's benefit, they (the Shumates, Carr, and Dare) would accept the bonds of Straley, payable in 6, 18, and 30 months, the sale being for cash under the deed of trust; that the arrangement was made with the Shumates, Dare, and Carr with the distinct understanding that the land was to be bid in for Bailey by Straley; that the Shumates, Dare, and Carr, under the agreement, made a deduction on the debt due them of \$600, and they were induced not to bid on the land, to make the said deduction, and to take the notes of Straley on account of the understanding that

the land was to be bid in for Bailey by Straley, and that no bid was made, except Straley's, on account of said understanding that it was to be bought for Bailey's benefit; that said Straley, for the purpose of defrauding said John M. Bailey, when asked to put the contract in writing, told Bailey that the arrangement could not stand in law, and fraudulently procured from said John M. Bailey assent to an oral agreement and arrangement; that Straley's purchase under the arrangement is in the nature of a mortgage, and was never intended or understood to be an absolute sale; that it was bid in at less than one-third of its value; that plaintiffs were entitled to have all the other lands of John M. Bailey exhausted before the property sold by John M. Bailey to Julia Bailey could be subjected; that their rights under said sale are paramount and superior to all other liens against John M. Bailey and against said land purchased; that they were not parties to said transaction between John M. Bailey, Straley, and Calfee, and not bound thereby; reallege the sale by verbal contract of John M. Bailey to Calfee and R. H. Bailey for \$7,000, which they agreed to pay him, but never paid; that they had knowledge of the agreement between Straley and Bailey, and that they all had notice of the rights of infant plaintiffs, and know the exact boundaries of their land purchased by their mother; that said Straley and Calfee and R. H. Bailey during all the lifetime of said John M. Bailey admitted their respective contracts and agreements with said John M. Bailey, and it was not until after his death, in January, 1891, that they denied it; that just prior to the institution of this suit Straley fraudulently procured a deed of said land from Douglass, trustee, and that after that, about the — of May, 1891, made the defendants Calfee and Bailey a deed, being made for the purpose and with the intent of defrauding the infant plaintiffs, the widow of John M. Bailey, and his heirs at law of what justly belonged to them, and that by this fraudulent conveyance made by Straley he received the benefit of the deduction of \$600 made by the Shumates, Dare, and Carr to John M. Bailey, and that he has fraudulently appropriated same to his own use, and should be compelled to account for it; that John M. Bailey had no authority or power to sell the land purchased by Julia to Calfee and Bailey; that said attempted sale was in fraud of the rights of the infant plaintiffs, and, so far as they are concerned, the same is void, and of no effect; that since the institution of this suit Miles P. Rowland, George P. Bailey, and James H. Wilson have each purchased a portion of the land from Calfee and Bailey, and obtained deeds for same; that they are pendente lite purchasers, and take subject to this suit; that they had notice of the rights of the parties. They pray that the pretended sale to Straley be held as a mortgage; that a deed of convey-

ance for the land purchased by Julia Bailey from John Bailey be compelled to be made to the infant plaintiffs; that they recover rents and profits of same for the time it has been in possession of Calfee and Bailey; that Calfee and Bailey be compelled to pay the balance of purchase money due John M. Bailey for said land, or, if they elect to give up said land, to account for the rents and profits of same; that Straley be compelled to account for the money received by him on account of the deduction made by the Shumates, Carr, and Dare; that all proper accounts be taken, and for general relief.

Defendant H. W. Straley filed his demurrer and answer to the second amended bill of plaintiffs, as did also W. D. Calfee and R. H. Bailey their joint and separate answer, denying all the material allegations of the bill, referring to their former answers, and making them parts of their answers, respectively, and denying the new allegations of the second amended bill.

Sarah Bailey filed her bill in the same court against W. D. Calfee and R. H. Bailey, setting up her dower, as the widow of John M. Bailey, in the tract of land sold by Douglass and purchased by Straley; alleging the verbal sale of a part thereof to said Calfee and Bailey by John M. Bailey, reserving the 200 acres before sold to wife of James M. Bailey, and also the Piney Hills tract, as alleged in the bill and amended bills of James M. Bailey and others, and claiming dower as such widow in three several other tracts,—one of 200 acres, sold in the chancery cause of A. J. Bailey against J. M. Bailey and others, and purchased at commissioner's sale by H. Buren Bailey for the sum of \$600, and sold by said H. Buren Bailey to William D. Calfee, and now in possession of said William D. Calfee; and another of 15 acres, and another of 75 acres, which were sold in the chancery cause of William D. Calfee and others against the Bank of Princeton and others, and purchased by William D. Calfee; that she is informed that R. H. Bailey claims an interest in all said tracts of land; and prays that defendants be required to answer the bill; that her dower be assigned her in kind, or a gross sum in lieu thereof, and that she recover damages for the detention thereof; that all proper accounts be taken and inquiries made, and for general relief. And said Sarah Bailey filed her amended bill against said Calfee and R. H. Bailey, and George P. Bailey, Mary E. Rowland, and James H. Wilson, and refers to and makes a part of it her original bill, and makes, in effect, the same allegations that are contained in the bill and amended bills of James M. Bailey and others concerning the sale by trustee Douglass to H. W. Straley, and the purchase thereafter from John M. Bailey by Calfee and R. H. Bailey for the sum of \$7,000, which sale she alleged included the 200 acres sold by John M. Bailey to James M. Bailey and wife, and the Piney Hills tract; that

she was entitled to dower in the excess for which said land sold over the sum of \$3,040, the amount of the trust debt, and that she has a lien on the land for her said dower; that said land was owned by said W. D. Calfee and R. H. Bailey and defendants George P. Bailey and Mary E. Rowland and James H. Wilson; and further alleging that when William D. Calfee purchased the 200 acres from H. Buren Bailey for \$600 he retained \$200 of the purchase money to pay off and discharge plaintiff's contingent right of dower in said land, and that said Calfee has never paid and refuses to pay the same; and realleges her right of dower in the two other tracts, calling it 80 and 18 acres, instead of 75 and 15 acres, as set out in her original bill, and claiming dower therein.

Calfee and R. H. Bailey filed their demurrer and answer to the original bill, denying the material allegations thereof, all verbal agreements or understandings about buying the land from John M. Bailey, or that they fraudulently obtained a deed therefor from Straley; aver that the tract of land referred to in the bill as sold in the case of A. J. Bailey against John M. Bailey to H. B. Bailey and by him to Calfee was sold for the purchase money due from John M. to A. J. Bailey, and when sold brought no more than the purchase money due and costs of suit and sale, and that said land, and no part thereof, belonged to respondents, or either of them, at the time of institution of plaintiffs' suit, nor does it now so belong to them, and that they had no interest in any of the lands referred to in the bill. These same respondents also answer the amended bill, denying its allegations, and averring that the several tracts of 200, 80, and 18 acres were sold for the purchase money due on them, and not subject to the dower rights of plaintiff, and deny that they sold for an inadequate price.

H. W. Straley filed his affidavit, exhibiting therewith the written agreement or contract referred to in the original bill of plaintiffs James M. Bailey and others between H. W. Straley and W. D. Calfee and R. H. Bailey, under which Calfee and Bailey purchased the lands from Straley purchased by him from Douglass, trustee, at the judicial sale, from which it appears that, after reciting the purchase by Straley of said lands at the price of \$3,040 from said trustee, Douglass, Calfee and Bailey agreed to purchase said land from Straley for the said price, and to pay, in addition thereto, \$1,919, amount of judgments held by Straley against John M. Bailey, to be paid when demanded by Straley, reserving a lien on the lands to secure Straley, and on payment of the \$1,919 Straley was to assign to them, without recourse on him, the said judgments against John M. Bailey, and to convey or cause to be conveyed to them the title to the lands.

Depositions of many witnesses were taken for plaintiffs and defendants, to which va-

rious exceptions were taken. On the 16th of February, 1898, the two causes were heard together "upon the original bill and first and second amended bills in the first of the above-mentioned causes, and upon the joint answer of the defendants W. D. Calfee and R. H. Bailey to all of said bills, and upon the plaintiffs' general replications to all of said answers, upon the separate answer of the defendant H. W. Straley to all of said bills, and upon plaintiffs' general replication to all of said last-mentioned answers, and upon bill of plaintiff in the second of the above-named causes, upon the joint answer of the defendants W. D. Calfee and R. H. Bailey to said bill, upon plaintiffs' general replications to said answers, upon all the depositions taken in the causes, and upon the record and all the papers in the chancery cause of John M. Bailey v. John A. Douglass, trustee, and others, referred to in said causes, and upon all the orders and decrees heretofore entered herein, and upon the agreement of counsel that the depositions taken in the first of the above-named causes should be read with the second of the above-named causes, and was argued by counsel. Upon consideration, and without passing upon any of the exceptions taken to the depositions taken in the cause, the court is of opinion that the plaintiffs in said causes are not entitled to the relief prayed for in their respective bills, and that the same should be dismissed, doth so adjudge, order, and decree," and adjudged costs to the defendants in each case. From this decree the plaintiffs appealed, and say: First, that "the court erred in not excluding the evidence of H. W. Straley, W. D. Calfee, and R. H. Bailey as to personal transactions and communications with John M. Bailey, the said John M. Bailey being dead"; and, second, that "the court erred in dismissing the plaintiffs' bills in said causes, with costs, and in not declaring the sale made by John A. Douglass, trustee, to H. W. Straley, a mortgage, and that said W. D. Calfee and R. H. Bailey held said land as constructive trustees, subject to the rights of plaintiffs." There was a large amount of evidence taken, and exceptions taken to certain parts of it by plaintiffs and by defendants, upon which exceptions the court did not pass, but it is presumed that in deciding the case the court excluded such evidence from consideration as was incompetent. In *Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1008 (Syl., point 2), it is held: "In a case tried by a court in lieu of a jury, it is not error in the court to hear illegal testimony; the court being fully competent to discard such evidence." See, also, *Nutter v. Sydenstricker*, 11 W. Va. 535; *State v. Seabright*, 15 W. Va. 590; *Abrahams v. Swann*, 18 W. Va. 274. In so far as the depositions of H. W. Straley, W. D. Calfee, and R. H. Bailey referred to statements made and conversations held by John M. Bailey to and with the said Straley, Calfee, and Bailey, as stated by plaintiffs' wit-

nesses, they are competent to testify. It is insisted that the bills of plaintiffs James M. Bailey and others are multifarious, and should be dismissed on that ground. The prayers of the bill and the first and second amended bills are almost innumerable, and are for the relief of various parties, and for many objects,—the payment to the infant plaintiffs of the \$1,500, the price of land paid, or the conveyance to them of the 200 acres of land alleged to have been purchased by their mother from John M. Bailey (this was an independent contract, separate and apart from the other transactions, in which the other plaintiffs had no interest); also for the conveyance to the heirs of John M. Bailey of the Piney Hills, and for the recovery of rents and profits therefor; also for the recovery of the balance of \$7,000, the price alleged by plaintiffs to be the amount agreed by Calfee after paying Straley what was due him; also for the assignment of dower in the lands to Sarah, the widow of John B. Bailey; and also that H. W. Straley be required to account for sums alleged to have been recovered by him on account of deductions made by the creditors of John M. Bailey for the benefit of said Bailey, which were not paid over by Straley. It is insisted by appellees that the bill and amended bills of plaintiffs should be dismissed because of their laches,—“that John M. Bailey, and those who claim under him, have slept too long upon their rights, if they ever had any.” The sale was made by Douglass, trustee, under decree of the court, on the 6th day of February, 1896, at which H. W. Straley became the purchaser at \$3,040. The sale was confirmed a few days thereafter. On the 12th day of June, 1896, by writ of possession, W. D. Calfee was put in possession of the land as assignee of H. W. Straley, and continued in possession, while John M. Bailey left the land, and lived at Bluefield until his death, in January, 1900. Plaintiffs' bill was filed January 9, 1892, within a month of six years after the confirmation of the sale to Straley. “The defense of laches may be made by demurrer, when the facts manifesting it appear in the bill.” *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507 (Syl., point 4); *Jackson's Adm'r v. Hull*, 21 W. Va. 601; and *Trader v. Jarvis*, 23 W. Va. 100 (Syl., point 2). “Delay in the assertion of a right, unless satisfactorily explained, even when it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver; and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced by a court of equity.” *Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815; 1 *Daniell*, Ch. Pl. & Prac. 559 (6th Ed.) cl. 9. Plaintiffs' bill and amended bills allege fraud on the part of H. W. Straley and W. D. Calfee and R. H. Bailey—especially Calfee and Bailey—in procuring from Straley an absolute deed for the

property by false and fraudulent representations, with the intent and purpose of defrauding the infant plaintiffs and heirs of John M. Bailey, deceased. When fraud is relied upon to secure the relief sought, prompt action must be taken. In *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799, it is held: "The right to rescind a contract for fraud must be exercised immediately upon discovery thereof; and any delay in doing so, or the continued use and occupation of the property received under the contract, will be deemed an election to affirm it." *Trader v. Jarvis*, supra; *Hale v. Cole*, 31 W. Va. 576, 8 S. E. 516; *Doggett v. Helm*, 17 Grt. 96; *Wagner v. Baird*, 7 How. 234, 258, 12 L. Ed. 681; *Carr's Adm'r v. Chapman's Legatees*, 5 Leigh, 164; *Hayes v. Goode*, 7 Leigh, 452; *Atkinson v. Robinson*, 9 Leigh, 398; *Caruthers' Adm'r v. Trustees*, 12 Leigh, 610; *Harwood v. Railroad Co.*, 17 Wall. 79, 21 L. Ed. 558. The defendants, in their answers, as well as their depositions, deny all the allegations of fraud and unfair dealings, and the record bears them out in their position. The sale was a public, judicial sale made by Douglass, the officer of the court; was regularly confirmed, without exception to the sale or report of sale; within a few days the purchaser resold the property, and the assignee of the purchaser invoked the writ of the court to place him in possession of the property, and the former owner of the property, for whose benefit it is alleged to have been purchased, was evicted from the property, and made no claim to it while he lived, between three and four years; and the plaintiffs took no steps in the matter for about two years after his death. There is evidence tending to prove the allegations of the bill and amended bills, but it is made up of conversations had with the defendants, which are for the most part vague, indefinite, and uncertain. These conversations are denied or explained. The original bill does not charge fraud against any of the defendants in the transaction except by implication. In the amended bill it is specifically asserted that no actual fraud is charged against the defendant H. W. Straley, but alleged that by making an absolute deed of said lands to defendants Calfee and Bailey he had rendered it possible for them to perpetrate the grossest fraud, and alleged that said Calfee and Bailey had resorted to every possible contrivance to cheat and defraud plaintiffs, and alleged that Straley was, by his said act, guilty of constructive fraud, but failed to allege against said Calfee and Bailey any specific fraudulent acts or contrivance to cheat and defraud them. The testimony is conflicting and contradictory, and seems to fully sustain the decree of the circuit court by a fair preponderance. The sale to Straley being held valid, it follows that the claim of the widow to dower in the lands in controversy, or any of them, fails. For the reasons herein stated, the decree complained of is affirmed.

(49 W. Va. 696)

STATE v. TAVENNER et al.

(Supreme Court of Appeals of West Virginia. Sept. 7, 1901.)

TAX DEED—VALIDITY—FORFEITURE TO STATE—FAILURE TO LIST LAND.

1. T. died intestate in 1849, seized of a tract of land in W. county. Said land was not on the assessor's books in the name of T. or of T.'s heirs for any of the years 1868, 1867, 1868, and 1869. Without authority from, and without the knowledge or consent of, the heirs of T., there was placed on the assessor's books of said county for the years 1870 and 1871 a tract of 500 acres of land in the name of T., without charging it with the taxes chargeable thereon for the previous years in which the tract was not on the books, as required by section 34, c. 31, Code 1868. Said land was returned delinquent for the nonpayment of the taxes so charged thereon for the year 1871, sold by the sheriff, and purchased by C., who assigned his purchase certificate to McC.; and the land, not being redeemed, was conveyed by the clerk of the county court to McC. by deed dated October 4, 1877. Held, the deed conveyed no title to the purchaser.

2. Under section 34, c. 31, Code 1868, said tract of land was forfeited, and the title thereto vested in the state, for nonentry on the assessor's books for taxation for more than five successive years from and after the year 1866 in the name of the heirs of T.

3. Syl., points 3, 4. *Cunningham v. Brown*, 20 S. E. 615, 39 W. Va. 588, approved.

(Syllabus by the Court.)

Appeal from circuit court, Webster county; W. G. Bennett, Judge.

Bill by the state against Jeanette S. Tavenner and others. From the decree, the defendant Emma Hubbard appeals. Affirmed.

W. E. Haymond, for appellant. J. W. Vandervort, for appellees.

McWHORTER, J. The state of West Virginia filed her bill in equity in the circuit court of Webster county against Jeanette S. Tavenner and others, alleging that on the 26th of April, 1842, Minter Bailey, commissioner of delinquent and forfeited lands for Lewis county, conveyed to Cabell Tavenner lot No. 31, containing 1,281 acres of land, situated on the Black Fork of the Little Kanawha river, since in Webster county; that said tract of land included 502½ acres, the land proceeded against, giving a description of said 502½ acres by metes and bounds; that on the — day of —, 18—, Cabell Tavenner died intestate, leaving surviving him his widow and heirs named in the bill; that said land was not charged on the land books or entered for taxation in the county of Webster, the same lying wholly therein, for more than five years prior to the year 1871, and for that reason was forfeited to the state and liable to be sold for the benefit of the school fund; that the same had never been redeemed in any manner prescribed by law; that in the year 1883 the said land, by some means having been entered on the land books, was by the sheriff of Webster county sold for the nonpayment of the taxes thereon for the year 1881, and was

purchased by the state and not redeemed, and became forfeited and the title vested in the state; that defendant Emma Hubbard claimed title to the said land by deed from —, dated — day of —, 18—; that her title was superior to that of any other claimant, with perhaps an equity of redemption in some of the defendants as provided by law; that the other defendants claimed title,—and praying that said land be sold for the benefit of the school fund and for general relief.

The defendants Jeanette S. Tavenner, widow, and Jeanette A. Tavenner and B. F. Shears, heirs at law, of Cabell Tavenner, filed their answer to plaintiff's bill, showing the purchase of the said 1,281 acres by Cabell Tavenner, and the conveyance thereof to him by Commissioner Minter Bailey; that Cabell Tavenner died in the year 1849 intestate as to the lands in question, and was the owner of said tract of 1,281 acres at the time of his death; that for many years the lands were involved in suit, and for that reason defendants failed to look after the taxes on the land as they should, but, said suits having been fully and finally settled, after investigating, found the title had been forfeited to the state of West Virginia; that respondents were the only heirs at law of Cabell Tavenner, and entitled to the same; that the 500 acres of land is a parcel of the 1,281 acres, and they caused the same to be surveyed by Stilman Young, surveyor of Upshur county; that for more than five years prior to the year 1870 said lands, although situated wholly within Webster county, were not charged on the land books or entered thereon for taxation, and thereby became forfeited to the state, and had never been redeemed in any manner prescribed by law; that respondents were informed that for the years 1870 and 1871 a man by the name of Isaac Butcher caused said 500 acres of land to be placed on the land books of Webster county in Holly township in the name of Cabell Tavenner, with the intention of having same become delinquent and forfeited, and expected at the sale of same to become the purchaser thereof, but at the sale of delinquent lands made in said county in 1875 the tract of 500 acres was purchased by B. C. Conrad, who assigned said purchase to Jonathan G. McCray, and on October 4, 1877, George M. Sawyer, clerk of the Webster county court, executed a deed therefor to said McCray; that neither B. C. Conrad nor McCray was charged on the land books of Webster county with said tract for the years 1872 to 1877, inclusive, and if the title of said parties, if they had any, was not previously forfeited, the same became forfeited to the state by reason of their failure to cause said land to be placed on the land books and charged with taxes for said several years; that in the year 1878, on the land books of Webster county, in Hackers Valley district, Jonathan G. McCray was

charged with said 500 acres of land, and also with 97 acres, said 500 acres being the same 500 acres in controversy, and the sheriff of Webster county, on the 25th day of November, 1879, pretended to sell said land as a tract of 537½ acres, and by deed dated September 23, 1881, Ballard P. Conrad, clerk of the county court of said county, made a deed to Benjamin C. Conrad for said tract of 537½ acres, more or less; that said 500 acres was charged for the year 1881 on said land books in name of Jonathan G. McCray, and the taxes for the year not paid, and in 1883 the sheriff sold it and purchased it for the state, and it was afterwards certified by the auditor of this state to the commissioner of school lands of Webster county as forfeited for sale, but it had never been sold by the commissioner of school lands, and hence this proceeding was instituted on behalf of the state for the sale of the same; that the sale of said lands by the sheriff of Webster county in 1879 as a tract of 537½ acres, when it was forfeited as tracts of 500 and 97 acres, respectively, was illegal, null, and void, and the deed thereunder of September 23, 1881, from B. P. Conrad, clerk, to B. C. Conrad, was illegal and passed no title; that on the 24th of September, 1881, said B. C. Conrad and wife pretended to convey to George Hubbard said tract of 537½ acres, more or less, which includes said 500 acres in controversy, but that no title passed by said deed; that George Hubbard by deed of the 28th of August, 1885, pretended to convey said 537½ acres to defendant Emma Hubbard, but conveyed no title, and she has no title to said land, and the said Emma Hubbard since and including the year 1886 has been charged on the land books of Webster county for taxation with 537½ acres of land, including 500 acres in controversy; that neither Benjamin C. Conrad, Jonathan G. McCray, George Hubbard, nor Emma Hubbard have ever had possession or title to said land; that the land is valuable, worth several thousand dollars, and respondents are sole owners, with right to redeem for forfeiture; that by reason of the fact that said land was not charged on the land books of Webster county, nor entered for taxation thereon, for more than five years prior to the year 1870, the title of Cabell Tavenner and respondents became forfeited to the state, and, if said forfeiture did not operate to transfer the title of Cabell Tavenner in said lands to the state, then that the same became forfeited to the state for the nonpayment of taxes in the name of Cabell Tavenner for the year 1870; that if said last forfeiture did not take place as stated, and the facts as alleged did not constitute a forfeiture of said lands to the state, then said lands were not properly placed on the land books for 1871 in the name of Cabell Tavenner, and the sale of the land by the sheriff in 1875 for the pretended delinquency and forfeiture for the

year 1871 passed no title to B. C. Conrad under his purchase from the sheriff at said sale, and his assignment to Jonathan G. McCray, and the deed by virtue of the assignment made to McCray by Sawyer, the clerk, dated October 4, 1887, passed no title to McCray, and, if it passed no title to McCray, then by reason of a forfeiture of same for nonpayment of taxes charged in name of McCray for the year 1878 and the nonpayment of same operated as a forfeiture of the title of McCray to the state, and the sale of said lands as a tract of 537½ acres by the sheriff in 1879 for the delinquent taxes of 1878, and purchase thereon by B. C. Conrad, and the conveyance to him by B. P. Conrad, the clerk, by deed of September 23, 1881, operated to pass no title to Conrad, and, if said proceedings were regular by which Conrad pretended to have obtained title by virtue of said deed from the clerk, then said pretended title of McCray became forfeited and delinquent for the nonpayment of the taxes so charged in his name for the year 1881 in said county, and the taxes for said year were not paid either by McCray, Conrad, George Hubbard, or Emma Hubbard, nor by any other person for them, and the same was never redeemed from said forfeiture for the nonpayment of taxes for said year, and in 1883 said land was sold by the sheriff of said county for said taxes of 1881 and purchased by the state, never redeemed, and in 1885 certified by the auditor to the commissioner of school lands of Webster for sale; that all the acts of the several county officers of Webster county, to wit, the sheriff and the clerks of the county court, by which they pretended to pass title to McCray and Conrad under the said several proceedings, were wholly null and void, and the title still remains in the state, subject to respondents' right of redemption as the sole owners of the land,—and offer to pay the taxes that may remain due and unpaid thereon, and pray that their answer be accepted and treated as their petition, under sections 16, 17, c. 105, Code, and they be permitted to redeem the said lands, etc. Copies of the several deeds referred to in said answer were filed therewith.

Defendant Emma H. Hubbard filed her answer, claiming to be the true owner of the land in question, first under the sale for delinquent taxes of 1871 and 1872 as two tracts of 500 and 97 acres in name of Cabell Tavenner, and purchased by B. C. Conrad, not redeemed, and his purchase assigned to McCray, and conveyed to McCray by Sawyer, the clerk, by the deed of October 4, 1877, then returned delinquent in the name of McCray and sold for the taxes November 25, 1879, and purchased by B. C. Conrad, and conveyed to him by B. P. Conrad, clerk, as one tract of 537½ acres by deed of the 23d of September, 1881, and conveyed by B. C. Conrad September 24, 1881, to George Hubbard, and by George Hubbard to respondent August

28, 1885. She denied the allegations of the bill that the land had been forfeited to the state for nonentry on the books, and averred that same had been regularly assessed, both in Lewis and Webster counties, up to date of tax sale, in name of Cabell Tavenner; denied that the land was sold to the state in 1883 for the taxes of 1881, or for any other years; says the land in 1881 was McCray's land, and was not sold to the state for taxes in that name for any year, and that since the purchase by McCray the taxes had been regularly paid, except the delinquency, and purchased by Conrad, and ever since the taxes had been regularly paid, and that she has a good and complete title, and that the proceedings on the part of the state ought not to be maintained; and asks leave to file evidence of title. And the same defendant also filed an answer in the nature of a cross bill in answer of Jeanette Tavenner and others, alleging that it is not true, as alleged in Tavenner's answer, that the title of Tavenner in and to the land in controversy was forfeited to the state prior to the year 1870; that the 500 acres of land was caused to be placed on the land books of Webster county in 1870 or 1871 by Isaac Butcher without authority, or that it was caused to be done by him at all, but that the land was rightfully entered on the books and regularly returned delinquent for the years 1871, 1872, 1873, and 1874, and sold in 1875, as stated in answer to original bill. She denies the allegation in said answer that said land was not, for any of the years from 1872 to 1877, inclusive, assessed in Webster county, and denies that the sale in 1879 to B. C. Conrad was null and void, but avers that it was regular, and vested in Conrad the title to the land, and that, if the land was forfeited for the year 1881, she is entitled to redeem the same, and asks that she be permitted to redeem, if it should be found to be so forfeited.

On the 6th day of August, 1897, the cause was referred to Commissioner B. D. Hutchinson to inquire into and report upon the matters set forth in the bill and answers,—the amount of taxes and interest due and unpaid on each tract, lot, or parcel, or part of tract, mentioned in the bill; in whom the legal title was vested at the time of forfeiture; in whose name and for what cause forfeited, and the facts in relation thereto; what portions, if any, of such real estate are claimed by any person under the provisions of section 3, art. 13, of the constitution of this state; the facts in relation to every such claim, and the boundaries thereof. On the 26th day of July, 1898, the commissioner filed his report, including therewith "the evidence, documents, papers, and other testimony introduced and filed before your commissioner," which were made a part of said report. The defendants the widow and heirs at law of Cabell Tavenner filed exceptions to said report of Commissioner Hutchinson, and the plaintiff excepted to

said report because "he should have reported the whole taxes from 1881 to the present time as chargeable against the land, with interest." The cause was heard on the 10th day of November, 1899, when the court sustained the defendants' exceptions to the commissioner's report, and decreed that the defendants the heirs of Cabell Tavenner were the only parties to the suit who had title to the 500-acre tract of land in controversy, and they were entitled to redeem the same from the forfeiture for nonpayment of the taxes thereon, and that the deed from Sawyer, clerk, to McCray, dated October 4, 1877, purporting to convey the 500-acre tract, be set aside, annulled, and canceled, and also the deed of Clerk Conrad to B. C. Conrad, dated September 23, 1881, purporting to convey the same tract, be set aside, annulled, and canceled, and referred the cause to Commissioner Hutchinson to ascertain and report the taxes properly chargeable against said tract of land in the name of Cabell Tavenner, deceased, or of the heirs. From such decree the defendant Emma Hubbard appealed, and assigns as errors the sustaining of the exceptions, and each of them, of Tavenner's heirs to the commissioner's report; also in setting aside the said deed from Sawyer, the clerk, to McCray of the 4th of October, 1877, and the deed from Clerk Conrad to B. C. Conrad, dated September 23, 1881, as well as declaring the said Tavenner's heirs to have title to the land and the right to redeem the same, and recommitting the cause to commissioner to ascertain and report the taxes chargeable against the land in Tavenner's name; and also for decreeing against appellant's claim of title, and in not confirming the commissioner's report.

The first exception to the report of the commissioner is "in not finding that the title of the heirs of Cabell Tavenner to said land was forfeited to the state of West Virginia by not being charged on the land books in their names by proper authority for more than five years prior to 1871 and for more than five years subsequent to that date." Section 7, c. 125, Acts 1869 (which is section 34, c. 31, Code 1868), provides that: "It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the state taxes thereon not charged to the owner, for the year eighteen hundred and thirty-two or any year thereafter, heretofore or hereafter, not released, paid, or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, or shall not have for five successive years, been charged on such books with such taxes on such real estate, the same, and all the title, right and interest of the owner, legal and equitable, thereto, shall without any proceeding be absolutely forfeited to and vested in this state: provided, however, that such owner may, within one

year after the passage of this act, cause such real estate to be charged with such taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for the failure so to charge the taxes for such years." It is claimed by appellant that, as the record shows that the tract was charged on the land books for the year 1870 in the name of Cabell Tavenner within the year from the passage of the act, the forfeiture was thereby prevented. The record shows that, although it was placed upon the books for the year 1870, it was not done or caused to be done by the owners of the Cabell Tavenner title or the heirs of Cabell Tavenner; and if it had been placed thereon by the heirs of Cabell Tavenner, and assessed in their names for taxes for the year 1870, would it have been a compliance with the law? and would it have been a legal entry on the books for taxation purposes? I think not. The requirement of the proviso in the statute was that the owner should, within one year after the passage of the act, not only have his real estate placed on the books, but have it charged thereon with the taxes with which it was properly chargeable for the years that it was not on the books and not charged with the taxes; and he is not authorized to have it entered otherwise. If the land was improperly on the books for the years 1870 and 1871, as it was, without the taxes for the years 1866 to 1869 inclusive, the years in which it was not on the books, being charged up, then the sale by the sheriff of the land for the year 1870 was a nullity, and the purchaser took no title under the deed dated October 4, 1877, made by George M. Sawyer, clerk, to Jonathan G. McCray, assignee of the purchaser, B. C. Conrad, at the sale made by the sheriff for the taxes of 1871 charged in the name of Cabell Tavenner. The death of Cabell Tavenner occurred in December, 1849. As shown, the land was not charged on the books for the years 1866 to 1869, inclusive, either in the name of Cabell Tavenner or of Cabell Tavenner's heirs, but was entered, by some one without authority to do so, in the name of Cabell Tavenner, and without charging up the taxes for the years 1866 to 1869, as required by statute, and in this name was sold by the sheriff, the 500 acres for the taxes of 1871, and the 97 acres for the taxes of 1872, as reported by the sheriff. The deed made by Clerk Sawyer, dated October 4, 1877, to Jonathan G. McCray, assignee of B. C. Conrad, purchaser, describes the property conveyed as that "which formerly belonged to and was returned delinquent in the name of Cabell Tavenner's heirs, for the nonpayment of taxes due thereon, for the year 1871, the first tract of 500 acres for the sum of \$4.05, and the second tract of 97 acres for the years 1871, 1873, and 1874, for the sum of \$1.31; that being the amount of taxes, interest, damages, and commissions due thereon at time of sale, including fee for receipt." In *Jones v. Dills*, 18 W. Va. 759, it

is held: "The only authority for making a deed for lands sold for the nonpayment of taxes is the sale of the land and the conforming to the requirements of the statute thereafter. The deed must conform to the report of the sale; and, if the report of the sheriff shows that an entire tract of land was sold, this is no authority for executing a deed for a part of such tract; and, if such a deed is executed, it is void." In *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615, it is held: "Where the assessment of a tract of land for taxation is illegal, a sale of such tract of land made by the sheriff for nonpayment of the tax so assessed is void; for there can be no valid sale made by a sheriff of a tract of land as delinquent for the nonpayment of taxes when there has been no legal assessment of such taxes."

In the case at bar the sale is reported of real estate charged with taxes and delinquent in the name of Cabell Tavenner, while the deed supposed to be based on said report describes it as being charged with taxes and delinquent in name of Cabell Tavenner's heirs. The deed is in this respect at variance with all the record, return of delinquency, sheriff's certificates of sale, and surveyor's report; and it is insisted by appellee that this is a material and fatal variance. At the time of said delinquency and sale, and the making of said deed, there was no provision of the statute for real estate being charged in the name of a decedent. Section 25, c. 31, Code 1868, provides: "When real estate is charged to heirs by description, or to the estate of a deceased party, such estate as was vested in the heirs or devisees of decedent shall pass to the grantee in such deed." The same section was re-enacted in Acts 1872-73 (section 25, c. 117). In order to provide against such contingency as we meet here, the legislature of 1882, in re-enacting section 25, c. 31, Code 1868, provided that "when real estate so sold is charged to the heirs or to the devisees of a decedent without giving their names, or to the estate of a decedent or to a deceased person in his or her own name, such right, title and estate as was vested in the decedent at the time of his or her death in such real estate shall pass to and be vested in the grantee in such deed." It will be seen that the legislature deemed it necessary, in order to legalize the charging of real estate in the name of a decedent, to enact a statute to that effect. At the time the land in question was placed on the assessor's books in 1870, after being off the books for at least 4 years, Cabell Tavenner had been dead over 20 years. 1 Blackw. Tax Titles, § 273, says: "An assessment to the 'estate of Parkhurst' is a nullity,"—and refers to *L'Engle v. Wilson*, 21 Fla. 461. He further says: "The effect of listing the property of the 'heirs at law' or 'devisees' of a former deceased owner, by which, perhaps, the

present owners could be ascertained and identified, might possibly be good; but listing to the estate of one who died 25 years before the sale does not satisfy the statute, which aims throughout at personal proceedings against the owner and his personality before recourse to the land,"—and refers to *Morrison v. McLaughlin*, 88 N. C. 251. In *L'Engle v. Wilson*, cited, the decision is based on a statute providing that assessment of land must be to the owner, or the occupant, or as "unknown," or to the trustee, guardian, executor, or administrator in his representative capacity; and it is there held: "An assessment to the 'estate of Parkhurst' is a nullity, and a sale consequent on such assessment conveys no title to the purchaser." In the opinion in the case the chief justice says: "In this case there is no assessment to the owner, occupant, unknown owner, or person in a representative character. The statute requires the assessment to one or the other of them. An assessment to the 'estate of C. Parkhurst' is to neither, and is equivalent to wholly ignoring the requirements of the statute. These requirements are few and simple. Any man of ordinary intelligence can without difficulty follow them with accuracy. Not to do so can only be attributed to the negligence of the assessor. Section 58, c. 3099, Revenue Act 1879, makes the 'clerk's deed prima facie evidence of the regularity of the proceedings from the valuation of the land to the date of the deed, inclusive.' This is a large invasion of the law as it once stood. We are not disposed to extend it by judicial construction,—a construction which would require us to declare some parts of the act directory and others mandatory. It must be admitted that there can be no definitely prescribed rule which will unmistakably mark the line of demarkation between the two." In *Cruger v. Dougherty*, 43 N. Y. 107, the court say: "It is a well-established rule that one claiming to have acquired title to the property of another under statutory proceedings must show that every material provision designed for the security and protection of the owners has been substantially complied with." In *Woodbridge v. State*, 43 N. J. Law, 270, the court say: "The power to sell lands for taxes is a naked power, and the validity of a title derived from such sale depends upon a strict compliance with the directions of the statute; and a purchaser at such sale is bound to inquire whether he has so acted."

Section 26, c. 29, Code 1868, provides: "When the owner dies intestate, his undivided real estate may be listed to his heirs, without designating any of them by name, until they shall have given notice to the assessor of the proper district of the division of the same, the names of the several heirs and the parcels allotted to each. * * * Where the owner has devised the lands, or

a freehold estate therein, absolutely, the assessor shall charge such land to the devisee. If, under the will, the land is to be sold, it shall continue to be charged to the decedent's estate, and the assets in the hands of the personal representative shall be liable for the taxes, until a sale and conveyance thereof be made." In *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627 (Syl., point 3): "The state is not bound by the unauthorized or illegal acts of its officers, nor can its title to a tract of land be transferred, divested, or affected in any manner, to any extent, by such unauthorized or illegal acts; and all persons who deal with such officers do so at their peril, in all matters wherein such officers exceed their legitimate powers." As far as the record shows, the land never was charged at any time in the name of Cabell Tavenner's heirs, either before or after the year 1869. I am aware that the tendency has been for many years, both on the part of the courts and the legislature of this state, to divest the proceedings whereby titles are obtained under sales for delinquent taxes as far as may be of all mere technicalities and irregularities which do not seriously prejudice the rights of the former owner, and I think very properly so. But the courts must keep at least within the spirit of the statute. It is the duty of the owner of real estate to contribute his fair proportion of the expenses of the state government in the way of taxes assessed upon his lands; but he is likewise entitled to have the protection of the law in his rights, and the purchaser of his title for the mere pittance of a year's taxes must take what risk there is as to the proceedings being in conformity to the statute. The land, being forfeited for nonentry in the name of the "heirs of Cabell Tavenner," was liable to be sold in this proceeding for the benefit of the school fund; and under the provisions of section 13, c. 134, Acts 1872-73, "at any time before the sale" directed in such proceeding, the former owner, or any creditor of the former owner of such land having a lien thereon, may pay into court, by and with the consent of the court, all costs, taxes, and interest due at the time, etc., and redeem the land. *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022. The answer and petition of the defendants the heirs of Cabell Tavenner pray for permission to pay the costs, taxes, etc., as provided by the statute, which permission is granted by the decree of the circuit court complained of.

The report is excepted to because, having found that said real estate was claimed by no person, under the provisions of section 3, art. 13, of the constitution of the state, the commissioner erred in finding that the right of redemption from the forfeiture claimed in his report was in the defendant Emma Hubbard under the several conveyances based on the sale for the taxes de-

linquent for the year 1871, in the name of Cabell Tavenner, and the deed thereunder by Clerk Sawyer to McCray, assignee of B. C. Conrad, dated October 4, 1877, and the sale for the delinquent taxes of 1878 in the name of Jonathan G. McCray, made November 25, 1879, and the deed thereunder by Clerk Conrad to the purchaser, B. C. Conrad, dated on the 23d of September, 1881, followed by the deed from B. C. Conrad to George Hubbard, dated September 24, 1881, and from George Hubbard to Emma Hubbard, dated August 25, 1885. The testimony of several witnesses is taken touching the possession of Jonathan G. McCray and his vendees under the deed from George M. Sawyer, clerk, to said McCray. The said McCray himself testifies to having taken possession and hacked out a large boundary of it, sowed grass seed, worked on the land quite a good deal, and kept stock, especially cattle, on the land, and that for the three years his possession was entirely uninterrupted, and that no person claimed or pretended to claim the land, so far as he knew; and there was other testimony tending to prove possession and acts of ownership on his part and that of his vendees, while other witnesses testified that they had been all over the land during the time, and saw no indications of its occupancy, or of any work having been done on it, but there was such improvement as he claimed on the Butcher tract adjoining the tract in question. As to the possession of and acts of ownership on the land, the testimony is very conflicting, and of such a character that an appellate court would not be warranted in disturbing a decree rendered thereon by the circuit court under the uniform rulings of this court for many years, as shown by *Smith v. Johnson*, 44 W. Va. 278, 29 S. E. 509 (Syl., point 2).

The report is also excepted to in that it finds that the land in controversy was forfeited to, and the title vested in, the state for the nonpayment of taxes charged for the year 1881 in name of Jonathan G. McCray, and sold in 1883 by the sheriff, purchased by the state, and not redeemed. It is clear that if, as we have seen, Jonathan G. McCray, assignee of B. C. Conrad, the purchaser under the sale for the delinquent taxes of 1871 in the name of Cabell Tavenner, took no title under his deed of October 4, 1877, and the land was forfeited for nonentry in the name of the heirs of Cabell Tavenner, then there was no title in McCray to forfeit which could entitle appellant to redeem.

The report is further excepted to because the commissioner did not find the amount of taxes on the land up to date from the time the same was forfeited, as claimed by defendants Tavenner in their answer, and in not finding that they had a right to redeem the land on paying the taxes properly chargeable thereon. From what has been

said, it will appear that this exception was well taken. I see no error in the decree complained of, and it should be affirmed.

(49 W. Va. 724)

STATE v. NEWMAN.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

UNLAWFUL SHOOTING—SELF-DEFENSE—QUESTION FOR JURY—RECOMMENDATION TO MERCY—SPECIAL JUDGE—FAILURE TO ACT—PRESENCE OF ACCUSED.

1. A question of self-defense is peculiarly a jury question, and an appellate court will not set aside a verdict against that defense, except in rare cases, where it is very manifestly and plainly against the evidence.

2. Where a verdict finds a defendant guilty of a crime, a recommendation in that verdict by the jury to the mercy of the court has no legal effect, is mere surplusage, and cannot be considered in an appellate court to set aside the judgment of the trial court in fixing punishment.

3. Where one person has been elected special judge to hold a court during the absence of the regular judge, and a second special judge is elected, though the record does not state the absence of the first special judge or other cause of his election, but only states that the regular judge is absent, it will be presumed that there was cause for the election of the second special judge, from the absence of the first special judge or other cause, unless it otherwise appears from the record, and the action of the second judge will be valid.

4. There may be more than one special judge elected during the same term to hold a court in the absence of the regular judge, if from the absence of the first elected judge there be reason for the election of a second special judge.

5. If it may be inferred from the record that a person is present in person at a trial, it is sufficient, though the record does not affirmatively say that he was present in his proper person.

(Syllabus by the Court.)

Error to circuit court, Kanawha county; Frank A. Guthrie, Judge.

William Newman was convicted of unlawful shooting, and brings error. Affirmed.

J. W. Kennedy and F. L. Beardsley, for plaintiff in error. R. H. Freer, Atty. Gen., and Alex Dulin, for the State.

BRANNON, P. William Newman was convicted in the criminal court of Kanawha county of the unlawful shooting of Jack Shea, and was sentenced to the penitentiary for three years. He applied to the circuit court of Kanawha county for a writ of error, but it was refused, and then he brought this writ of error in this court.

The first point which his assignment of errors makes against the judgment is that the court refused to give him a new trial on the ground that the verdict was contrary to the evidence. I shall only say, because it is only necessary to say, that as the question before the jury was whether the shooting was excusable, as in self-defense, was peculiarly a jury question of fact, I need not cite authority to say that we cannot reverse the jury

and the criminal court for error herein. The shooting not being questioned, and the sole question being one of self-defense or not, it must be a very plain case of erroneous verdict to justify this court in overruling a verdict approved by the trial judge, as has been held a thousand times. We cannot thus invade the province of a jury. In the federal courts and most of the state courts, no error can be based on the refusal of a new trial, where the question is purely one of evidence; and while such is not the law in this state, still it is an admonition to us of the sanctity and legal effect of a verdict of a jury, and of the danger of our interference with a verdict, except upon the plainest grounds of error. *State v. Hunter*, 37 W. Va. 744, 17 S. E. 307; *State v. Bowyer*, 43 W. Va. 180, 27 S. E. 301; *Lawrence's Case*, 30 Grat. 845.

The second point made against the judgment is that the verdict was for unlawful shooting only with a clause added, in the words "and [the jury] asks the mercy of the court," and that this indicated a finding for a misdemeanor only, and the court erred in sending Newman to the penitentiary. Plainly there is nothing in this point. The verdict distinctly found Newman guilty of unlawful wounding, as charged in the indictment, and the recommendation was simply surplusage, which the court was at liberty to disregard, because the court is given by law the sole power and discretion to fix the punishment, and to say whether, in such a case as this, the party shall be punished by confinement in the penitentiary or jail. Code, c. 144, § 9; Id. c. 152, § 21. A jury cannot infringe upon the prerogative of the court in such matter. The law demands of the judge that he shall pass his judgment as to the mode and extent of the judgment. Nor can it be said that the punishment is excessive, because, if it is within the limit of the law, it cannot be so regarded.

A third point made against the judgment is that J. H. Couch tried the accused as special judge, and that the record shows that on one day of the court George W. McClintic was elected a special judge, on the 5th day of January, and that on the 9th day of January Edwin M. Keatley was elected special judge, and that on the 6th day of February James H. Couch was elected special judge, and that the record shows no reason for the election of Couch, further than its statement that, "the judge of this court not being able to attend the court this day, the clerk of this court, at the instance of the attorneys present and practicing in the court, proceeded to hold an election of a judge to hold said court during the absence of said criminal judge." The contention is that McClintic, under his election on the 5th day of January, filled the office of judge, and the record must show his resignation, death, or failure to be present in order to warrant the election of another judge. Here it is only necessary to say that it has been held that

where a special judge has tried a case, and no objection was made on the trial to his authority, and the record is silent as to the mode of his appointment or election, no objection to his authority can be raised in the appellate court for the first time, provided that by law he could have been elected, as the appellate court will presume that he was legally elected. *State v. Lowe*, 21 W. Va. 782; *Jarrell v. French*, 43 W. Va. 457, 27 S. E. 263; *Winans v. Winans*, 22 W. Va. 678. Such is the general law laid down, under many authorities, in 11 Enc. Pl. & Prac. 793. No objection to the authority of the judge was made in the trial court. Therefore, though the record does not show the resignation or other reason for nonservice of the judges antecedently elected, yet we will presume that such a state of things existed as to warrant the election of Couch, on account of either the resignation or absence of the other judges. It is true that section 11, c. 112, Code 1890, does require that, if the regular judge is present, he must order the election of a special judge and give the reasons therefor; but here the record states that he was absent, and gives that as a reason for the election of a special judge, and when the regular judge is absent it is only necessary to say so on the record to warrant an election of a special judge, if, indeed, it be necessary to make such statement at all. The statute does not demand that the facts be stated of record to warrant the election of a second or third special judge. But the further position is taken that the election of Couch is utterly void, on the theory that McCintic had been already elected special judge, and that under no circumstances whatever could there be an election of another special judge at the same term. We cannot accept this construction of the statute. It is true that the statute does declare that a special judge may be elected, to hold the court "during the absence of, or for the trial of the cause in which, the judge cannot preside." This is a remedial statute. The language quoted means that whenever the judge is absent a special judge may be elected to act while he is absent. That is the warrant for an election. The record states the fact of the absence of the regular judge as a reason for Couch's election. The statute intends that the court shall go on and business be dispatched notwithstanding the absence of the regular judge; and I ask, why should the court and business be stopped by the absence from death, sickness, or resignation of a special judge any more than from the absence of the regular judge? The statute does not limit the number of elections of special judges. According to this contention, if the regular and first elected special judge be both absent, the court must stop. Neither the letter nor the spirit of this remedial statute calls for a construction productive of such great inconvenience and public injury.

A fourth point made against the judgment

is that the defendant is not shown by the record to have been present in court when a motion to set aside the judgment was made in the criminal court. The record says, on the 23d day of February: "This day came the defendant, and moved the court to set aside the verdict heretofore entered in this case, on the grounds that said verdict is contrary to the law and the evidence and said judgment is contrary to said verdict." Now, as held in *Lawrence's Case*, 30 Grat. 845, approved in *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876, it is necessary that a prisoner accused of felony shall be present in his own proper person from the inception of the trial to the final judgment, inclusive, when anything is done affecting him, and the record must show his presence, and he must be present, when action is had on a motion for a new trial; but as held in the *Lawrence Case*, and also in *State v. Cross*, 44 W. Va. 331, 29 S. E. 527, if it may be inferred from the record that he was present, that is sufficient, though the record does not formally state that he was present. The record here states that the defendant came into court and made this motion; definitely so states; affirmatively so states. Presumably it was in proper person. The record does not say that he appeared by attorney. Moreover, on a prior day of the term, as the record shows, the prisoner was in person present at the rendition of the verdict, and made a motion to set aside the verdict and grant a new trial; and the court overruled it, and rendered final judgment upon the verdict. Eight days thereafter the accused, as it seems, conceiving that the recommendation of the jury of mercy rendered the judgment erroneous, made the motion to set aside the verdict. This was after the motion for a new trial had been made and overruled, and final judgment passed. Therefore, so far as the motion for a new trial is concerned, there can be nothing in the point, because on a former day Newman was personally present when a new trial was refused. *State v. Parsons*, supra. But it is claimed that there was a motion to set aside the judgment which had been rendered eight days before on the ground that it was not warranted by the verdict. The language above quoted from the record will not, if strictly construed, by its letter import any motion to set aside the judgment, but only the verdict. But say that there was a motion to set aside the judgment. It is extremely doubtful whether we should carry the requirement of the presence of the accused so far as to hold that, after the trial has closed and a final judgment been rendered, the accused must be personally present when he makes a motion to set aside that final judgment. Be this as it may, as stated above, the record sufficiently shows the presence of the accused. Finding no error, we affirm the judgment of the criminal court.

Though it is not necessary, because the verdict is a finality, yet I will say that the

verdict is right. Newman called Shea a God-damned liar, when Shea struck at Newman with a small railroad lantern, and Newman jumped back, drew a pistol, and fired five shots at Shea; three of them striking him. Where was the emergency of life or limb to justify such quick recourse to a most deadly weapon, and to justify five shots? Could not Newman have retreated? The law of self-defense required it, especially when he had brought the trouble upon himself by such opprobrious language. There was no stress of life or limb to justify Newman's actions. Affirmed.

(49 W. Va. 712)

STATE v. MOONEY et al.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

**CRIMINAL LAW—PRELIMINARY EXAMINATION
—REMARKS OF COUNSEL—OBJECTIONS.**

1. Where an indictment for felony is found, the accused is not entitled to a preliminary examination before a justice before trial.

2. The syllabi in *State v. Shawn*, 20 S. E. 873, 40 W. Va. 1, *Landers v. Railroad Co.*, 33 S. E. 296, 46 W. Va. 492, and *State v. Allen*, 80 S. E. 209, 45 W. Va. 74, as to remarks of counsel to a jury, are reaffirmed.

(Syllabus by the Court.)

Error to circuit court, Ohio county; Thayer Melvin, Judge.

John Mooney and Frank Friday were convicted of murder, and bring error. Affirmed.

W. W. Arnett, for plaintiffs in error. R. H. Freer, Atty. Gen., Alex. Dulin, and John A. Howard, for the State.

BRANNON, P. The evidence in this case is not certified, but it appears that James Hervey was shot and killed 1st of March, 1900, by a man whose face was covered with a red handkerchief. John Mooney and Frank Friday were jointly indicted for the murder of Hervey, and were sentenced to death in the criminal court of Ohio county, and, their sentence having been affirmed by the circuit court of that county, they have brought a writ of error in this court. I do not think that I can improve upon the opinions delivered in those courts in the case, and I do not think it necessary to do more than insert the opinions of the judges of those courts delivered in the case.

Judge T. J. Hugus, of the criminal court, filed the following opinion:

"The prisoners, on being arraigned upon the indictment found against them, moved the court to send them before a justice for preliminary examination. This motion was refused, and that ruling is now assigned as a ground for a new trial. Their claim to a preliminary examination previous to trial seems to rest on a statute passed by the legislature of this state on the 3d day of April, 1873. This act provided: 'Before any person charged with a felony is tried

before a circuit court, he shall be examined before the county court, unless he waives such examination by his assent entered of record.' Acts 1872-73, c. 90. This act continued in force until the 23d day of December, 1875, on which day it was repealed by chapter 92 of the Acts of 1875. During its brief existence, it came before the supreme court for consideration in four cases, viz.: *Buskirk v. Judge*, 7 W. Va. 91; *State v. Stewart*, Id. 731; *State v. Abbot*, 8 W. Va. 746; and *State v. Strauder*, Id. 686. In this last one, yet generally remembered in this county, the act in question saved Strauder from the gallows. Nothing, however, was decided in any of these cases tending to throw any light on the ruling under consideration further than to show, as was decided in the *Strauder* Case, that no one could be tried for a felony, while the act was in force, without a preliminary examination, if one was demanded. The act providing for an examination before trial by the county court did not in terms repeal any other statutory provision, nor did it do so by implication. It simply provided for a special or additional examination, before trial, of all felonies. Such examination was to take place before the county court, then a recently created tribunal. Its repeal in two years after enactment put an end to this special preliminary examination before the county court, and left the law as to examination, indictment, and trial as it was before the enactment, and substantially, if not identically, as it is now. Not only has the statute providing for such preliminary examination been repealed, but the county court, which had exclusive jurisdiction to hold it, has been abolished. This, then, would seem to end, so far as that statute and the county court are concerned, all possible contention that a preliminary examination is a legal prerequisite to a trial now. And such a contention cannot be based upon our present statute, which is chapter 156 of the Code of 1891, relating to 'arrest, commitment, and bail.' This chapter is identical with chapter 156 of the Code of 1868, except that there is omitted from it section 10, permitting certain misdemeanors, like assault and battery, to be settled by the parties themselves, and not to be prosecuted to indictment and trial when so settled. Chapter 156 of the Code was not repealed, expressly or by implication, by the act of 1873, providing for special examination by the county court. The arrest, commitment, and bail, and examination before a justice, provided for in chapter 156 of the Code of 1868, continued in force during the existence of that special statute, as it had before and does to-day in the same chapter in the Code of 1891. There is, then, certainly no law now requiring preliminary examination before trial. On the other hand, however, there is express statutory authority for proceeding to indictment and trial without preliminary examination. This

is very evident from the statutes in force now relating to the finding of indictments and to trial thereon. Section 1 of chapter 158 of the Code of 1891 in express terms permits the finding of an indictment without an examination. Its last clause reads: 'And the indictment may be found in the first instance, whether the accused has been examined or committed by a justice or not.' Now, the indictment having been found, the next step is to proceed to trial. This is apparent from section 1 of chapter 159 of the Code of 1891, the first sentence of which reads: 'When an indictment is found in the circuit court of any county against a person for a felony, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, unless good ground be shown for a continuance, be tried at the same term.' These two provisions of section 1 of chapters 158 and 159 of the Code, as read, seem to me to be conclusive against the claim that no trial can occur until after preliminary examination. There was no error in refusing prisoners' motion for a preliminary examination. I have not referred to the Virginia cases, because the Virginia statutes differ essentially from ours. Virginia has no statute like the last clause of section 1 of chapter 158, permitting an indictment to be found without an examination. That provision first appears as Virginia law in the Code of West Virginia of 1868.

"Complaint is also made of the invitation to the defendant Mooney to put on a mask. This is assigned as another ground for a new trial. This is analogous, I think, to the case of asking a prisoner to stand up, or expose his person. Such requests he may comply with or not, as he may see fit. If he declines, or voluntarily complies, no error results from the question. Mooney might have been asked, when testifying, to put the mask on, and the simple interrogatory would not have been error. So I think, in argument, when, in connection with the reference to the mask, counsel says, 'And I invite him to put it on,' it was not going beyond the limits of permissible argument.

"Objection is also made to certain statements during the argument, and the making of these statements is alleged as ground for a new trial. In *Arnold v. Com.* (Ky.) 55 S. W. 804, counsel used very much such argument as complained of in this case. In his opening the prosecuting attorney said: 'He did not desire to have any man's blood on his hands; asked the jury to perform their full duty, lest some one else's blood might rest on their hands in case of a too lax administration of the law.' The court said it was eminently proper to call the jury's attention to the responsibilities resting upon them, and to the duties they, as members of a tribunal created by law to ascertain the facts from evidence, are required to perform. And in this case counsel, in closing his argument, 'ap-

pealed to the jury for a substantial penalty, in order to suppress lawlessness, repeating a conversation he had with a resident of another county, in which he was told that in that county only two murders had been committed in fifty years, and that the men who had committed them were hung by the neck, and that this had the effect to completely stamp out the commission of murder in that county.' The repetition of this conversation by counsel was condemned by the court, but was held not to constitute reversible error. This holding of the Kentucky court is much like the holdings of our own court in *Shawn's Case*, 40 W. Va. 1, 20 S. E. 873. Here counsel said to the jury: 'If you sentence him to the penitentiary for life, it won't be five years till he will be let out again to enter upon a new course of crime.' Apropos of this remark, and as a comment thereon, our supreme court says: 'The choice between two modes of punishment, in case the jury find the case to be murder in the first degree, is absolutely with the jury, and it is difficult to limit the considerations which shall govern a jury, if deducible from the nature of the crime and its perpetrator as manifested by the evidence.' In view of the Kentucky decision and the observations of our own supreme court, it was not, in my judgment, error for counsel in argument to say: 'Let him off to murder some other James Hervey; * * * to turn loose on society some murderers like these. * * * This is simply a case of murder, with the death penalty. * * * In behalf of Henry Hervey, speaking for him and the state, I demand of you a verdict of murder in the first degree.' There was evidence upon which these statements and appeals could be predicated. Nor do I think it was error to allude to the pride, courage, and manhood of the jurors, as counsel seemed to do in the use of the sentences: 'It is an evidence of the weakness of the men who were on the jury. * * * It would be a reflection upon your strength of character.' These allusions to the jurors are matters more of taste or propriety than anything else. Nothing severer can be said of them, I think, than that they may not have been in good taste. Our supreme court further says in *Shawn's Case* that: 'Where a criminal trial is fair in other respects, a conviction will not be set aside for improper remarks of counsel, where the verdict of conviction is plainly warranted by the evidence, and no other verdict could have been found without misconduct of the jury.' In my judgment, this is a case where the evidence so justifies the verdict returned that, had the jury found any other verdict, they would have been guilty of misconduct. If the evidence so warrants the verdict, improper arguments will not be regarded as in any way instrumental in securing it. It will be regarded as the verdict of jurors convinced by the testimony, and forced to render it because the testimony demanded it.

And of this sort is, I think, the verdict rendered in the case."

In the circuit court Judge Thayer Melvin filed the following opinion:

"At the April term, 1900, of the criminal court of Ohio county, the defendants were convicted of the crime of murder in the first degree. Subsequently they moved for a new trial, and, the motion having been overruled, and judgment rendered upon the verdict, they applied for and obtained a writ of error from this court. Several grounds of error are alleged:

"1. The indictment was preferred on March 3, 1900. The defendants were then in custody, but had not been examined by a justice touching the felony charged. Before the trial came on, they insisted, by plea and otherwise, upon being remanded for such examination. This was refused. A reversal is sought because of such refusal. No constitutional right or privilege is invoked. It is argued, however, that the statute (Code, c. 158, § 1) makes necessary such examination. It reads in part: 'The trial of a person on a charge of felony shall always be by indictment; and the indictment may be found in the first instance, whether the accused has been examined or committed by a justice or not.' Differing constructions have been placed upon the latter clause. By the defendants it is claimed that the right to a preliminary hearing is here implied, that the effect is merely to allow it to follow the indictment; by the state that, after indictment is found, no further preliminary investigation is required in any event. There does not appear to be any enactment bearing directly upon the question. Other provisions are believed, however, to have a controlling influence. Chapter 156, entitled 'Arrest, commitment and bail,' contemplates such an examination. But this relates to a period anteceding affirmative action by the grand jury. The title of the chapter and the arrangement of chapters so indicate, and the reading of certain of the sections makes it clear. No directions looking to such proceedings have been pointed out or observed. On the contrary, a different procedure seems to be prescribed. Section 14 of chapter 158, relating to indictments and process thereon, makes it the duty of the court to issue a capias for the arrest of a person indicted for a felony, and not in custody, and the officer making the arrest is required, not to deliver to a justice for a judicial inquiry, but to such court, if sitting, or to the jailer of the county. Section 18. And under section 1 of chapter 159 the accused, if he is in custody, or voluntarily appears, is to be tried at the same term at which the indictment is presented, unless cause is shown for a continuance. These serve to make apparent the legislative intention. Read with the quoted clause, they show that no judicial inquiry by an inferior tribunal is contemplated or warranted after action of the grand jury, even if none was

had before. It is not seen that this interpretation takes away or affects injuriously any right belonging to an accused person. The practice is within the control of the law-making power in criminal as in civil cases, the only limitations being those contained in the constitution. See *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005. Nor is it clear that any substantial advantage would have accrued to the plaintiffs in error if their plea had been sustained. They had needed information of the charge, and had the aid of counsel before and at the trial. It is said, however, that they would have had the opportunity of hearing in advance the testimony for the state, and thus have been better enabled to make their defense. But is this certain? An indictment might well be held to furnish evidence of probable cause to believe the accused guilty, and to require him to be held to court; and such probable cause is the only matter for the determination of the justice. And there is no rule requiring the production of all the testimony for the prosecution at a preliminary investigation. In any view, prejudicial error is not perceived.

"2. The record sets forth some of the remarks of counsel to the jury in the closing argument for the state, which remarks, it is insisted, were not only improper, but hurtful to the defendants. The judge who presided has certified, however, that no objection was interposed on this account before the retirement of the jury. Clearly, if the language used was deemed improper, the attention of the court should have been promptly invited to the fact, and its interposition sought. Failing that, or a request for an instruction having reference to the irregularity, if irregularity there was, it was not to be considered on the motion to set aside. *State v. Chisnell*, 36 W. Va. 660, 15 S. E. 412; *Landers v. Railroad Co.*, 46 W. Va. 492, 33 S. E. 296. Besides, the evidence has not been certified, and it is impossible to say that the remarks were unjustifiable. To warrant a reversal, this must appear. *State v. Shawn*, 40 W. Va. 1, 20 S. E. 873; *State v. Allen*, 45 W. Va. 74, 30 S. E. 209. The same counsel, during his argument, requested one of the defendants (Mooney) to place the handkerchief found in his possession when arrested over his face, and to stand up in the presence of the jury, —this, to afford an opportunity of determining to what extent witnesses could identify one with covered features, one or more having testified that, while the face of the man who did the felonious shooting was thus covered, he 'looked to be the defendant Mooney.' A colloquy ensued, the named defendant signifying his assent if his counsel so directed, the counsel saying that he would object to the request, and except, and then have the defendant comply. Thereupon the court advised him that he need not do so, and the request was withdrawn, the defendant then objecting and excepting because of

his having been so requested. It is unnecessary to go over all the grounds traversed by counsel in the recent oral discussion. The principle already alluded to is deemed decisive. While the propriety of the request is more than doubted, it is not seen that the defendant, under the circumstances, was prejudiced by what occurred. But, were it otherwise, the court should have been asked to set the jury right by an instruction eliminating the objectionable matter from their consideration. This was not done. Instead, the defendant remained silent, excepting, it is true, but not to any ruling of the court. It was not asked to interfere in any manner, and its voluntary intimation of opinion was not unfavorable to the defense. This being so, the point could not avail on the motion to set aside.

"3. The motion was made on the 16th of April, 1900, and was argued and submitted five days thereafter. There was no reservation except as to affidavits of newly-discovered evidence. On May 18th—the day on which the motion was decided—certain affidavits were offered; notably one made by the two defendants charging misconduct before or during the trial (dates not being given) against the assistant counsel for the state and the sheriff of the county, by which, as averred, a fair and impartial trial was prevented. It is unnecessary to quote at length. This affidavit tends to show attempts to influence witnesses by intimidation and otherwise; and it is charged that the arrest of certain persons, whose names are given, for supposed complicity in the offense, was brought about by the counsel solely for the purpose of discrediting them as witnesses for the defense. Other matters are alleged, but the most material are those noted. Objection being made to the filing, the affidavit was rejected, and the rejection is assigned as ground of error. I am of opinion there was no error. First. The affidavit was not in time. It was not offered until nearly a month after the right to file the same had ceased to exist. No leave to file was asked, no excuse for the delay suggested. Its consideration would have been the result of grace and favor merely. But there is more. For aught that is disclosed, whatever of fact existed was known to the affiants before the case went to the jury. That was the time to make the complaint. Undue delay is generally fatal. It will not serve to hold back information of misconduct affecting the administration of justice for use only in the event of an adverse finding. Here it must be assumed that everything set up was within the knowledge of the affiants before the jury had the case. And, if so, whatever right was theirs was lost by their own neglect. *Flesher v. Hale*, 22 W. Va. 45, is in point. That case related to jurors, it is true, but no different principle applies when misconduct of counsel is alleged. Second. The charges (many of them vague) were made

upon information and belief, and there was no supporting evidence. The names of the informants were withheld, the source of information concealed. It was the plain duty of the affiants to advise the court of all particulars known to them. Something more tangible than hearsay allegations is required. 14 Enc. Pl. & Prac. 905. Third. It is certified by the trial judge that so much as relates to the intimidation of witnesses was shown by the evidence adduced on the trial to be untrue. In the absence of any formal certificate of evidence, this must be taken in contradiction. Certainly, its effect is to discredit the affiants as witnesses in this behalf. Without going so far as to hold that the unsupported statement of one convicted of felony is not in any case to be received, it is to be said that in this instance, largely on account of the nature of the charges, the lapse of time, and the absence of specific statements of fact, corroborative evidence was essential. No mention was made of such evidence. No request looking to its procurement for use at another time was preferred. The paper itself was offered as making the case of the affiants. It was not the best evidence of which the matter was susceptible, and was properly held insufficient. Having reached this conclusion, it is unnecessary to consider objections directed more particularly to different portions of the affidavit. The record shows other exceptions, but as to them it will suffice to say that error is not apparent. The judgment of the criminal court of Ohio county is affirmed."

We can find nothing in the record of this case, solemn as the judgment is, to warrant this court in annulling a sentence which we must take to be based on a verdict fully warranted by the evidence, and to be the result of a fair trial. The matters alleged against this conviction are unsubstantial, and should not be allowed to defeat the plain demands of public criminal justice. Therefore we must affirm the judgment of the circuit court of Ohio county in this case.

A second brief for the prisoners, presented since the foregoing opinion was written, lays particular stress upon the allegation that the assistant prosecuting attorney and sheriff suppressed evidence favorable to the prisoners by intimidating witnesses. This brief seems to call for an analysis of the affidavit made by the prisoners in support of that point. That affidavit is entirely inadequate. Clearly, a new trial cannot be had for the suppression of evidence, unless it appear that evidence was suppressed, and what that evidence was, and that it was material, and that it could be procured upon another trial. A new trial cannot be had upon the mere hope or expectation that evidence can be produced on another trial. There must be some stable foundation to believe that such material evidence exists, and will be produced, and that it will call

for a different verdict. *State v. Madison*, 48 W. Va. —, 38 S. E. 492. The affidavit does not comply with the principle governing applications for a new trial on newly-discovered evidence, which are on like basis with applications for new trial based on suppression of evidence. *Roderick v. Railroad Co.*, 7 W. Va. 54, holds that, to get a new trial on new evidence, the party must state that he had conversed with the witness proposed, and must detail the testimony that witness will give. *Strader v. Goff*, 6 W. Va. 257, says that there must be an affidavit of the informant, and that an affidavit of the party or a third person will not do. *Brown v. Speyers*, 20 Gratt. 296, requires the affidavit of the new witness as to his evidence, or, if that is impracticable, the affidavit of persons who have conversed with that witness, stating the facts he will testify. Now, this affidavit says that the prisoners "are informed and positively believe that the assistant prosecuting attorney and sheriff procured the arrest of Reilly, Lynch, and Connors on the charge of being accessories before the fact in the murder in order to impair and destroy the effect of their evidence." Is it possible that the mere fact of the arrest, at the instance of public officers, who are conservators of the peace, shall call upon a court to grant a new trial upon the mere pretense that such arrest was for the purpose of intimidating witnesses without adequate evidence of such intent? The affidavit does not state what evidence those parties would give, which is a serious defect. If we may infer from it that they were expected to testify that they saw the prisoners in Wheeling on the night of the murder, about 8 o'clock,—less than 30 minutes before the murder occurred at a distance of $5\frac{1}{2}$ miles from Wheeling,—then it appears that Reilly and Lynch did so state on the trial. Their evidence was not suppressed. Are we to say that the mere arrest broke the effect of their evidence? How do we know that? Are we to say that the arrest in the administration of criminal justice of a person who happens to be a witness impairs his evidence, and calls for a new trial? The affidavit does not intimate any other evidence which these parties were expected to give. Connors did not testify. Why he did not we do not know. What evidence would he give? We do not know. His affidavit as to what evidence he would give is not filed. Not a man who heard Connors say what he knew about the case, if anything, is vouched for his expected evidence. The prisoners do not say that they knew he would give any particular evidence. Are we to guess that he would give evidence favorable to the prisoners? The affidavit says further that the assistant prosecuting attorney, "as affiants believe, for the express purpose of intimidating witnesses for the defense," declared, "as affiants are informed and believe, in the presence of said witnesses, that any

person who should testify that affiants were in the city at 8 o'clock p. m. on the night of said homicide" he (the assistant prosecuting attorney) would have arrested, and that this intimidated said witnesses. It does not appear who so informed the prisoners. It did not intimidate two of them, for they gave that evidence; and as to Connors we have no reliable statement as to what he would say on another trial, no ground on which to base any confidence as to his evidence. Authorities above cited hold this inadequate. In addition, this intimidation was denied, as stated above by Judge Melvin. The affidavit states that the sheriff, as affiants are informed and believe, summoned Wingerter for the defendants, and that said sheriff told Wingerter that he was expected to testify that he saw the prisoners in Wheeling at 8 o'clock of the night of the murder, and that the sheriff "then talked to said witness in a way and to the effect that was prejudicial to the affiants." Now, the party who induced the prisoners to believe that the sheriff so talked to Wingerter in a way prejudicial to the prisoners is not named. What did the sheriff say to Wingerter that was prejudicial? We do not know from this affidavit. Wingerter testified on the trial that he did see the prisoners, but whether on the night of the murder or some other night he could not say. The affidavit avers that he could and would have testified that he saw the prisoners on the night of the murder in Reilly's saloon. Are we to say, without evidence of the fact from Wingerter or anybody else, that Wingerter would testify on another trial that he saw the prisoners in Reilly's saloon on the night of the murder, in the face of his own evidence that he could not say that he saw them there on that night? Wingerter did not say so. The prisoners did not hear him say so. We are asked to assume that the sheriff kept him from saying so by talk "in a way and to the effect that was prejudicial" to the prisoners, when we do not know what that talk was. We are asked to annul this verdict on these vague, general, weak, and inconclusive statements and surmises, resting on no solid basis.

(48 W. Va. 661)

HARPER v. HARPER.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

CRIMINAL LAW—EXAMINATION BEFORE JUSTICE—MALICIOUS PROSECUTION—PROBABLE CAUSE.

1. Under section 12, c. 153, Code, it is the duty of any justice before whom any person is brought for an offense, if demanded by such person, as soon as may be to examine on oath, in the presence of the accused, the witnesses for as well as those against him.

2. In an action for malicious prosecution, the discharge, by a justice, of the plaintiff, who has been arrested and brought before him for examination, or the refusal of the grand jury to indict him, is prima facie evidence of a

want of probable cause, except in a case where it shall appear that such discharge, or refusal to indict, was after the hearing by the justice or the grand jury of the witnesses for the accused as well as for the prosecution; and such prima facie evidence is liable to be rebutted by proof, and (*Vinal v. Core*, 18 W. Va. 1, Syl., point 16) is modified accordingly. (Syllabus by the Court.)

Error to circuit court, Raleigh county; J. M. Sanders, Judge.

Action by Lee Harper, by his next friend, against H. H. Harper. Judgment for plaintiff, and defendant brings error. Reversed.

McCreery & Keatley and A. P. Farley, for plaintiff in error. James H. McGinnis, for defendant in error.

McWHORTER, J. Lee Harper, who sued by his next friend, W. T. Harper, brought his action of trespass on the case in the circuit court of Raleigh county against H. H. Harper. Defendant appeared, and demurred to the declaration and to each count, which demurrers, being argued, were overruled by the court. The defendant then entered his plea of not guilty, and tendered three special pleas in writing, when it was agreed by the plaintiff on the record that the defendant might introduce any evidence in defense of the action relevant under any special pleas which could be properly pleaded. A jury was then impaneled, and, having heard the evidence, returned their verdict in favor of the plaintiff, assessing his damages at \$500. The defendant moved the court to set aside the verdict of the jury as being contrary to the law and the evidence in the case, and to arrest judgment upon said verdict, of which motions the court took time to consider, and afterwards overruled the same, and entered judgment upon the verdict, to which rulings of the court defendant excepted, and filed a bill of exceptions setting forth the various exceptions saved to him in the course of the trial.

Defendant obtained a writ of error, and assigned first as error the overruling of his demurrers to the declaration and each count thereof. Counsel for defendant give two reasons why the demurrer should have been sustained: First, "For the reason that the evidence adduced clearly proves that a felony had been committed (see section 5, c. 145, Code), and it was the undoubted right and duty of defendant to detain the suspected parties until an officer could be secured;" and cite many authorities touching his right and duty to make the arrest, etc. Of course, what the evidence adduced showed or proved had nothing to do with the sufficiency of the declaration. Their other point is that the declaration failed to set forth the alleged malicious prosecution or arrest. The declaration is substantially in the form laid down in *Hogg, Pl. & Forms*, 337, and shows good cause of action.

Second assignment: That the court erred in permitting the transcript of the justice's

docket and the warrant issued by William M. Rogers, the justice, on the 17th of October, 1896, to be given in evidence to the jury. It is claimed by counsel for appellant that the action of the justice was irregular, and, if he had proceeded in the regular manner, the judgment would have been different in form; citing section 15, c. 156, Code, on the theory that the justice should only examine the witnesses for the prosecution to ascertain whether there was probable cause for holding the accused to answer further. But section 12, same chapter, provides that "the justice before whom any person is brought for an offence, if demanded by such person, shall as soon as may be, in the presence of such person, examine on oath, the witnesses for and against him, and he may be assisted by counsel." The proceeding was not irregular, but such as was authorized by statute. The judgment of the justice was, "After hearing all the evidence on both sides, it is considered by me that the prisoner is not guilty, and is hereby acquitted." In *Sullivan v. Myers*, 28 W. Va. 375, plaintiff had been arrested, and taken before a justice, charged with a misdemeanor; and without lawful authority a jury of six were sworn to try the question of his guilt, and rendered a verdict of not guilty, upon which the justice discharged the prisoner. Upon the trial for malicious prosecution the transcript of the docket of the justice, showing what took place at the trial, and the verdict and judgment, was offered in evidence by the plaintiff, and the whole transcript was objected to by the defendant, and the objection was overruled, and the transcript admitted. It was held: "No error sufficient to reverse the judgment." The judgment was proper evidence as showing a discharge, yet, it appearing that the justice tried the question of the guilt of the party, and heard the evidence on both sides for and against the plaintiff, the judgment so admitted is entitled to very little weight. It is said in *Hale v. Boylen*, 22 W. Va. 240: "In an action for malicious prosecution, the burden of proving want of probable cause is, in the first instance, on the plaintiff; for the law presumes that every public prosecution is founded on probable cause. But, as want of probable cause is a negative proposition, necessarily difficult of proof, slight evidence is regarded sufficient to prove such want of probable cause,"—citing *Vinal v. Core*, 18 W. Va. 1, 41; *Willans v. Taylor*, 6 Bing. 183, 19 E. C. L. 49; *Taylor v. Willans*, 2 Barn. & Adol. 845, 22 E. C. L. 195; *Cotton v. James*, 1 Barn. & Adol. 128, 20 E. C. L. 358. "But, slight as the evidence is that is necessary to prove, in the first place, a want of probable cause, yet there are many cases which hold that the acquittal of the plaintiff by a jury will not even amount to prima facie evidence of such want of probable cause, though some have said such acquittal would amount to prima facie evidence of such want of probable

cause, and thus throw the burden of showing that there was probable cause on the defendant. It is obvious, therefore, from the decisions, that, if the acquittal of the plaintiff is any evidence at all on the question of whether there was or was not probable cause, it is entitled to very little weight." In *Williams v. Van Meter*, 8 Mo. 339, 41 Am. Dec. 644, it is held: "In an action for malicious prosecution the bare acquittal of the plaintiff is not sufficient evidence of the want of probable cause;" and in *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85: "Where the prosecutor appeared and testified as a witness at the trial, and the defendant was acquitted by the verdict of the jury, held, in an action against the prosecutor for malicious prosecution the defendant's acquittal did not raise the presumption of the want of probable cause." In *Heldt v. Webster*, 60 Tex. 207, where the trial court charged the jury that, if the plaintiff was discharged by the examining magistrate, then the presumption of law is that there was no probable cause, but, if the evidence further showed that defendant had reasonable cause to believe and did believe that the facts stated in the complaint were true, then he would have such probable cause as the law contemplated, the charge was held to be erroneous, because: "(1) The discharge of the defendant in a criminal prosecution does not raise a presumption of want of probable cause. Following *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85. (2) The want of probable cause is a question of fact for the jury to determine, and such charge gave to that fact a prominence to which it was not entitled." Here the court holds the discharge of the defendant in a criminal prosecution by the examining magistrate as the equivalent of a verdict of not guilty by a jury in so far as it raises no presumption of want of probable cause; and very properly so, because, when the examining justice hears all the evidence for and against the accused, and acts upon it, he has gone beyond inquiring as to the probable cause for holding the accused to answer an indictment for the offense, and has weighed the evidence, and passed upon the guilt or innocence of the accused, as a jury would do upon the trial of an indictment. Where a grand jury or a justice examines only the evidence for the prosecution to ascertain whether there be grounds for indictment against the accused, and the grand jury refuses to indict him, or the justice discharges him from arrest, it is prima facie evidence of want of probable cause, but it may be rebutted by proof. *Ganea v. Railroad Co.*, 51 Cal. 140. As said in *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729: "In determining whether the prosecution was founded on probable cause, the existing state of facts must be reviewed from the standpoint of the prosecution, and not from that of the accused. For this reason, trial and acquittal do not raise the presumption of the want of

probable cause. Verdict of acquittal may be given notwithstanding probable cause, because there is not proof of guilt beyond a reasonable doubt. But the magistrate and grand jury have the very question of probable cause to try, and the evidence on the part of the prosecution is alone examined, and the proceeding is entirely ex parte, at least so far as the grand jury is concerned." In case of examination before a justice, if the accused so desire, he may of right, under the statute, produce his evidence, and have it heard for the consideration of the justice. He has not this right before the grand jury. The duty of the grand jury being to inquire whether an indictment is to be found, "the general rule is that they should hear no other evidence but that adduced by the prosecution." *Whart. Cr. Pl. & Prac.* § 360. See, also, *Id.* § 362.

Assignments 3, 4, and 5 relate to the admission of testimony excepted to, and the refusal to admit testimony claimed to be properly offered. When the plaintiff, Lee Harper, was testifying, he was asked by counsel for plaintiff, referring to the time of making the arrest by H. H. Harper of himself: "Was there any demonstrations made upon the part of Mr. Harper? Was he armed with any weapons? A. To the best of my recollection, there was some Winchesters and shotguns in the crowd. (Motion to strike out the question and answer overruled, and exception.)" While the answer was not closely confined to answering the question, yet, according to the evidence, there was a company of four, and the witness, without saying anything about defendant especially as to his being armed, said there were some Winchesters and shotguns in the crowd, and it was not improper to state what he did in relation to the guns. Again, witness was asked, over objection of defendant: "Was there anybody there that seemed to assume control of the people who came and molested you while you were engaged there at the polecat hole?" Plaintiff had a right to show defendant's connection with the transaction, and the question was proper. On cross-examination witness had stated that "Mr. Hylton, he came in that evening [at witness' father's house], and after that John Barnes and Robert Brown and John Brown, and we concluded we would go possum hunting; and when we started, and got up on top of the first hill, some of them says, 'Let's play a game of cards,' and we played two or three games. Charley Howerly had a dog borrowed, and we wanted to go on hunting, but they said they never had any lantern, and they went up on the mountain, and said they would build a fire up there, and we boys went on possum hunting from there." After some further questions and answers, witness was asked: "What became of the other boys when you and Charley went possum hunting?" Objection to the question was sus-

tained, and he was further asked: "What direction did the other boys go when you left them?" and "Do you know what direction the other boys went when you left them?" to both of which objections were sustained, and the questions not permitted to be asked. The said questions should have been permitted to be answered, to test the correctness of his previous statements as to where the rest of the party were, and to locate the way that witness and Howery went in reference to the field in which the corn was burned. Witness was shown a diagram, and asked: "Now, you started from your father's house, and came up two or three hundred yards? A. Yes, sir; four or five hundred. Q. Up here; and you all played a game of cards? A. That writing you have there, that ain't like the road we took. Q. What is the difference? A. Most on account of drawing the way we went. Q. Can you make a diagram of the route? A. Of course, I couldn't make it just as it is, but I can give something close to it, I expect—the road we took. Q. Will you please do that? (Objection. Sustained, and exception.)" Witness could not be required to draw a diagram, but he should have been permitted to answer the question, and illustrate it to the jury by a diagram, if he chose to do the latter. On examination in chief the witness was asked "whether or not he burned the corn," and answered, "No, sir; I did not." At once counsel for plaintiff asked leave—which was granted without objection—to withdraw said question and answer in relation to the burning of the corn, it being deemed proper evidence in rebuttal. On cross-examination the witness was asked: "What field do you have reference to? A. You said the field where the corn was burned. Q. Was there any corn burned? A. That is what they all said. I don't know whether it was or not. (Motion to strike out the evidence of this witness with reference to the burning of the corn. Motion was sustained, and exception.)" It was properly stricken out. See *State v. Hatfield* (W. Va.) 37 S. E. 626 (Syl., point 5). On cross-examination of Hugh Clyburn, a witness examined for plaintiff, he was asked: "What is your feeling towards Henry Harper? A. I have nothing against him much. Q. Didn't he accuse you of stealing things from him? (Objection to the last question sustained, and exception.)" The answer to the question immediately preceding indicated that there was at least some feeling on the part of the witness against the defendant. The defendant had a right to such cross-examination of the witness as would show to the jury the animus of the witness towards the defendant against whom he was testifying, and to bring out any facts that would tend to show the true relations between them, and the motive of the witness in testifying as he did. Section 446, 1 Greenl. Ev.

It is insisted that the court erred in refusing to set aside the verdict of the jury, and grant the defendant a new trial, because the verdict was contrary to the law and the evidence, as shown by the record in the case. The proof shows that on the night of October 17, 1896, after defendant had gone to bed in his house, several witnesses saw two or three shocks of corn in the fodder in defendant's field, some four or five hundred yards from the house, burning, and saw two men with a lantern set fire to other shocks of the corn, going from one shock to another, firing them as they went. Defendant, with several other persons, went to where the corn was burned, and took the measure of some of the tracks left near the corn shocks that were burned; then went a short distance to where some persons were playing at cards, and applied the measure of the tracks taken to some of their shoes, found they did not fill the measurement, but arrested them, and proceeded to another place not far distant, where plaintiff and one Charley Howery claimed to have a polecat "treed," or in a hole. Defendant applied the measure he had taken of the tracks found near the burnt shocks of corn to the shoes of plaintiff and Howery, and claimed that the measures and shoes corresponded, when he arrested them also, and took them all to his house. The next morning defendant and other witnesses took one of the shoes worn by plaintiff and one worn by Howery to the field where the corn was burned, and also to the "cat hole," where plaintiff and Howery were arrested, and tried the tracks found at both places to correspond with the shoes of said plaintiff and Howery. It appears further that the last two mentioned persons separated from the others who were found playing cards a very short distance from where the corn was burned, when they started "possum hunting" had a lantern with them, and started in the direction of the corn that was burned. There is no question about the commission by some persons of the crime of burning defendant's corn and fodder. That the prosecution alleged in the declaration was set on foot, instigated, and conducted to its termination by the defendant before the justice, which ended in the acquittal of the plaintiff on the examination of the witnesses for and against him, is not denied. In *Stone v. Crocker*, 24 Pick. 81, it is said: "There are two things which are not only indispensable to the support of this action, but lie at the foundation of it: The plaintiff must show that the defendant acted from malicious motives in prosecuting him, and that he has no sufficient reason to believe him to be guilty. If either of these be wanting, the action must fail. A man from pure malice may prosecute another who is really guilty, or whom, from sufficient reason, he believes to be guilty, though in fact innocent, and

no action will lie against him. *Golding v. Crowle*, Sayer, 1; *White v. Dingley*, 4 Mass. 433; *Lindsay v. Larned*, 17 Mass. 190. The want of probable cause is the essential ground of this action. Other things may be inferred from this, but this cannot be inferred from anything else. It must be established by positive and express proof. It is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the onus probandi is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no grounds for commencing the prosecution." See, also, *Purcell v. McNamara*, 1 Camp. 199, 9 East, 361; *Sykes v. Dunbar*, 1 Camp. 202, note; *Inledon v. Berry*, Id. 203, note; *Wallace v. Alpine*, Id. 204, note; *Shock v. McChesney*, 4 Yeates, 507. It is insisted there is absolutely no evidence to support the fact that defendant acted from malicious motives in prosecuting plaintiff, and, further, that probable cause was clearly shown to exist, to authorize the prosecution of the plaintiff; and this insistence is by no means groundless. For the reasons herein stated, the judgment is reversed, the verdict set aside, and the case remanded for a new trial to be had in case plaintiff should be so advised.

(19 W. Va. 684)

STATE v. JOHNSON et al.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

HOMICIDE—INDICTMENT—CHARGING DEGREE OF OFFENSE—PANEL—COMPETENCY OF JUROR—EVIDENCE—ARGUMENT OF COUNSEL—OBJECTIONS.

1. *Flanagan's Case*, 26 W. Va. 116 (Syl., point 1); *Smith's Case*, 24 W. Va. 814 (Syl., point 1); *Schnelle's Case*, Id. 767 (Syl., point 1); and *Douglass' Case*, 23 S. E. 724, 41 W. Va. 537 (Syl., point 1),—approved.

2. A person charged by indictment with felony is entitled under the law to a panel of 20 jurors, each and all of whom shall be "free from exception," from which panel the jury for the trial of the case is to be selected, under section 3, c. 159, Code.

3. In order that one who has formed or expressed an opinion as to the guilt or innocence of the accused may be accepted as a competent juror on such panel, his mind must be in condition to enable him to say on his voir dire unequivocally and without hesitation that such opinion will not affect his judgment in arriving at a just verdict from the evidence alone submitted to the jury on the trial of the case.

4. When a juror on his voir dire admits that he has formed and expressed an opinion of the guilt or innocence of the accused, and expresses any degree of doubt as to whether such previously formed opinion would affect his judgment in arriving at a just and proper verdict in the case, it is error to admit him on the panel.

5. On the trial of an indictment for murder, where self-defense is relied upon by the defendant, and, to avail, must be established by a preponderance of evidence, it is the duty of the jury to consider and weigh all evidence tending to prove self-defense, whether intro-

duced by the defendant or by the state, and all the evidence and circumstances in the case. 6. *Syllabus, Landers v. Railroad Co.*, 33 S. E. 290, 46 W. Va. 492, approved.

(Syllabus by the Court.)

Error to criminal court, Ohio county; T. J. Hugus, Judge.

Clarence Johnson and Hugh Devinney were convicted of murder in a criminal court. From a judgment of the circuit court affirming the same, they bring error. Reversed.

B. B. Dovener and S. O. Boyce, for plaintiffs in error. R. H. Freer, Atty. Gen., Alex Dulin, W. C. Meyer, and John A. Howard, for the State.

McWHORTER, J. At the November, 1898, term of the criminal court of Ohio county, the grand jury returned the following indictment, duly indorsed by the foreman "A true bill," to wit:

"The State of West Virginia, Ohio County, to wit: In the Criminal Court of the said County. The jurors of the state of West Virginia, in and for the body of the county of Ohio, and now attending the criminal court of the said county, upon their oaths present that Clarence Johnson and Hugh Devinney, on the 9th day of September, in the year of our Lord 1898, in the said county of Ohio, feloniously, willfully, maliciously, deliberately, and unlawfully did slay, kill, and murder one Charles McLaughlin, against the peace and dignity of the state. W. C. Meyer, Prosecuting Attorney for the Said County of Ohio."

"Found upon the information of John M. Shorts. Witness sworn in open court, and, by order of the court, sent before the grand jury to give evidence."

On the 10th of November, 1898, the defendants appeared in person, and demurred to the indictment, in which the prosecution joined, which demurrer, being argued, was overruled by the court, and the defendants pleaded not guilty, and the cause was set for trial on the 25th of November, 1898, on which last-named day the defendants moved the court for a continuance until the then next term, because of the absence of Annie Riley, a witness on behalf of the defendants, and filed the affidavit of Clarence Johnson in support of the motion; but the court overruled the motion, and refused to continue the case, to which ruling defendants excepted. And at the same time the defendants filed their joint petition and affidavit, by permission of the court, praying for a change of venue, said affidavit being accompanied by extracts from certain newspapers published daily in the city of Wheeling, and of general circulation in the city of Wheeling and Ohio county, as a part of said affidavit, and placed August C. Meyer upon the stand, who was examined as a witness on behalf of said petitioners on said motion for change of venue, which said motion was, on the 26th of November, taken under advisement, and on the 28th was further considered and overruled,

to which ruling defendants excepted, and the court proceeded to select a jury for the trial of the case, and, after securing 11 names, "jurors summoned by virtue of the several venire facias heretofore directed by the court were elected and tried, and found free from exception, and all the others who appeared being challenged for causes, and it appearing that the several venire facias have been exhausted, it is ordered that the sheriff of this county do summon one hundred qualified jurors from the body of the county of Ohio, as heretofore directed by the court, to appear here to-morrow morning at 8:30 o'clock, and the elected jurors aforesaid were placed in the hands of the sheriff, with the usual instructions of the court"; and, the required panel of 20 jurors having been secured, on the 30th of November the defendants renewed their motion for a change of venue, based upon the original petition for that purpose filed in the case, and asked that the evidence heard in open court on examination of the jurors on their voir dire be made a part of the record, and considered in connection with their said motion for change of venue, based on the petition and evidence theretofore filed and offered in the case for that purpose, and the court overruled said motion, and the defendants excepted to the action of the court in overruling said motion and petition for change of venue. Defendants put in their plea of not guilty, and a jury was impaneled and sworn, and, after hearing the evidence and arguments of counsel, returned a verdict of guilty of murder in the first degree, as charged in the indictment. The defendants moved the court to set aside said verdict and grant them a new trial, and also moved in arrest of judgment upon said verdict, and on the 9th day of February, 1899, the court overruled said motion, and pronounced judgment against the defendants, who excepted to said rulings of the court, and filed eight several bills of exceptions to the various rulings of the court. Defendants obtained a writ of error to the circuit court of Ohio county, which being heard on the 4th day of December, 1899, the judgment of the criminal court was affirmed, to which ruling of the circuit court the defendants also excepted, and obtained from one of the judges of this court a writ of error, and assigned as error the overruling of defendants' demurrer to the indictment.

It is contended with apparent earnestness that the indictment fails to charge the defendants with murder in the first degree, and only charges murder in the second degree; hence it was error to enter judgment upon said verdict, and not to arrest judgment thereon, as moved by the defendants. The statute prescribes the form of indictment for the crime of murder, and it has been held time and again by this court that an indictment after the form prescribed by the statute (section 1, c. 144, Code) is sufficient. In *State v. Schnelle*, 24 W. Va. 767 (Syl., point 4), it is held: "In this state there is no such thing

as an indictment for murder in the first or second degree. The indictment is for murder, and it depends upon the proof whether it is in the first or second degree." *Flanagan's Case*, 26 W. Va. 116 (Syl., point 1); *Douglass' Case*, 41 W. Va. 537, 23 S. E. 724; *Baker's Case*, 33 W. Va. 319, 10 S. E. 639. Defendants' counsel ask this "court to not only reconsider this point decided in the *Schnelle* and *Baker Cases*, but permit appellants to argue the same." The questions involved have been so often and so fully argued and so uniformly decided by the court that, as said in the *Douglass Case*, 41 W. Va., at page 538, 23 S. E. 724: "We regard the indictment good under several decisions there mentioned [referring to the *Baker Case*, 33 W. Va. 319, 10 S. E. 639], and will not reopen its discussion. It has been so long used, and so often approved, that the matter ought to have rest."

The second assignment—that it was error to refuse defendants a continuance—was based solely on the absence of *Annie Riley*, a material witness for the defense, and is disposed of by the fact that the witness was present at the trial and testified in the case, and the defendants had the benefit of her testimony.

The third assignment—"In overruling and not sustaining and granting the several motions of the defendants for a change of venue"—is based principally upon the prejudice in public sentiment claimed to be wrought up against the defendants in the city of Wheeling and county of Ohio by published editorials in the three principal daily newspapers of the city, the *Intelligencer*, the *Register*, and the *Wheeling Evening News*, and the further fact that a subscription paper was circulated to some extent among the citizens, and it was shown to have been signed by several persons, for the purpose of raising funds to employ counsel to assist the prosecuting attorney in his duties of public prosecutor in the prosecution of the indictment against the defendants. The editorials complained of were somewhat sensational, and perhaps a little extravagant, but not more so than usual on an occasion of the like kind. A tragedy like that in question, enacted in the public streets of a city in open daylight, or, indeed, at any time of day or night, would create more or less excitement and comment; and, while such scenes are calculated to a greater or less extent to arouse the indignation of all good citizens, ex parte statements, comments, and publications are not likely to so affect and inflame the mind of the whole community that 20 fair-minded men in the county cannot be found and impaneled who can insure to the accused a fair and impartial trial. Reasonable, intelligent men, such as the jurors of the county are presumed to be, do not form such opinions in regard to the guilt or innocence of persons charged with crime from rumors and news-

paper reports as would interfere with their rendering a just and correct verdict after hearing the whole evidence of the sworn witnesses in the case in open court after themselves taking a solemn oath to well and truly try and true deliverance make upon the issue joined between the state and the accused, according to the evidence, not according to rumors and newspaper reports. There was no special public demonstration against the defendants. After the commission of the deed, they went together along the public streets some two or three squares, apparently with deliberation, unmolested, and surrendered themselves to the officers of the law. The trial took place more than two months after the commission of the deed, yet the state of the public mind, while it was invoked to support the motion for a change of venue, was not mentioned as a reason for continuance of the case. The publications complained of were all within a few days after the tragedy, and there is no evidence, except that elicited from the persons summoned as jurors on their voir dire examination, as to the public feeling towards the defendants at the time of the trial, and from their evidence it was not apparent that the public mind was at that time so wrought up and inflamed as to prevent a fair trial, and this should be made to appear in order to entitle the defendants to a change of venue. Defendants must show good cause for such change. *Greer's Case*, 22 W. Va. 800. That subscription papers to raise money to assist the prosecuting attorney in his duties in the proper prosecution of the case should be circulated is not necessarily evidence of a personal prejudice against the accused, but may be the offspring of an honest desire for a fair and thorough investigation of the case and a proper vindication of the majesty of the law. When men get into the meshes of the law, they employ for their defense—which is their privilege and their right—the best talent obtainable, and it is entirely proper that the state should be fairly and ably represented. It is not shown how many persons contributed, nor how much was contributed, for the purpose. In proof as to subscriptions, defendants placed on the witness stand A. C. Meyers, who testified that he subscribed \$5 for the purpose of helping the McLaughlins in the case, and afterwards gave 50 cents more; that he circulated the subscription paper among the mill men at Riverside Mills, in Marshall county, where McLaughlin (the deceased) had been employed “for I don’t know how many years, and he was a friend of mine that worked there, and it was nothing more than they done for anybody”; and witness said that he collected and turned over to the McLaughlins \$29 and \$5. It is not shown what other sums, if any, were turned over. There were other subscription papers. In *Wormeley's Case*, 10 Gratt. 688, Judge Daniel says: “It is true,

it is shown that subscription papers were circulated to raise a fee for the employment of counsel to aid in the prosecution, and that they had been signed by some twenty or thirty persons. Such a fact of itself is no ground for a change of venue;” and this is quoted by this court with approval in *Greer's Case*, 22 W. Va. 800. We do not think the trial court improperly exercised its discretion in refusing the motion for change of venue.

It is insisted for defendants that the case was not tried by an impartial jury; that jurors were accepted on the panel of 20 who, on examination on their voir dire, showed themselves incompetent. Under the law, defendants are entitled to a panel of 20 jurors wholly free from bias or prejudice, whose minds are in condition to hear, consider, and properly weigh the evidence as it is presented to them at the trial, uninfluenced by what they have heard or read of the case before the trial. A. W. Pogue, one of the panel, and one of the jurors who tried the case, on his voir dire said he read the papers at the time of the killing; that he thought he had expressed an opinion which was likely a pretty decided one, and was still of the same opinion, and, if sworn as a juror in the case, would go into the jury box with the same opinion, and he would have to hear some good evidence to change it; and in answer to the question, “And you would not go into the jury box unbiassed, and without a prejudiced opinion, would you?” he answered, “Well, I think not;” and in answer to the question by the court: “Suppose that the evidence given by the witnesses on the witness stand would show a state of facts different from that given in the newspaper, would your opinion change then? A. Well, possibly it would, if they had evidence. My opinion might be wrong. It might be changed. Q. And, if the evidence showed that your opinion was erroneous, you could change it? A. Yes, sir.” That one who has formed or expressed an opinion as to the guilt or innocence of the accused may be accepted as a competent juror, his mind must be in a condition to enable him to say unequivocally and without hesitation that such opinion will not affect his judgment in arriving at a just verdict from the evidence alone submitted to the jury on the trial of the case. Can one be held to be a competent juror under the law who admits that he goes not into the jury box “unbiassed, and without a prejudiced opinion,” although he says, “Possibly that opinion might change, if they have evidence”? Certainly not. This juror was challenged by the defendants, the challenge overruled, and exception taken. In the *Schnelle Case*, 24 W. Va. 767 (Syl., point 9), it is held that: “If a proposed juror on his voir dire admits that he has formed and expressed an opinion as to the guilt or innocence of the accused, and halts and hesitates as to his then condition

mind, and cannot say that his mind is free from bias and prejudice, and cannot say that the previously formed opinion will not influence his verdict, he is an incompetent juror, and ought to be rejected." Hatfield's Case (W. Va.) 37 S. E. 626. C. S. Snooks, drawn on the panel, said he had formed and expressed an opinion from reading the accounts in the papers; thought he could throw aside his opinion, and try the case on the evidence alone. On further examination: "Q. Your mind is affected now. You have come to certain conclusions as to this case. Now, isn't your mind to a certain extent biased, and would not that bias and that opinion unconsciously prejudice you in regard to the evidence you would hear in the case? A. It might to a certain degree. Q. Then you have doubts as to whether you could throw aside all these influences, and decide the case solely on the evidence? A. Yes, I have some little doubts." Jacob Straub, examined by the court: "Q. Have you formed or expressed any opinion? A. Yes, sir; I have. Q. On what is that opinion based? A. Newspaper reports. Q. Is that opinion such as would prevent you from giving them a fair trial if you were sworn as a juror in this case, and under your oath as a juror? A. I couldn't say. Q. How is it? Do you think you could give them a fair and impartial trial? A. I believe I could." On further examination as to the opinion he had formed, he says, "As far as I know of the case, it is a decided opinion," and further said that he did not think the impressions that the reading of the newspapers had made on his mind would influence his judgment. When a juror on his voir dire admits that he has formed and expressed an opinion of the guilt or innocence of the accused, and expresses any degree of doubt as to whether such previously formed opinion would affect his judgment in arriving at a just and proper verdict in the case, it is error to admit him on the panel.

The fourth assignment of error is the overruling of the objections of the defendants to certain questions by the state, and permitting answers thereto to be given and considered by the jury as evidence, as well as refusing to permit questions asked by the defense, notwithstanding the objections of the state, and the answers thereto to be considered as evidence by the jury. As defendants in their brief and also in their oral arguments fail to insist upon any of the exceptions taken in relation to the testimony concerning which the exceptions were taken, or to even call attention to such exceptions, and I having examined many of such exceptions without finding rulings of such a nature as to be reversible error, I conclude those exceptions are waived.

The fifth assignment is that "the court erred by permitting instructions Nos. 4, 5, and 6 to be read to the jury on behalf of

the state, and considered by them in arriving at a verdict in this cause." Instructions Nos. 4 and 6 are objected to on the theory that the indictment is one charging the defendants with murder in the second degree only, and therefore, under the indictment, defendants could, in no event, be convicted of murder in the first degree; hence the instructions are erroneous and misleading. We have seen that the indictment is in the form prescribed by the statute for murder, under which it has been well settled by this court that there can be no indictment for murder of the first or second degree specifically, but for murder generally, and the degree thereof established on the trial of the case depends upon the evidence. The further objection to No. 6, which is as follows: "The jury is further instructed by the court that, even if you do believe before Friday, September 9, 1898, the deceased, Charles McLaughlin, the witness William Craig, the witness Frank McLaughlin, and the witness James McLaughlin had threatened, kicked, beat, bruised, and assaulted the defendants; yet, if you further believe from all the evidence that the defendants followed the deceased and those who were with him, on the said Friday afternoon, down Market street, from a point above Sixteenth street to a point near the photograph gallery mentioned in evidence, with the felonious intent to take the life of deceased, and there, without further provocation, justification, or legal excuse, shot and killed the deceased, Charles McLaughlin, as charged in the indictment, then it is your duty to find them guilty of murder in the first degree,"—is that it "excludes any reasonable doubt which the defendants are entitled to, especially upon the points stated in the instruction, and, in effect, instructs the jury that the guilt or innocence of the defendants depends merely on what the jury might conclude is preponderating evidence." The jury were thoroughly instructed on the question of reasonable doubt, being instructed by the court "that in this case the burden of the proof rests upon the prosecution to make out and prove to the satisfaction of the jury, beyond all reasonable doubt, every material allegation in the indictment, and, unless that has been done, the jury should find the defendants not guilty." They were further instructed "that this is not a civil case, but is a criminal prosecution; and that the rules as to the amount of evidence in this case are different from those in a civil case, and the mere preponderance of evidence would not warrant the jury in finding the defendants guilty, but, before the jury can convict the defendants, they must be satisfied of their guilt beyond all reasonable doubt, and, unless so satisfied, the jury should find the defendants not guilty"; and, further, "that in criminal cases, even when the evidence is so strong that it demonstrates the probability of the guilt of the parties accused,

still, if it fails to establish beyond reasonable doubt the guilt of the defendants, or of one or more of them, in manner and form as charged in the indictment, then it is the duty of the jury to acquit the defendant or defendants as to whose guilt they entertain such reasonable doubt." After these instructions, the jury could not have been misled by instruction No. 6, because it says nothing about the reasonable doubt. Instruction No. 5 is as follows: "The court instructs the jury that, according to the law of this state, which is binding upon the jury in this case, that if the jury find from the evidence that the defendants shot and killed Charles McLaughlin, the deceased, and rely on self-defense to excuse them for such killing, the jury cannot acquit them on the grounds of self-defense unless the defendants have proven by a preponderance of the evidence that such killing was actually done in self-defense." This instruction may be misleading to the jury, in that it carries with it the idea that the preponderance of evidence in favor of self-defense must be furnished by the defendants, and proven by their own witnesses, while all the evidence in the case, whether introduced by the state, elicited on cross-examination of state's witnesses, or the circumstances of the case which in any manner tend to show that defendants acted in self-defense, would be weighed and considered by the jury. In *Mann's Case* (W. Va.) 37 S. E. 613 (Syl., point 5), it is held: "While the court may instruct the jury that the burden is on the prisoner to show by a preponderance of evidence that the killing charged was in self-defense, yet it should add thereto, in effect, that such defense may be fully sustained by the evidence for the state, or by all the evidence and circumstances in the case." Also, *Jones' Case*, 20 W. Va. 764: "All error is presumed to be prejudicial, and only in extreme cases, where it clearly appears that no injury could have resulted, will this court refuse to set aside a verdict rendered on erroneous instructions." *Jackson's Case*, 97 Va. 762, 33 S. E. 547; *Cain's Case*, 20 W. Va. 679.

The sixth assignment: "The language used by the prosecuting attorney, W. C. Meyer, as well as the language of John A. Howard, his assistant, in addressing the jury on behalf of the state, was clearly erroneous, to the prejudice of these defendants, and was an error which should entitle these defendants to have said verdict set aside, and a new trial granted." At the close of Howard's argument, defendants' counsel moved the court to say to the jury that every word that Howard had said to them about matters about which there was no evidence which was indicated by the word "exception" should be disregarded by the jury. After the instructions given for the defendants and for the state had been read to the jury, the court addressed the jury, referring to certain remarks made by Mr. Howard in the

course of his argument, which he held to be improper, and directed the jury to permit such remarks to have no weight in making up their verdict, and closed his address by saying: "I recall no other observations which need special mention. However, if there was anything that you noted,—anything entirely foreign to this case, that has no relation to the facts, or any evidence that was not a proper reply to the remarks of opposing counsel,—you will discard it in making up your verdict." In *Landers v. Railroad Co.*, 46 W. Va. 492, 33 S. E. 296, it is held: "In order to authorize this court to revise errors predicated upon the abuse of counsel of the privilege of argument, it should be made to appear that the party asked and was refused an instruction to the jury to disregard the unauthorized statements of the counsel." *Young v. State*, 19 Tex. App. 536; *Vannatta v. Duffy*, 4 Ind. App. 168, 30 N. E. 807; *State v. Hull*, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609; *Chisnell's Case*, 36 W. Va. 659, 15 S. E. 412. The argument or speech of attorney Howard is reported in full in the record, and the word "exception" is interjected into and following expressions of the speaker which are by defendants' counsel regarded as objectionable quite 50 times, but it is certified in the bill of exceptions "that the attention of the court was not called to the language of the counsel at any time where, in the foregoing argument, the word 'exception' in parenthesis occurs. Said word 'exception' was noted by the stenographer at the instance of defendants' counsel, seated by the side of the stenographer, and was not ruled upon by the court, the court being engaged in a final review of the instructions, of which the state submitted a great many." It was further certified "that on the argument of the motion for a new trial defendants' counsel insisted that the exceptions thus entered by the stenographer during the progress of the argument were not covered by the court's ruling and remarks to the jury." It is true, the remarks of the court to the jury did not cover all the expressions contained in the said argument of counsel which were excepted to in the manner aforesaid, many of which appear to be highly improper to be used in such argument; but they were not objected to at the time, nor was the court's attention called to them so as to require a ruling. There was very much of the argument which it would seem was unauthorized, and quite intemperate. Yet to what extent the speaker had been provoked to these expressions by the argument of the opposing counsel does not appear. It is not only no part of the duty of a prosecuting attorney, but it is improper conduct in him, to indulge in personal vituperation and invective. He owes a duty to the accused as well as to the state. He is an officer of the law. While he should prosecute with all proper vigor, and even with rigor, if circumstances should

require it, he should be careful in all cases not to prejudice the rights of the accused, and thereby deprive him of the right guaranteed him by the constitution and laws of his state of a fair and impartial trial. It is a matter of regret that there is so much real cause of complaint on this score against those charged with the prosecution of crime, yet it could usually be corrected if counsel would make proper objection, and bring the matter promptly to the attention of the trial court, and insist upon the exclusion of such improper matter. But it is contended that, when once said, the desired impression is made on the minds of the jury, and cannot be effaced; and there is some force in this position. On the other hand, when the jury once discovers that counsel is striving by unfair means—as by unauthorized statements—to carry his point, he loses his influence with the jury, and may prejudice his case. The average American juror is intelligent, fair-minded, and loves justice, and is usually sufficiently discriminating not to be far influenced by mere appeals to his passions and prejudices.

For the reasons stated, the judgment of the circuit court affirming the judgment of the criminal court is reversed and annulled, and the judgment of the criminal court is reversed, the verdict of the jury set aside, and the case remanded to the criminal court for a new trial to be had therein.

(40 W. Va. 638)

McCLELLAN et al. v. TOWN OF WESTON.

(Supreme Court of Appeals of West Virginia. Sept. 7, 1901.)

INCORPORATION OF TOWN—PLAN AND SURVEY—NOTICE TO PARTIES INTERESTED—STREETS AND ALLEYS—ABUTTING OWNERS.

1. Sections 8 and 9 of an act of the general assembly of Virginia passed January 14, 1846, incorporating the town of Weston, are as follows: "(8) Be it further enacted, that all streets, cross streets and alleys, which are already laid off and opened, or which may at any time be located, surveyed and opened in said town, shall be and they are hereby established as public streets and alleys of the said town. (9) That the said trustees shall, within six months after the passage of this act, open all the public streets and alleys of said town; shall make or cause to be made a survey and correct plan or plat of said town, showing distinctly each lot, street and alley, and the size and width thereof, numbering anew all lots, and showing the former as well as the new numbers of all lots which have been numbered heretofore, with such remarks and explanations thereon as they may deem necessary and proper; which plan or plat so made out, and under the hands and seals of any four of said trustees, shall be lodged in the clerk's office of the county court of Lewis county, there to be recorded and kept; and the said plan and survey so duly made, signed, sealed and recorded, shall, in all future suits and contests concerning the boundaries of the lots, streets and alleys of the said town, be deemed, held and taken as full and conclusive evidence between the parties: provided, that infants, femes covert, persons non compos mentis, or out of the com-

monwealth, shall have six months after such disability shall be removed; within which time they may contest such plan and survey so made and recorded." Laws 1845-46, p. 139. *Held*, that all real-estate owners in the town were bound to take notice of said act incorporating said town, as well as of the acts of the trustees required by said act to be performed thereunder in reference to the plan and survey of said town so to be made, signed, sealed, and recorded.

2. Such plan and survey, when duly recorded, was full and complete notice to all abutting real-estate owners on the streets and alleys of said town of the claims of the town as to the location of the lines of such streets and alleys.

3. Persons in possession of any portion or portions of such streets and alleys so laid out by having the same inclosed, and so continued in possession after the making and recording of such plan and survey, held such possession subject to the demands of the town whenever it should see proper to open such streets or alleys to their full width for the public use.

(Syllabus by the Court.)

Appeal from circuit court, Lewis county; O. C. Higginbotham, Special Judge.

Bill by Floride McClellan and others against the town of Weston. Decree for complainants, and defendant appeals. Reversed.

E. A. Brannon, for appellant. W. W. Brannon, for appellees.

McWHORTER, J. On the 18th day of October, 1818, Daniel Stringer and wife conveyed by deed of that date to Lewis Maxwell "the following lots or parcels of ground situate, lying, and being in the town of Preston: * * * Lots as named in the ground plan of said town Nos. 1 and 2, adjoining each other, and bounded as followeth, to wit: On the north side by lot No. 3, on the south side by First street, on the east end by Centre street for 145 feet, and on the west end by an alley; each containing seventy-two one-half feet in breadth and one hundred and fifty feet in length." By deed of date December 23, 1836, Lewis Maxwell conveyed to John Lorentz the said lot No. 1, described in said deed as "situate in the town of Weston, it being lot No. 1 on the west side of Centre street, on which said Lorentz shop now stands, 72½ ft. in front and 150 ft. in length." By deed dated 20th November, 1844, John Lorentz and wife conveyed to Rankin W. Douglass the same lot No. 1, described as "situate in the town of Weston on the west side of Centre street, it being lot No. 1, and bounded on the southwest by First street, on the west by an alley, on the north by lot No. 2, on the front by Centre street, being 72½ feet in front and 150 feet back, containing one-fourth of an acre." By deed dated the 16th day of November, 1846, Douglass and his wife conveyed said lot No. 1 by same description to William E. Arnold. Said William E. Arnold, by his last will and testament, devised said lot to Susan M. Arnold, his wife, for life, remainder in fee to his daughter, Floride McClellan. The general assembly of Virginia, by an act passed Janu-

ary 14, 1848, incorporated the town of Weston, by which name it had been called for several years before its incorporation, but had theretofore at one time been known as Preston, and at another as Flesherville. Section 8 of said act provided "that all streets, cross streets and alleys which are already laid off and opened, or which may at any time be located, surveyed and opened in said town, shall be and they are hereby established as public streets and alleys of the said town." And section 9 provided that the trustees for whose election it was provided in said act should, "within six months after the passage of this act, open all the public streets and alleys of said town; shall make or cause to be made a survey and correct plan of all said town, showing distinctly each lot, street and alley, and the size and width thereof, numbering anew all lots, and showing the former as well as the new numbers of all lots which have been numbered heretofore, with such remarks and explanations thereon as they may deem necessary and proper; which plan or plat so made out, and under the hands and seals of any four of said trustees, shall be lodged in the clerk's office of the county court of Lewis county, there to be recorded and kept; and the said plan and survey so duly made, signed, sealed and recorded, shall, in all future suits and contests concerning the boundaries of the lots, streets and alleys of the said town, be deemed, held and taken as full and conclusive evidence between the parties: provided, that infants, femes covert, persons non compos mentis, or out of the commonwealth, shall have six months after such disability be removed; within which time they may contest such plan and survey so made and recorded." Under said section the trustees of said town of Weston proceeded to make such survey and map, and on the 8th day of June, 1847, lodged the same in the clerk's office of the county court of Lewis county, and caused the same to be duly recorded therein. On the 1st day of June, 1899, the council of the town of Weston passed an order to open up the streets to the full width according to the said plan and map. The said life tenant of lot No. 1, Susan M. Arnold (since deceased), and the remainder-man, Florida McClellan, enjoined the town authorities from opening said Centre street through said lot by removing therefrom such obstructions as had been placed thereon, claiming that the lot is inclosed just as it was at the time and before it came into the possession of William E. Arnold in November, 1846, and that it had been so held as against the town and everybody adversely all these years, and cannot be now disturbed in that possession; relying for protection in their adverse possession on the case of *City of Wheeling v. Campbell*, 12 W. Va. 36; *Teass v. City of St. Albans*, 28 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; and other cases cited. The defendant, the town of Weston, filed its demurrer and

answer. Depositions were taken, the cause submitted, and the circuit court perpetuated the injunction. The defendant appealed from said decree, assigning as error the perpetuation of the injunction, because in doing so the circuit court totally and wholly ignored and disregarded the decision of this court in the case of *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834, and the later case of *Town of Weston v. Ralston* (W. Va.) 36 S. E. 446, and, in effect, followed the case of *City of Wheeling v. Campbell*, 12 W. Va. 36, which this court overruled and repudiated in said case of *Ralston v. Town of Weston*.

Counsel for appellees, in a very elaborate and very able brief, reargues the case of *Ralston v. Town of Weston*, supra, to satisfy the court that its decision in that case was wrong, and should be overruled in deciding the case at bar, and thus return to what he terms the safe and sound position held in *City of Wheeling v. Campbell*, 12 W. Va. 36. In the case of *Ralston v. Town of Weston*, followed by that of *Town of Weston v. Ralston*,—especially in the concurring opinion of Judge Brannon in the latter,—the questions involved in the case at bar are so thoroughly considered and discussed that very little new light can be thrown upon them. Prior to October, in the year 1818, a "general plan" of the town of Weston (then called Preston) had been adopted, and the lot No. 1 in controversy was conveyed with reference to that general plan. As mentioned in the deed from Daniel Stringer and wife to Lewis Maxwell, the lot was described as fronting on Centre street. The streets and alleys as per that plan had been dedicated to the public, and lots sold with reference thereto. When the dedication took place does not appear. There is no plat produced showing any "general plan" prior to that of 1847. The act of the general assembly of January 14, 1848, incorporating the town of Weston, adopted the general plan of the said town already theretofore accepted and acquiesced in by all the parties interested; section 9 of said act providing that the trustees should, "within six months after the passage of the act, open all the public streets and alleys of said town," and should make or cause to be made a survey and correct plan or plat of said town showing distinctly each lot, street, and alley, and the size and width thereof, numbering anew all lots, and showing the former as well as the new numbers of all lots which had been theretofore numbered. In the performance of their duties the trustees followed the general plan of the town, fixing the lines, giving the courses and bearings, the width of the streets and alleys, and size of the lots; and in numbering the lots the lot in question was given the same number it had in the description given it in the said deed of October, 1818, and subsequent deeds. The

deeds all show a uniform size of the lots,—72½ by 150 feet,—whether fronting on Centre street or Main street. The plat prepared by or for the trustees, approved by them under their hands and seals, was duly recorded, as provided by said act, on the 8th day of June, 1847. This record was notice to all parties interested of the claims of the town under it. All persons interested were bound to take notice of the public act of assembly incorporating the town, as well as of the acts of the trustees required by the act to be performed thereunder in the preparation and recordation of the plan and survey of said town as dedicated by the original plan. Appellee claims that, although her possession may encroach upon the streets and alley as laid out and recorded by the trustees, such possession is adverse to the claims of the town, and has ripened into a perfect title. By fair implication, at least, by the said act of incorporation it was clearly made the duty of William E. Arnold, or any other property owner whose interests were affected by the survey and plat, to take the initiative, and contest the plan and survey so recorded within six months after such recordation of said plat. Section 9 of the act of January 14, 1846, provides that such "plan and survey so duly made, signed, sealed and recorded shall in all future suits and contests concerning the boundaries of the lots, streets and alleys of the said town, be deemed, held and taken as full and conclusive evidence between the parties," and at the close of said section there is a saving proviso to those under disability as follows: "Provided, that infants, femes covert and persons non compos mentis or out of the commonwealth shall have six months after such disability shall be removed; within which time they may contest such plan and survey so made and recorded." This provision is intended to place those property owners who might be affected by the said survey, and who were at the time of its recordation under any of the disabilities mentioned, on an equal footing with those who were not so under disability. William E. Arnold, the owner of said lot No. 1, and in possession thereof with full knowledge of the said plan of the town as laid out on the said plat, and of the claims of said town thereunder, took no steps to contest the correctness thereof, but acquiesced therein, and continued to hold such portions of the streets according to such plan and plat as he had inclosed, subject to the demands of the town whenever it should see proper to open such streets to their full width. There is nothing in evidence to show that Arnold or the plaintiff ever held otherwise than subject to the rights of the town. No notice was ever given the town or authorities thereof that it was proposed to hold the possession adversely, or hostile to the rights of the town. So that, if the statute of limitations applied, it could not, in the face of

the act of incorporation, begin to run before notice to the town of such adverse and hostile possession. *Hudson v. Putney*, 14 W. Va. 561; *Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *Creekmur v. Creekmur*, 75 Va. 430; *Hutch. Land Tit.* § 408; and *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 884, where it is well said that "no possession of a portion of a street not required by the present necessities of the public could raise the presumption of such notice, for the reason that there is nothing inconsistent with a public easement for the authorities to allow an abutting landowner the temporary occupation of a public highway not demanded for the present use of the public." The appellee relies very strongly on the case of *Ralston v. Miller*, 8 Rand. 44, 15 Am. Dec. 704, where it is held that "ancient reputation and possession, in respect to the boundaries of streets, are entitled to infinitely more respect in deciding upon the boundaries of the lots than any experimental survey that can now be made. If not, the whole city, and all other towns, would be thrown into the utmost confusion." This was a contest between private parties, where the purchaser enjoined the collection of the purchase money of a lot purchased by him,—not a corner, but an "inside lot," fronting on a street,—claiming that the building which bounded his lot on one side, and was on the corner of the street, encroached upon the street about two feet. There was no claim by the city that there was any encroachment, and no threat that possession would be disturbed, and the question of the location of the street was not involved. As between the parties, the wall of the building was sufficient to mark the line. *Yates v. Town of Warrenton*, 84 Va. 337, 4 S. E. 813, 10 Am. St. Rep. 860, was a case very similar to case at bar. In 1811 trustees laid off the town, among others locating a certain street 23 feet wide. In March, 1887, the council of the town determined to open the street according to the plan adopted by the trustees 76 years before. The sergeant of the town, under the order of the council, entered and began to tear away the fence of Yates to open the street according to said plan, when Yates enjoined the town from further proceedings. The survey directed by the court showed that plaintiff had all the land called for by his deed, and included within his inclosure 23 inches of said street, and Yates proved that he had had long adverse use of said strip of land. It was held: (1) "There was a dedication and acceptance of the streets as located by the trustees." (2) "The possessor can acquire no right nor title to any part of such highway by adverse possession thereof for any length of time whatever." And, further, that: "Any unauthorized obstruction of such highway is an indictable nuisance, and when a municipality has control of its streets it may proceed in

its corporate name to prevent or remove obstructions therein by judicial proceedings." And in *Taylor v. Com.*, 29 Gr. 780 (Syl., point 7): "The streets of the city of Manchester having been dedicated to the public by Wm. Byrd when he laid off the town, and this dedication having been accepted by the act of the house of burgesses in November, 1769, the streets are public highways; and any occupation of a street, or a part of a street, by the owner of an adjoining lot, however long continued, cannot give such occupant a right to hold it, or bar the right of the public to the use of the street to its full width and extent." And in the case of the *City of Norfolk v. Chamberlain*, 29 Gr. 534, where the city council had granted permission to C., in replacing a bank building, which had been destroyed by fire, to extend the steps of the building on the pavement so they should not extend beyond the distance occupied by the steps of the building which had been destroyed, and afterwards, on petition of other near by property owners, the council directed the steps removed as a nuisance, C. enjoined their removal, on appeal it was held that, inasmuch as the original permission to place the steps of the building on the public street was beyond the powers of the municipal authorities, they were not estopped to order their removal. See, also, *Buntin v. City of Danville*, 93 Va. 200, 24 S. E. 830. In the later Virginia cases involving questions between municipal authorities and private individuals touching the rights of the public in the streets, the case most confidently relied upon by the appellee—that of *Ralston v. Miller*—seems not to have been invoked as authority sustaining the position held by appellee, and it was not in any instance in such cases referred to by the court as sustaining such position. In *Com. v. McDonald*, 16 Serg. & R. 395, Justice Duncan says that "public rights cannot be destroyed by long-continued encroachments"; and in *Barter v. Com.*, 3 Pen. & W. 253, Gibson, C. J., said: "That the government of any incorporated town has a right to improve the streets for public purposes is a proposition about which there can be little dispute," and "no private occupancy, for whatever time, and whether adverse or by permission, can vest a title inconsistent with it." *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *City of Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452. Any continuous obstruction of a public highway or street, not authorized by competent legal authority, is a public nuisance. *Davis v. City of New York*, 14 N. Y. 506, 67 Am. Dec. 186. 2 Dill. Mun. Corp. (4th Ed.) § 660: "The king cannot license the erection or commission of a nuisance; nor, in this country, can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the

legislature, is a nuisance; and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express powers to this end conferred upon them by charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner by erections made for his exclusive use and advantage, such as porches extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings standing in the line of the streets." See cases there cited. In *Pettis v. Johnson*, 56 Ind. 139, where the owners of a building leased the same to the city, the condition was that they were to construct an iron stairway on the outside of the building, occupying for that purpose five feet of the adjoining alley, and by the contract the city granted to said parties a perpetual right to maintain such stairway. The stairway was held a public nuisance, and that the city had no power to contract for such a structure in such a place. The common council of a city can only contract by ordinance, resolution, or order, and an illegal and void contract cannot form the groundwork of an estoppel. In *Scheider v. Hutchinson*, 35 Or. 253, 57 Pac. 324, reported in 76 Am. St. Rep. 474, in "Reference to Monographic Notes" or "Adverse Possession of Public Property," beginning on page 479, the subject is very ably and elaborately discussed. It is there said: "In defense of the doctrine that highways and other public easements may be made the subject of adverse possession, it is asserted that statutes of limitation, being statutes of repose, should be liberally construed, so as to effectuate the intention of the legislature; and that to exclude from their operation any action that a state might bring would be giving them a strict construction. The answer to this is the elementary principle that legislatures, in the enactment of statutes, cannot be presumed to transcend their constitutional authority, which they would do should they attempt to abridge the sovereign rights of the people. Again, it is contended that there is no reason why a state should not be barred of its right of action to recover property as well as an individual. One has not far to look for reasons why a state, in respect to its sovereign rights, should not be so affected. 'Experience does not justify the presumption that the community at large will assert their rights with the same promptness with which individuals assert their private rights. [The opposite is notoriously true.] Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have sufficient interest to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it

right. The state is impersonal. The people do not and cannot legally act in a body. Their power must, of necessity, be exercised through agents. It cannot be expected that these agents will manifest the same diligence in detecting and resisting encroachments on public interests that individuals evince in the protection of their private rights.' *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513. No man wishes to single out himself and be an actor against his neighbor. What is every man's concern is no one's, and hence it is that no time should bar the enforcement of a public right. Public easements belong to the people, and cannot be aliened or otherwise disposed of except in accordance with their will. To permit individuals to acquire title therein by prescription allows them to accomplish through the want of vigilance, or the indulgence of the public, or through their own mistake or cupidity, what they could not accomplish legitimately. The great weight of authority supports the proposition that title by adverse possession cannot be acquired in streets, highways, or other property dedicated to the use of the public,"—citing *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Reed v. City of Birmingham*, 92 Ala. 339, 9 South. 161; *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005; *Yolo Co. v. Barney*, 79 Cal. 375, 21 Pac. 833, 12 Am. Rep. 152; *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303; *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834; *Lee v. Town of Mound Station*, 118 Ill. 304, 8 N. E. 759; *City of Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *City of Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561; *Schmidt v. Draper*, 137 Ind. 249, 36 N. E. 709; *Cheek v. Arora*, 92 Ind. 107; *Heddlleston v. Hendricks*, 52 Ohio St. 460, 40 N. E. 408; *Childs v. Nelson*, 69 Wis. 125, 33 N. W. 587; *Com. v. Moorehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Priggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *St. Vincent Female Orphan Asylum v. City of Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *Laing v. Canal Co.*, 54 N. J. Law, 576, 25 Atl. 409, 83 Am. St. Rep. 682; *Price v. Inhabitants of City of Plainfield*, 40 N. J. Law, 608; *State v. City of Trenton*, 86 N. J. Law, 198; *Ulman v. Charles St. Ave. Co.*, 83 Md. 130, 34 Atl. 366; *Almy v. Church*, 18 R. I. 182, 26 Atl. 58; *Simmons v. Cornell*, 1 R. I. 519; *Yates v. Town of Warrenton*, 84 Va. 337, 4 S. E. 818, 10 Am. St. Rep. 860; *Taylor v. Com.*, 29 Grat. 780; *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752; *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; *City of Vicksburg v. Marshall*, 59 Miss. 563; *Ice Mfg. Co. v. City of New Orleans*, 43 La. Ann. 217, 9 South. 21; *City of Shreveport v. Walpole*, 22 La. Ann. 526; *Sims v. City of Chattanooga*, 2 Lea, 694; *Rahb v. Railway Co.* (Tenn. Ch.

App.) 50 S. W. 72; *City of Waterloo v. Union Mill Co.*, 72 Iowa, 437, 34 N. W. 197; *Taraldson v. Town of Lime Springs*, 32 Iowa, 187, 60 N. W. 658; *Williams v. City of St. Louis*, 120 Mo. 403, 25 S. W. 561; and other authorities.

The evidence shows pretty conclusively that the Minnich building at the corner of First and Main streets, on line with the Tierney building and with the Bailey Hotel at the corner of Second and Main, all on the west side of Main street, constitutes the starting or beginning point for the survey of the town, and fixes the west line of Main street. It is true, the plat of the town is not produced nor found, but it is clear that the trustees, in making their survey and plat, which was recorded June 8, 1847, made it to conform to the old plan; and it is evident that in numbering the lots the trustees made no changes in the numbers, but adopted the old numbers, which accounts for the lots having but one number, when the act required the old numbers as well as the new to be shown on the new plat. As far as numbers mentioned in deeds made prior to the date of the plat of 1847, the old numbers are preserved in the plat and adopted. While the starting point on Main street for a survey of the town is well established, the corner of First and Centre streets on the south line of First is more certainly established, principally by the evidence introduced by appellees. Judge John Brannon testifies that about the year 1849 or 1850, when about to locate his dwelling house, which he now occupies, he wanted to place the front of his house parallel with the line of First street, and, to be certain of the boundary of First street, he made inquiries as to the abutments or marks for the border of said street; that he inquired of Maj. Thomas Bland, who occupied, and had for years before that occupied, property on that street, and of Jacob Butcher, who had lived in or about town, and who had been a carpenter in building the first two or three houses in the town. Maj. Bland stated that the posts of the portico of his dwelling on the front boundary on said street were on the line of it, and Butcher told him he remembered seeing a rock placed where there was a corner of some property, and that corner would be on the corner of what was then a road going westward from the court house; that they examined by digging, and found a small rock "that had apparently been set up on end." Witness then took his compass, and ran a line from that down and past where the said pillars of the porch of said Bland stood. At that time he was also informed there was an outside chimney to a frame house which stood on the corner of Main and First streets; that it was stated to him, and "so reported all around, that that was built out from the building, but was on the line of said First street"; that he measured, and made some other tests and observations, and found it to correspond with the

other side of the street as it then existed and was used. "By that means I got the true line of my lot." Witness states that the rock stood diagonally from the McClellan property across said First street, and across the road he mentioned; that, while he lived close to the point where the rock was, "the inclosures are now as they were then, and at a point at or just about where the corner of the present fence is." He further says that the eastern line of Centre street extended from Fourth street clear on across First street to the stone would show it to stand at the intersection of Centre street with First street, and that the fence of W. W. Brannon now corners in the place where the said stone was discovered. Here we have a corner established by not only the statement of Judge Brannon that the old man Jacob Butcher told him that he remembered of seeing a rock placed on the corner of some property, and that corner would be on the corner of what was then a road going westward from the court house, but on examination by digging the rock was found where it was stated to have been placed, having been "washed over by deposits from First street from rain and the like," as stated by the witness Judge Brannon. Peter Flesher, the surveyor who made a survey of the town, finds that starting the width of First street on the south line thereof from the Minnich or Edmiston corner on Main street, and running with the line of First street to correspond with the corner post of the iron fence of W. W. Brannon's property, which is the location of the said stone corner, except as to distance, in running the line of First street from the corner of Main after measuring the width of Main and Centre streets, and the alley, and the length of the lots, as laid down on the map, there was three feet too much. Flesher testifies that by giving the distance three feet short of the rock corner, and making that the east line of Centre street, as the measurements laid down on the map of 1847 would do, the result would be that the street line would run three feet further in the lots facing on the west side of Centre street than the line run by him. He further says that he found "the old King House," which is an old landmark standing at the corner of Centre and Second streets, on the east side of Centre, to correspond nearly with the iron fence (or rock corner) and the corner of the Bailey house, after allowing the three feet mentioned between the Main street point and the iron fence post. It is clear that the trustees, in surveying and preparing their map in 1847, established the stone corner as on the east line of Centre street and the south line of First street, to accommodate, as far as they might, their lines of the streets and alleys to the inclosures as they were at the time of making their survey. This accounts for the three extra feet required above or beyond the width of the streets and length of the lots to reach the stone corner or the east line of

Centre street from the point on Main street. As a further evidence of this it will be observed that the alley between First and Second streets, running from Main to Centre, called "Bank Alley," is given on said trustee's map a width of 20 feet, while the rest of the same alley has the regular width of all the other alleys of 12 feet. It is not at all probable that in making the original plan the owner who dedicated the streets and alleys for the use of the public would give a part of one alley a greater width than all other alleys, and greater, too, than other parts of the same alley. While the trustees yielded the three feet, and perhaps changed the location of Centre street to that extent, they preserved the general course of the streets and alleys, the bearing of the streets running parallel with the river being then north, 87 east, and the cross or numbered streets being south, 53 east. It is further shown that by the survey as made by Flesher appellee has still 153 feet in the length of her lot from Centre street to the alley, 3 feet more than her deed calls for. In *Walsh v. Hopkins* (R. I.) 48 Atl. 390, it is held: "What is the legal line of a street must be determined by the record of the layout, and not by the line of the street as actually used." This was a proceeding by mandamus to require the defendant, the inspector of buildings of the city of Providence, to issue a building permit proposing to erect a building over what is called the "Moshassuck River," claiming they had title; the respondent, in his return, claiming that the title was in the city. Stiness, C. J., says in the opinion of the court: "The claim of the petitioners that the line as actually used, rather than that of the record of the layout, should be taken as the line of the street, is urged upon the authority of *Aldrich v. Billings*, 14 R. I. 233. The two cases are very different. The question in that case was not where the legal line of the street actually ran, but what was to be taken as the line intended in a deed between private parties." Counsel for appellees, in his brief, referring to the case of *Walsh v. Hopkins*, just cited, says: "It has never been claimed in the case under consideration that the true boundaries between Mrs. McClellan's lot and Centre street, First street, and the alley are to be ascertained by reference to streets and alley as actually used;" and adds: "I have always maintained, and still insist, that the best evidence of the true lines are the old buildings, old inclosures, and ancient possessions,"—which position is true as a rule, but "old buildings, old inclosures, and ancient possessions" cannot stand as indicating the true line of a street as against the well-established monument set up for the true corner and line of the street in the plan and layout of the town. The counsel then again cites *Ralston v. Miller*, 8 Rand. 49, 15 Am. Dec. 704, and claims that the case of *Walsh v. Hopkins*, cited, differs from case at bar, in that in the *Walsh Case* the

layout was clear, and about which there seemed to be no dispute, while in this case "the buildings were constructed, the lot inclosed and in actual occupancy many years before there was any layout or plat. The old plat mentioned in the old deeds is not produced." It does appear from the record that the layout under the act of assembly of 1846 is clear; the western line of Main street, as well as the eastern line of Centre street, is well established, and the lines are run straight, giving their bearings, and the layout shows no such irregularities in the streets and alleys as the buildings and inclosures show according to the record.

It is insisted by counsel for appellees that the proceeding by the town authorities to open the street under the ordinance of June 1, 1890, is in violation of the fourteenth amendment to the constitution of the United States, in that it is a proceeding to take private property without due process of law, the title of appellees being vested by reason of the adverse possession over which the public has the easement in question having ripened into a perfect title by virtue of the statute of limitations. In *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834, it is held (Syl., point 3): "The maxim, 'Nullum tempus occurrit regi,' applies to all the sovereign rights and property of the people of the state dedicated to public uses, and of which they cannot be deprived otherwise than according to their express will and appointment." (4) "The public easement in the public highways, including roads, streets, alleys, and other public thoroughfares, dedicated to the use of the general public by individuals, or under the right of eminent domain, is such property, and cannot be lost to the people by the negligence of public officials or the unlawful acts of individuals." (5) "An individual cannot destroy such easement by setting up a claim by prescription, adverse possession under the statute of limitations, or equitable estoppel, as the people cannot be deprived of their sovereign rights in any of those ways." The layout of the town being thoroughly established, the appellee can only claim title by adverse possession by virtue of the statute of limitations, which, under the rule in the *Ralston-Weston* Case, cited, does not and cannot apply in this case; and, as she acquired no right by virtue of what she claims to be adverse possession, the question of due process of law cannot arise in this case. It is not a taking of private property for public uses; it is only the taking of that which belongs to the public by dedication, and of which the public cannot be deprived; such an easement as an individual cannot destroy "by setting up a claim by prescription, adverse possession, or equitable estoppel," as held in *Ralston v. Town of Weston*, cited. The decree of the circuit court will be reversed, the injunction dissolved, and plaintiffs' bill dismissed.

STATE v. SHEPPARD.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

MURDER—INDICTMENT—CHANGE OF VENUE—PREJUDICE—EVIDENCE—FORMER CRIMES—CROSS-EXAMINATION OF ACCUSED—ORDER OF ADMISSION OF EVIDENCE—REBUTTAL.

1. An indictment in the form prescribed in section 1 of chapter 144 of the Code is sufficient to support a conviction of murder in the first degree.

2. The burden of proof is on the prisoner to show, to the satisfaction of the court, good cause to have the trial of the case removed to a county other than that in which the crime was committed, and such cause must exist at the time the application for the change of venue is made.

3. In order that a change of venue may be had, facts and circumstances must be shown from which the conclusion that a fair and impartial trial cannot be had is fairly deducible; and the court must be satisfied from those facts and circumstances, and not from conclusions or opinions of the defendant or his witnesses, that such trial cannot be had.

4. Where it appears from the petition and affidavits that, immediately after the commission of the crime, there were rumors and talk of mob violence against the prisoner, but such rumors and talk were confined to the inhabitants of a small portion of the county, and there had been some excitement and prejudice and feeling against the prisoner immediately after the perpetration of the crime, but at the time of the trial there is no longer talk of such violence, and the excitement, prejudice, and feeling have greatly subsided, and no trouble is found in obtaining a jury free from exception, the court may properly overrule a motion for a change of venue.

5. Upon the trial of a person charged with murder, evidence of acts and conversations of the accused, prior to the homicide, though not shown to be a part of the *res gestæ*, is admissible, when such facts legitimately tend to establish motive or intention on the part of the defendant to commit the crime with which he is charged; but such evidence is admissible for that purpose only. Such evidence is not limited to the time or place of the homicide, but will include all such acts and declarations, of any date prior to the homicide and at any place, as will serve to cast light upon the question whether the accused committed the homicide.

6. In such case it is proper to show, against a prisoner charged with having murdered his wife, that the deceased had some property; that they had been married but a short time; that he had stated, prior to the marriage, that if she disposed of her property he would not have her; that he had been displeased after the marriage because of her useless expenditure of money; that he had used language after the marriage importing that her property was one of the inducements to the marriage; and that he had stated before the homicide that he intended to get shut of her child, and, if he could not do that, he would get shut of both of them,—it being shown that the child was murdered at the same time, for the purpose of showing a motive for, and an intention to commit, the crime; and how much weight such facts and circumstances, taken in connection with all the other evidence in the case, are entitled to, is for the determination of a fair and impartial jury, duly impressed with a sense of their responsibilities and duties.

7. In such case it is competent to prove any actions and declarations of the prisoner, subsequent to the homicide, tending to show a lack of concern at the death of the deceased or indifference as to her fate, although such

acts and declarations would not be admissible as a part of the *res gestæ*, because too remote.

8. Anything voluntarily done or said by one charged with crime, which in any way or to any extent tends to show his guilt, is competent evidence, and should go to the jury; and of its weight the jury alone can judge.

9. It is proper to ask a witness, as a preliminary question, if he was a member of the coroner's jury upon the inquest held over the dead body of the child, in such case, and where the jury sat.

10. Where the prisoner, on a former occasion, has been charged with having murdered a person other than the one for the killing of whom he is on trial, and such former homicide is in no way connected with the other, and the prisoner has been acquitted of such former charge, it is improper for the attorney for the state, in cross-examining a witness, to propound questions or make remarks relating in any way to the prisoner's connection with such former homicide; he not having put his character in issue.

11. Upon the cross-examination of the prisoner as a witness in his own behalf, the grounds may be laid for the purpose of contradicting him as to any material matter, although evidence in chief of such material matter was not introduced, but this can be done for no purpose other than to impeach his credit as a witness.

12. The order of introducing testimony is in the sound discretion of the trial court, and it is not error to permit the introduction of evidence out of its regular order, unless it appears that the prisoner was, or may have been, prejudiced thereby.

13. Where witnesses for the defense have testified, in chief or on cross-examination, as to material matters, and the grounds have been laid for contradicting them, witnesses may be called to testify in rebuttal for the purpose of such contradiction.

14. Whether a matter is material or collateral, as regards the impeachment of witnesses, depends upon whether the cross-examining party is entitled to prove it in support of his case.

15. It is competent to prove, against a person charged with murder, that while confined in jail, in reply to the question of a stranger, concerning the murder, he said, "I could tell you the time and all about it, but they told me not to say anything about it;" and it is for the jury to determine what the language means and how much weight shall be given to it.

16. While voluntary declarations or extrajudicial admissions of one charged with homicide, concerning its commission, are admissible in evidence against him, evidence of declarations, which he denies having made, and which are not shown to have related to the homicide or to the deceased, although, if made, they may have related to it or to the deceased, is not admissible against him.

17. Point 11 of the syllabus in *Cain's Case*, 20 W. Va. 679, is a part of the settled criminal law of this state, and it is deemed an unwise and unnecessary innovation to so alter the language there used—"A man is presumed to intend," etc.—as to make it read, in an instruction to the jury, "A man intends," etc.

18. It is essential to maintain the distinction between juridical and moral truth, and it is error to give an instruction in which there is no reference to the evidence in the case.

19. A person charged with crime may be convicted on circumstantial evidence alone, if the jury believe from such evidence, to a moral certainty and beyond a reasonable doubt, that the defendant is guilty of the crime alleged against him; and the jury may be properly so instructed, and that they have the right to convict upon such evidence in a case in which the evidence is circumstantial, if from it they

so believe the defendant is guilty, and, further, that such evidence is not only competent, but is sometimes the only mode of proof in criminal cases.

20. In a trial upon an indictment for murder, it is error to give the following instruction: "The court instructs the jury that reasonable doubt to warrant acquittal in criminal cases is not mere possible doubt, but is such doubt as, after mature comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction of the truth of the charge, or for which reason can be given,"—it being uncertain whether the clause, "for which reason can be given," qualifies the word "doubt," or the word "conviction."

21. It is not error to refuse to give an instruction enunciating propositions of law which are fully and specifically set forth in other instructions given in the same case.

22. In a case of felony, it is reversible error to proceed with the examination of a witness in the absence of the prisoner, although the questions propounded and answered in his absence are preliminary questions, and upon the return of the prisoner the same questions are reasked and reanswered in exactly the same way, and no exception is taken on the grounds of such irregularity at the time; for to be present at all stages of the trial is a constitutional right of the prisoner, which he cannot waive, and of which he cannot be deprived, and such error cannot be cured.

(Syllabus by the Court.)

Error to circuit court, Wirt county; Lewis N. Tavenner, Judge.

Samuel Sheppard was convicted of murder, and brings error. Reversed.

T. A. Brown, D. O. Casto, D. H. Leonard, and W. W. Arnett, for plaintiff in error.
Atty. Gen. R. H. Freer, Alex. Dulin, and F. C. Copen, for the State.

POFFENBARGER, J. On the 16th day of November, 1900, Samuel Sheppard was convicted in the circuit court of Wirt county of one of the foulest and most brutal murders recorded in the annals of crime. On or about the 1st day of April, 1900, he had been married to Allie Gorrell. She and her little boy, Lee Gorrell, an illegitimate child, aged about 7 years, were the victims of this crime, which occurred at the home of Samuel Sheppard on the night of Tuesday, the 21st day of August, 1900. Sheppard, on the afternoon of that day, had left home and gone to his brother Charles Sheppard's to assist him in digging a cellar. That was about one mile from where he lived. Instead of returning home after his day's work, he went to the home of his father, M. V. Sheppard, which place was about a mile and a half or two miles from his home. He claims to have had two purposes in going there,—one to borrow a shovel to use in digging the cellar, and the other to get a sack of apples, although he had apples at home, but not of the kind he claims to have gone after. He claims to have remained at the home of his father during all of that night. He was there the next morning, and, upon leaving, took some apples in a sack and the shovel, and went to his brother's where he worked during the greater part of

the day. At 5 or 6 o'clock in the afternoon of Wednesday, the 22d day of August, he went back to his house, which consisted of one main room, with a door and window in the front, and a shed kitchen in the rear, with a door at each end; another door opening from the kitchen into the main room, and a window in the rear opposite the door leading to the main room. He claims the doors were all closed, but that the kitchen door near the smoke house, and the door opening from the kitchen into the main room, were not locked nor fastened, and, after throwing the sack of apples down at the smoke house, he entered the unfastened kitchen door, and went to the door opening to the main room, and pushed it open, and saw his wife lying on the floor in a pool of blood, with only her night clothes on, and they drawn up around her body under the arms. He says he called to her twice, but received no answer. Then, turning to go away, he saw her move, and as he went out through the other kitchen door he unlocked it. He says he then jumped the fence and ran towards the house of a neighbor by the name of Ott, and, as he did so, he saw the wife of Steve Price, another neighbor, in the field, and hallooed over to her that his wife was killed or murdered. He then saw another woman, and hallooed to her that his wife was lying on the floor "all mashed up." Price Ayers was coming down the road in his wagon, and he stopped his team and ran to Sheppard, and they together went to the house, but concluded not to go in or touch anything until somebody else should come. They then hallooed to John Vandall, another neighbor. Not being able to make him hear at first, Ayers went after Vandall, but returned to Sheppard before Vandall came. In the meantime, Mrs. Mattie Ott had come. Sheppard and Mrs. Ott then went into the house, but as to whether Ayers went in at the same time he and Sheppard seem to differ in their testimony. Sheppard says that as he went in the second time he saw the little boy on the bed, and looked at him a moment; called his wife's name, but received no answer; and then went to the window and removed a quilt, which hung over it. He told Mrs. Ott to get some water and open the front door, and, she being unable to open it, he went and opened it himself. Mrs. Ott told him she could not give his wife the water, but would get it for him. He told her to get it, and he would give it to her, and she did so; and he, with a wet cloth, washed her mouth and nose, and gave her a little water with a spoon. The little boy was lying on the back part of the bed dead. The right side of his head had been crushed with the poll of an ax. He had no clothing on except a waist, and the front of the bed was covered with blood. Mrs. Sheppard's wound was also from an ax; the right side of her head being crushed. She was unconscious,

and, although she did not die until the 31st day of August, she never regained consciousness, nor uttered a word. The ax was found in the room, partly under the bed on which the little boy lay, with blood on it, and Sheppard admits that it was his ax. He was brought to trial on the charge of having murdered his wife, was convicted, and has brought the case here on a writ of error.

Stella Ayers, aged 10 years, and daughter of Mrs. Jonathan Ayers, sister of Mrs. Sheppard, living near her, says she went to the Sheppard house Wednesday in the early afternoon, and found all the doors fastened, and she was unable to arouse any person, although she thought she heard Mrs. Sheppard moaning. Much of the testimony relates to the conduct of the prisoner before and after the homicide. Price Ayers says that, as he and Sheppard ran to the house, he said: "Sam, where is little Lee?" and that Sheppard said, "My God, I don't know." He and several others testify that shortly after this ghastly discovery, and after a number of people had gathered, Sheppard asked some of them to feed his chickens, and they did so, but that afterwards he went and fed them again, and fed his hogs; that after dark he lay down in the kitchen and slept the greater part of the night; that when the physicians came he asked them no questions about his wife; that he did not go in to see her that night; and that he seemed to be indifferent as to her fate. He claims he was sick that night. Ayers says that, as he and Sheppard went to the house, Sheppard told him the doors were all fastened, except the back kitchen door, and it was standing ajar about two inches, and that the middle door was open. Price Ayers says that, while Sheppard was giving his wife some water, he (Ayers) discovered the little boy, and said to him, "Sam, there is little Lee," but that Sheppard paid no attention to him, and that a light was then brought, and he said again, "Sam, there is little Lee lying there in bed with his brains knocked out with your ax," but that Sheppard never acted as if he saw the boy, nor looked around at the bed. Several of the witnesses say that there was an offensive odor in the room from the dead body of the child, and arrangements were made for burying the body on Thursday at Sandyville, a place 12 or 15 miles distant and on the railroad. Sheppard's house was about 5 miles from Leroy, on the railroad, which was the nearest point from which a casket could be obtained. M. V. Sheppard, the father of Samuel Sheppard, says he arranged with the undertaker at Leroy for a casket; that it was arranged to ship and inter the body on Thursday; that he was to send four men to McLain's store for a coffin, to be sent there from Leroy, and have it carried across the hill; that he had sent them, but the casket had not arrived; and that it was necessary to send the body over on Thursday that it might go on the train,

so as to reach Sandyville in time for the interment. It is admitted that Sam Sheppard went to the stable and got a goods box, and the body was placed in that and taken from the house in a wagon; and it is claimed that he kicked or knocked the end out of it in a rude way. The state attaches importance to the conduct of Sheppard on this occasion, it appearing from the evidence of Price Ayers that Sheppard said to him, "You tell Mr. Ott to take that child out of here," and that he replied, "My Lord, Sam; the casket ain't come," to which Sheppard said in return, "That is all right." It is also admitted that he laughed at some incident as the body was taken away. On the following Saturday Sheppard was arrested, and while in custody of the officer it is said by two witnesses that he said, "There are others that need their brains knocked out," or "need knocking in the head," or words to that effect. One witness says his language was, "I would just as leave to be shot as to have to lay in jail; they need not think they can scare me; there is two or three more who ought to have their brains knocked out." The defense introduced evidence tending to show that this language was directed to these two witnesses, Full and Bumgarner. Another witness testifies that Sheppard's father and brother, on Wednesday evening, finding him on the porch, urged him to go in the house, saying he had been working that day and would take cold, and, further, that people were talking about his conduct, and he ought to go in the house. On the day of his wife's death he was in jail, and testimony was introduced to the effect that, in the afternoon of the same day on which he received information of his wife's death, he played a French harp and sang, and that on other occasions shortly afterwards he was mirthful and noisy, so much so that the jailer spoke to him about his conduct.

The state relies upon a number of circumstances, prior to the murder, tending to show on the part of the prisoner a motive for and the intention to commit the crime. Allie Sheppard owned the undivided one-half of a farm in Jackson county, consisting of 80 or 90 acres, with good buildings on it, worth probably \$1,500. In March, 1900, just a few days before the marriage, the personal estate left by her mother was sold, she bidding in a considerable portion of it; and Sheppard was there, and manifested great interest in her purchases, and took charge of them. J. L. Ayers, the husband of the sister of Allie Sheppard, who owned the other half of the farm, testified that on one occasion the following conversation took place between him and Sam Sheppard: "Sam, what made you come so often? What made you run after Allie?" "Well, I could not sleep; two or three nights I could not sleep at all; she has money." Ayers and his wife testify that Sheppard, while at their house, and during a conversation relating to

some correspondence between Mrs. Ayers and the grandmother of the murdered child, said to Mrs. Ayers, "You had better write to him to come and get his boy," meaning the father of the child. To this Mrs. Ayers replied, "Well, she will never give her boy up." At a time not long before the murder, the boy was with Sheppard and his brother while they were stacking wheat, and, on refusing to stay at the wheat stack and keep the cattle away, Sheppard broke off an iron weed and whipped him with it. William Ott and his wife say that, after that occurrence, Sheppard was up at their house and told them about the whipping of the child, and said he had given him about 20 before he conquered, and, further, that he did not like the child's turn or disposition, and that he was always talking of killing, cutting, or shooting somebody. David Murphy testifies that Sheppard had told him that he did not like the disposition of the child, and was going to dispose of him. And Murphy then said to him, "Sam, Allie will never part with Lee," in reply to which he said he was going to dispose of the child some way, and if he could not get shut of the child he was going to get shut of both of them. It appears from the evidence that the kitchen door by which Sheppard says he entered had an ordinary thumb latch on it, and although the catch might be turned on the inside, so as to hold the latch down, it might still be opened by lifting the door up slightly.

The defense relied largely upon an alibi. In addition to what has already been stated on that subject, it was shown by the testimony of Sam Sheppard and others that he not only went to his father's house on the evening of August 21st, and was there in the early morning of August 22d, but that he obtained and took away from there some apples in a sack, as he said he did, and that he was at his father's house between 10 and 11 o'clock on the night of August 21st. This latter is testified to by his brother, Henry Sheppard, who had been away from home during the day, and did not return until that hour; he having accounted for his time during the day and evening up until that hour. Returning home at about that hour, and not having had his supper, he went to the kitchen, lighted a lamp, and was eating a lunch at the table, when Sam Sheppard came to the door and spoke to him, and was bareheaded and barefooted. It is admitted by the prisoner and all members of the family that he slept that night in a small room opening on the porch, and not immediately connected with any other room of the house. He says he got up at that time and got a drink of water. A grandson of Samuel Sheppard's father was there at the time, and says he had been sleeping in that room for two nights, and went in there to go to bed on the night of August 21st, and the accused told him to sleep with Henry. This is admitted by the prisoner. It is testified by the mem-

bers of the Sheppard family that he was always averse to sleeping with any one. L. W. Wood testifies that he saw him passing his house in the early morning of August 22d, carrying a sack with something in it. A number of witnesses testify that the sack, partially filled with apples, was found at the front gate at Sheppard's home on the evening of August 22d, although he claims to have left it at the smoke house. The prisoner's father testifies that he saw him with the apples, but did not see him have a shovel, when he left, but says he found afterwards that his shovel was gone, and that it was at the home of his son, Charles Sheppard, where Sam Sheppard claims to have taken it. Charles Sheppard testifies to the same facts stated by the prisoner concerning the digging of the cellar. Wade Sheppard, another brother, and the owner of the farm on which Charles Sheppard lived, was away from home at the time, and did not return until the next week; and he says Sam Sheppard owed him some money, and that it was arranged that he should help to dig the cellar, and that he (Wade) had left \$1.50 with Charles with which to pay the accused for his work after crediting on the work what he owed him. Nearly all of the members of the Sheppard family testify that they had never heard of any trouble between Sheppard and his wife, or the little boy, and that they had all treated each other well. Wade Sheppard says he was present when the prisoner received the information of the death of his wife, and that he bowed his head for a minute, and said, "Well, this is very hard," and wanted to know if he would be allowed to go to the funeral, and, being informed that he could not, stood there awhile, and then went and laid down on the bed, and appeared to be very much depressed. J. L. McGee notified him, and he says he thinks Sheppard said, "That is too bad," though he is not positive as to the language, and that Sheppard was not demonstrative. Only so much of the evidence is given here and elsewhere in this opinion as is deemed necessary to a proper understanding of the questions raised in the assignments of error and disposed of in this opinion.

In the petition there are 38 grounds of error assigned, the first of which is that the court erred in overruling the motion to quash the indictment. The indictment is in the form prescribed in section 1 of chapter 144 of the Code, and there is no longer any question about its sufficiency. That was settled long ago in *Schnelle's Case*, 24 W. Va. 767; *Smith's Case*, 24 W. Va. 815; *Flanagan's Case*, 28 W. Va. 116; and *Baker's Case*, 33 W. Va. 319, 10 S. E. 639.

The plaintiff in error filed his petition for a change of venue, supported by a number of affidavits, in which the affiants express the opinion that the defendant could not have a fair trial in Wirt county. Some of these affidavits show that, at about the time

this crime was committed, there was a good deal of excitement and feeling against the accused in certain portions of Wirt county and an adjoining portion of Roane county; that at places in the neighborhood in which Sheppard lived there had been some rumor or talk of mob violence; and that certain individuals having an extensive acquaintance in Wirt county had talked to a great many people, and satisfied themselves that there was a great deal of prejudice against Sheppard in the county. Several of these affiants admit that at the time of the trial the excitement and feeling had subsided considerably. A number of affidavits were filed on the part of the prosecution, denying the existence of prejudice, excitement, or feeling which might prevent a fair and impartial trial, and no trouble seems to have been encountered in securing a competent jury. While many of the authorities hold that the obtaining of a competent jury is conclusive against the prisoner upon a motion for a change of venue, such is not the law in this state. In *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885, this court held that the fact that a jury free from exception can be impaneled is not conclusive, on such a motion, that prejudice does not exist, and will not justify the court in refusing to receive other evidence to support the motion. In the opinion of the court, Judge Brannon says influences, silent, yet potential, may permeate the community, endangering an impartial trial. It is equally well settled by the decisions in this state and in Virginia that the affidavit for a change of venue must state facts and circumstances from which the conclusion is deduced that a fair trial cannot be had, and that the court must be satisfied from those facts, and not from conclusions or opinions of the defendant or his witnesses, that such fair trial cannot be had. *State v. Douglass*, 41 W. Va. 537, 23 S. E. 724; 4 Minor, Inst. 676; *Boswell v. Flockheart*, 8 Leigh, 364; *Wormeley's Case*, 10 Grat. 658; 4 Am. & Eng. Enc. Law, 818. It is also a general rule that the granting of a change of venue is discretionary with the court, and subject to revision only in cases of abuse. 28 Am. & Eng. Enc. Law, 96; 4 Am. & Eng. Enc. Law, 818. But it would hardly be so here, where the constitution guarantees it, when good cause therefor is shown. The burden is on the prisoner to show to the satisfaction of the court good cause to have the trial of the case removed, and such cause must exist at the time the application is made. *State v. Greer*, 22 W. Va. 800; 4 Am. & Eng. Enc. Law, 560. Section 14 of article 3 of the constitution of this state, said article being our bill of rights, provides that "trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offense was committed, unless upon petition of the accused, and for good cause shown,

It is removed to some other county." This is the common-law rule, and Blackstone, in speaking of causes for removal, says: "Where the question has an extensive local tendency; where a cry has been raised, and where the passions of the multitude have been inflamed; or where one of the parties is popular, and the other a stranger, or obnoxious." He says, to summon a jury laboring under local prejudices "is laying a snare for their consciences, and, though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious and resort under various pretenses to another mode of trial." He introduces this paragraph by saying: "The administration of justice should not only be chaste, but (like Caesar's wife) should not even be suspected."

Applying the principles and rules just referred to in the clearly discernible spirit in which they have been fixed in the jurisprudence of the state, it cannot be doubted that the court below committed no error in overruling the motion for a change of venue. Whatever talk there may have been about mob violence was largely among people outside the county, and of those who were citizens of the county the affidavits indicate that few participated in it, and these were confined practically to the neighborhood in which the crime was committed. These manifestations of a spirit of violence towards the prisoner occurred at about the time of the commission of the crime, which was in August, 1900, and the trial did not occur until nearly three months afterwards, in November, 1900. These are the only facts stated in the petition and affidavits. The balance of the testimony consists merely of the opinions of certain individuals that a fair and impartial trial could not be had. That these opinions, in several instances, are based upon conditions long prior to the date of the trial, appears from the testimony of some of the witnesses, who state that the feeling referred to had existed, but had largely subsided. This court decided in Greer's Case, *supra*, that the cause of removal must exist at the time the application is made. The record in this case fails to show the existence of such feeling or prejudice against the prisoner at the time he was tried as could have endangered a fair and impartial trial, and there is not even an intimation that there was any talk of violence towards him at that time.

The third assignment of error is that the court permitted a witness to testify that in the year 1900 Sheppard had said to her that he had heard that Allie Gorrell had deeded what property she had out of her hands, and that if that was the case he would not have her to save her life or anybody else, and then asked if the child had an estate coming to it. The theory of the prosecution is that Sheppard murdered his wife and her child to obtain her property. In 9 Am. & Eng. Enc.

Law, p. 675, it is said: "All acts and conduct of the deceased previous to the fatal encounter may be shown in evidence which form a part of the *res gestæ*, or which in any manner tend to shed light upon the question of motive or malice, or of legal provocation, or upon the question whether the defendant committed the homicide. But acts or conduct of the deceased which are not a part of the *res gestæ*, and which could not in any manner have influenced the defendant in the commission of the homicide, cannot be shown." At page 688 of the same volume it is said: "Evidence of prior acts of defendant, though they were not shown to be a part of the *res gestæ*, is admissible when such facts legitimately tend to establish motive or intention in defendant to commit the crime with which he is charged; and such evidence is admissible for that purpose only. Its admissibility is not limited as to the time or place of the act or acts, but they may be shown whenever they will serve to cast light upon the question whether defendant committed the homicide, or whether he did it with malice, or with premeditation and deliberation." "Where it appears that the homicide may have been committed in order to enable the slayer to possess himself of property belonging to the deceased, or to obtain or destroy evidence of indebtedness from himself to the deceased, it is competent to prove the business and social relations between the defendant and the deceased for a reasonable time before the commission of the homicide." 9 Am. & Eng. Enc. Law, 707. "Upon a trial for indictment for murder, it is admissible to show that the deceased was, at or near the time of the homicide, possessed of a considerable amount of money, or things of value, which tempted the avarice of defendant, and so constitute a motive for killing the deceased." *Id.* 713.

The testimony complained of under this assignment relates to only one of a number of circumstances upon which the prosecution predicates the theory that the defendant was avaricious and was actuated in all his relations with the deceased by the desire to obtain her property. Proceeding upon that theory, it was shown that the deceased owned an undivided one-half of a farm, worth probably \$1,500; that she had an interest in the personal property of which her mother had been possessed at the time of her death; that Sheppard attended the sale of this property with her, and was very watchful of her interests there; that he inquired as to whether the child had an estate coming to it; that he said he would not have her if she disposed of her property; that at the sale she had bought a gun, which had belonged to her father, for 95 cents, and that Sheppard had said, "I will 'tend to that gun some of these days; you paid 95 cents for it," to which she replied, "It don't make any difference; I would have bid all my estate

in for Lee." The fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh assignments of error relate to testimony admitted concerning these facts. It is not only competent to show any facts or circumstances which may have constituted a motive on the part of the prisoner in the commission of the crime with which he is charged, but, as we have seen, it is competent to prove the business and social relations existing between the defendant and the deceased for a reasonable time before the commission of the homicide. How much weight these circumstances are entitled to is a question for the jury, each to be taken in connection with all the others and all other facts in the case. The declaration that he would not have her in case she disposed of her property; his comment upon her purchasing the gun, a mere trifle, indicating, however, that he considered it a waste of money; his conduct at the sale; his knowledge of the value of her property; his inquiry before the marriage as to whether the child had an estate coming to it,—may all have been consistent with an honest purpose, and fall far short of proving him guilty of the crime with which he is charged. At the same time they are consistent with the theory of the state that he married the deceased, and put her and her child to death, with a view of obtaining all or a portion of her property. All these circumstances, therefore, were properly admitted as evidence under the rules and principles of law, and the weight to which they were entitled, taken in connection with all the other evidence, was a matter for the fair, impartial, and unbiased consideration of the jury.

The twelfth and thirteenth assignments of error are based upon the action of the court in permitting witnesses Lewis Full and John P. Bumgarner to testify that the prisoner had stated, while under arrest, that there were others who ought to have their brains knocked out, or needed knocking in the head. This testimony is not admissible under the rules heretofore adverted to, nor as a part of the *res gestæ*. The language attributed to the prisoner is not indicative of any motive or purpose which may have actuated him in so doing, if he did commit the crime. The crime was committed on Tuesday night, and he was arrested and made this remark on the following Saturday. It is too remote in time, being subsequent to the date of the commission of the crime, to be considered a part of the *res gestæ*. Besides that, it was contemporaneous with his arrest,—an act which is separate and distinct in its nature and character, as well as in time, from that of the commission of the crime. This distinction was recognized in *Crookham's Case*, 5 W. Va. 510. After the deceased had declared he was dying, and while he was dying, he said: "It was hard to die by the hand of another and leave his family." The court held that it was error

to admit the declaration as part of the *res gestæ*, because it was too remote from the transaction. But is it admissible upon any other ground? It is said in 9 Am. & Eng. Enc. Law, p. 691: "Where the charge that the defendant is the slayer is disputed, it is proper to show, for the consideration of the jury, the conduct and appearance of the defendant at or near the time of the commission of the homicide, as indicating his mental condition; and for this purpose actions showing nervousness, excitement, or fear when first informed of or charged with the crime, or silence, or manifesting a lack of concern at the death of the deceased, where sorrow is natural and to be expected, may be proved against the defendant." The language addressed to the witness indicates some other person than the deceased. His reference to persons having their brains knocked out, that being the condition of his wife and the child, might be indicative of a lack of concern or respect for them; but, it having been made under circumstances which, if the prisoner was innocent, were sorely aggravating and painful, it may not have meant more than a manifestation of anger towards persons concerned in his arrest. The mental condition of the accused and his feeling towards the deceased, whether friendly, hostile, or otherwise, being a legitimate subject of inquiry by the jury, this expression on the part of the prisoner was properly permitted to go to the jury; they to ascertain, upon considering all the evidence, what it meant, and, if found applicable, to give it such weight as in their impartial judgment it was entitled to. When one is charged with crime, anything he says or does voluntarily, which can have any bearing towards showing his guilt, is competent to go to the jury for what it is worth, of which the jury alone can judge. *Kinney's Case*, 26 W. Va. 141.

The fourteenth assignment of error is to the action of the court in permitting David Murphy to testify that the prisoner had told him, prior to the homicide and in a conversation in which the witness had said something about having gotten Allie, "Yes, that he was going to get all he could," and was going to dispose of the child, and, if he could not get shut of the child, he was going to get shut of both of them. This testimony is consistent with the theory of the prosecution, tends to show motive and intent, was proper for the consideration of the jury, and entitled to such weight only as reasonable, fair, and impartial men, acting under their oaths and with a due sense of their responsibility, might give it.

The fifteenth assignment of error is not well taken. The witness was asked whether he was one of the coroner's jury, and where the jury sat. The court permitted him to answer the last question over the objection of the defendant, and exception was taken. It was merely a preliminary question in the

introduction of the witness to testify as to certain things he had observed about the premises; the inquest having been held at the home of the defendant.

The sixteenth assignment of error is grounded upon the action of the court in permitting counsel for the state to ask certain questions, relating to the conduct of the prisoner on a former occasion, when he had justifiably or excusably taken the life of a man by the name of Somerville, for which he had been tried and acquitted. Certain testimony had been introduced by the state to show a lack of concern on the part of the prisoner for the death of his wife. Members of his family testified that he was of a stoical disposition, and that, on the occasions of the deaths of two of his sisters, he had shed no tears nor manifested any signs of grief, although he and his sisters had been devoted to each other. In the cross-examination of one of these witnesses the counsel for the state propounded this question: "Did you see him after he killed Somerville?" Objection to this question was sustained. The counsel then said: "Did you ever see your brother immediately after the death of any one else than his two sisters, when he was in trouble or charged with it?" This being objected to, the counsel for the prosecution added the words, "Or interested in it?" The objection to this question as amended was overruled. Another question, permitted over objection, was: "Did you see him about six years ago, when there was trouble up in your neighborhood in which he was interested?" The answer was, "I suppose that I did." Then followed the questions, "What trouble was it?" and "Was there such trouble as to call for expression or emotion?" and "of joy, or grief, or sorrow, that you have reference to?" All of this was objected to, and the answer was, "Well, I do not remember, six years ago, how my brother acted." Exception was taken to the answer, as well as the question and remarks of the attorney for the state. All remarks of counsel and questions relating to the fact that the prisoner had formerly taken the life of another man were objectionable, and should not have been permitted by the court. "Proof of other homicides or crimes, having no connection with the one for which the defendant is on trial, is irrelevant and inadmissible." 9 Am. & Eng. Enc. Law, 690. No connection between these questions and remarks and their ostensible purpose is clearly perceptible. The justifiable or excusable killing of a stranger is not calculated to produce the same or a similar state of mind and heart on the part of the accused as would result from the death of a sister to whom he was devoted. There is danger, also, that the jury will construe these inquiries as an attack upon his character. Until it is put in issue by him, it cannot be attacked. 9 Am. & Eng. Enc. Law, 700. The reason assigned for these ques-

tions and remarks is not sufficient to warrant an exception to, or a departure from, these two well-established rules.

The seventeenth ground of error is that the court permitted the counsel for the prosecution to propound to the defendant on cross-examination, and required him to answer, the following question: "Did the jailer have to come to you and admonish you on the day that your wife died, and say to you, 'My God, Sam; you ought not be carrying on this way, laughing and cutting up, and your wife just died.'" If the state relied upon this circumstance, and had any evidence of it, such evidence should have been introduced in chief. The jailer was put on the stand afterwards, and testified that he had admonished the prisoner there on that day or the next day, but was not positive as to which day. It would have accorded better with the rules of practice and procedure also to have shown in chief what the conduct of the prisoner was on that day, rather than what the jailer said to him. Evidence of Sheppard's conduct on this occasion was admissible upon principles already adverted to, and might have been given in chief. Used in rebuttal, it was only competent for the purpose of impeaching his credit as a witness. But the fact that it was admissible as evidence in chief affords no ground of objection to its use for the other purpose; he being a party to the proceeding. 29 Am. & Eng. Enc. Law, 795. The eighteenth ground of error is the same in substance as the seventeenth, and the same observations apply to it.

The nineteenth ground of error is based upon the action of the court in permitting a witness to testify in rebuttal that the door leading from the kitchen to the main room could be opened from the outside with the blade of a knife, the latch being a wooden latch in the main room, operated from the kitchen by a string; it having been shown that when the crime was discovered the string was pulled out into the main room. This relates to the order of introducing the testimony only, and that is in the sound discretion of the trial court. Still it properly belongs to the evidence in chief. It is difficult to see how the prisoner could have been prejudiced by its having been given in rebuttal.

The twentieth ground of error is that the court permitted the counsel for the state to ask the jailer this question: "On the day that Sam Sheppard learned that his wife was dead, did he want you to throw apple butter on Jackson, who was in the opposite cell?" and the further question, whether he had, on that day or the next day, admonished the prisoner and told him he ought to be ashamed of his conduct on that day. What has been said here as to the seventeenth assignment of error is applicable to this one.

The twenty-first assignment is that the court permitted the attorney for the state

to ask Harry Holt, introduced by the state to testify in rebuttal, as to where he slept on Sunday night, and the witness to answer that he had slept in the room on the end of the porch. This relates to the alibi, which was a part of the defense. It is claimed by the state that until Tuesday night Harry Holt had slept in that room, and that on that night Sam Sheppard had sent him to another room. Other members of the Sheppard family had testified that Holt had not been sleeping in that room. It was therefore proper to introduce testimony in rebuttal to contradict these witnesses, it all bearing a close relation to the conduct and whereabouts of the prisoner on the night of the murder, and for that reason is material. The same may be said as to the twenty-second and twenty-third assignments of error, in which it is objected that the state was permitted to show by Holt where he slept on Tuesday night, how he happened to go there, and at what time Henry Sheppard came to bed.

The twenty-fourth ground of error is that the court permitted Harry Holt to testify, in rebuttal, that on Wednesday he and Henry Sheppard went out hunting in the afternoon, and, coming back to the house, they found Myrtle Sheppard crying, and she had told them about the murder, and that Henry had said to her, "There's no use crying like as if this ain't an everyday occurrence all over the world." Henry Sheppard and Myrtle Sheppard had been asked about this statement on cross-examination, and had denied it. Sam Sheppard was not present. Neither Henry nor Myrtle Sheppard was charged with complicity in the crime. There was no charge of conspiracy, nor any shown in the evidence; and the facts that she had been crying and Henry had made the statement in question were immaterial, and as to them the witnesses could not be contradicted. The testimony was therefore improperly admitted, even for the purpose of affecting the credit of the two witnesses. A witness cannot be contradicted as to a collateral matter for the purpose of impeaching him. The test as to whether a matter is collateral is whether the cross-examining party is entitled to prove it in support of his case. 29 Am. & Eng. Enc. Law, 794; Whart. Cr. Ev. § 494; *State v. Goodwin*, 32 W. Va. 177, 9 S. E. 85; *Forde's Case*, 16 Grat. 547; 3 Greenl. Ev. 462.

The twenty-fifth and twenty-seventh assignments of error are predicated upon the action of the court in permitting Mrs. Flora Ayers and Mrs. Mattie Ott to testify in rebuttal, over the objection of the defendant, that Mrs. M. V. Sheppard had told them, or had stated in their presence, that the defendant had gotten up very early on Wednesday morning,—before daylight; Mrs. Sheppard having denied the statement in her cross-examination. This was proper testimony in rebuttal, for it was material as to

whether Sheppard was up before daylight that morning, and as to that matter contradictory statements of Mrs. Sheppard were proper evidence.

The twenty-sixth assignment is to the action of the court in permitting Mrs. Flora Ayers to testify, in rebuttal, over the objection of the defendant, that Mrs. Sheppard, the prisoner's mother, had told her, on the evening of August 22d, that the defendant did not like children, and that she had told Alie not to let Lee fondle over him or bother him; Mrs. Sheppard in her cross-examination having denied that she had made such a statement. The court erred in admitting this statement, which relates to the character of the defendant. He had not put his good character in this respect in issue. Until he puts his character in issue, it cannot be attacked. It is true that there is evidence on the side of the defense that the prisoner's relations with his wife and her child were pleasant and agreeable, but that testimony does not relate to his general character or disposition towards children. The state might have shown, if it could, that his relations with his wife and her child were otherwise; but it could not base upon that testimony an attack upon his general character, either in the evidence in chief or in rebuttal. 3 Greenl. Ev. §§ 25, 26; 3 Am. & Eng. Enc. Law, 110, 111; 9 Am. & Eng. Enc. Law, 699. If such evidence had been proper and material, and the witness might have been contradicted upon it, the evidence complained of would still have been improper, for the reason that the mother of the prisoner had not testified to his good character in this respect, but only that his relations with the members of his family were pleasant and agreeable, and that might have been true without regard to his general disposition or character.

The twenty-eighth ground of error is that the court permitted Isaac G. Davis to testify in rebuttal, over the objection of the defendant, substantially, that he had passed by the jail, seen Sheppard at the window, called him, wanted to know what he was doing there, and if he was put in there on suspicion; that Sheppard had replied that he was; that he then asked him something about the murder, and Sheppard said, "I could tell you the time and all about it, but they told me not to say anything about it." Sheppard had been asked about this conversation on his cross-examination, and had denied that he had used the language attributed to him, but had said that he might have told the man that he knew the night his wife was murdered. Does this mean that he knew the hour of the perpetration of the crime and the person who committed it, and under advice, or for other reasons, declines to disclose the information? If so, his admission and refusal amount to suspicious conduct, proper for the consideration of the jury. In 1 Archb. Cr. Prac. & Pl. (7th Ed.) 431, note, it

is said: "The seeking of opportunities and means to commit a criminal act, the flight of the accused, concealing, or showing anxiety to conceal, evidence of guilt, are circumstances for the prosecution." At the same page it is said the same is true of concealing instruments of violence. In *Tooney v. State*, 8 Tex. App. 452, the acts and declarations of the defendant, indicating apprehension on his own account because of the condition of the person whom he was charged with having fatally injured, were held to be admissible against him. In *State v. Hinckle*, 6 Iowa, 380, evidence was admitted against the defendant, who was charged with the murder of his wife by poisoning, that, upon being asked, in the jail, whether he did not get arsenic with which to kill rats, he answered that he did, and, being asked where he got it, replied that it was none of the inquirer's business. In *Aaron's Case*, 4 N. J. Law, 231, as stated in 1 Archb. Cr. Prac. & Pl. 407, it appears that a colored boy under 12 years of age, a slave, confessed that he had drowned a child by throwing him into the well. He was seen at play with the child near the well shortly before the child was missed, no other person being with them. In searching for the child, the prisoner was found up in a cherry tree. He pretended the child had gone up the road; looked around, and called him; went to bed at night without his supper; admitted the next morning he saw the child fall into the well; gave no reason why he neglected to tell of it, but quietly continued his work. When the child was found, and taken out of the well, he came up, and, seeing the corpse lying on the earth, said, "So you have found Stephen." The rule seems to be to admit almost every statement, made by the accused after the homicide, which contains any reference thereto, for the purpose of showing his conduct, his mental condition, and state of feeling towards the deceased and respecting the crime. Thus, it is said in 9 Am. & Eng. Enc. Law, 604, that "the voluntary declarations or extrajudicial admissions of one charged with the homicide, concerning its commission, are admissible in evidence against him." The declaration under consideration here could not be regarded as more than an admission of knowledge of the crime. It is in no sense a confession on the part of the prisoner of his having committed the offense. Whether it is more than a declination on the part of the accused to talk about the homicide and the accusation against him is another question to be determined. The witness virtually says he so understood it, and the conversation was immediately turned to other subjects. But this is a question that must be addressed to an unbiased and impartial jury, to be by them determined in the light of all the circumstances of the case. The possibility that the statement means more than that compels the court to admit it, either as evidence in chief or for the purpose of con-

tradicting the witness and affecting his credit, upon the principles already adverted to. It is to be noted here that in *Aaron's Case*, supra, all the declarations and conduct of the accused went to the jury. It was so in *Baker's Case*, 83 W. Va. 319, 10 S. E. 639, also.

The twenty-ninth assignment of error is to the action of the court in permitting a servant of the jailer to testify that she had overheard a whispered conversation in the jail between Sam Sheppard and Wade Sheppard, in which one of them said, "I don't know how she got her feet turned around towards the door,"—she having been directed by the jailer to ascertain, if she could, what they were talking about. She further testifies that she did not know about whom they were talking, nor which of them used the language. This was in rebuttal; the prisoner and his brother having denied the conversation in their cross-examination, and there having been no evidence of it in chief. Had it been shown by the testimony of the witness that this conversation related to the murdered woman, and that the accused had uttered the language in question, it would have been admissible, upon the same principle and for the same purpose, as the declaration considered under the last preceding assignment. But there is nothing by which it can be certainly connected with the crime under investigation, or attributed to the prisoner. If the statement was made by Wade Sheppard, it does not charge his brother with the commission of the crime, and thus make it possible for him to criminate himself by his silence and acquiescence. If it was a part of a conversation so charging him, there is nothing to show such silence or acquiescence. It being impossible to tell what the subject of the conversation was, or by whom or in what connection the statement was made, the court should have excluded it, and erred in failing to do so.

It is claimed, in the thirty-second assignment of error, that the court erred in giving instruction No. 1, asked for on behalf of the state. This instruction is in the language of point 11 of the syllabus in *Cain's Case*, 20 W. Va. 679, except that the word "presumed" is omitted, and the court instructed the jury "that a man intends that which he does, or which is the immediate or necessary consequence of his act," etc. It is unnecessary to determine here whether the omission of the word "presumed" from the instruction would be fatal to the verdict and judgment, for the reason that the judgment must be reversed upon another ground. But this instruction, as given in *Cain's Case* and numerous other West Virginia cases, has been so thoroughly and so often considered and approved that the opinion is here expressed that it is unwise and unnecessary to depart from it. It would be difficult to say to what extent such an innovation upon the settled criminal law of the state might re-

sult in danger to the lives and liberty of citizens. This instruction is nothing more than the enunciation of the well-settled and time-honored rule of law, dating back beyond Hill's Case, 2 Grat. 599. It was intended, and operates, as a means of judicially determining by the aid of the jury the necessary ingredients of murder known as willfulness, deliberation, and premeditation, in those cases in which it is shown that there has been a killing unattended by any circumstance sufficient to excuse, justify, or reduce the crime to an offense inferior to that of murder in the first degree. It was formulated with great care and deliberation, and has ever since been jealously guarded and preserved by the courts. The impossibility of ascertaining the secret intent existing in the mind and heart of the accused, when shown to have given a mortal blow, and of ascertaining and disclosing what mental functions were performed by him in the execution of the act, is recognized and provided for in this rule. It is a presumption of law, and to leave out the word "presumed" destroys, or at least impairs, its character as such. It is not true that a man always intends that which he does, or that which is the immediate or necessary consequence of his act; and the law holds no man to such responsibility. It does presume, however, that he so intends it; but it allows him, if he can, to rebut or overthrow that presumption. As throwing light upon the origin and reason of this rule of law, the following is quoted from the opinion of the court, delivered by Judge Duncan, in Hill's Case: "The principal difficulty, we apprehend, that exists in distinguishing between murder in the first and second degree, is in determining what proof is sufficient on the part of the commonwealth to show that the killing was willful, deliberate, and premeditated. In order to elevate the offense from murder in the second to murder in the first degree, there must be proof that the accused deliberated, and that the killing was the result of such deliberation. This being proved, it is not material how recently the deliberation preceded the killing. The practical difficulty in cases of this kind is in determining what is sufficient evidence of deliberation. A homicide rarely declares his intention; nay, he often, under the disguise of friendship and kind offices, sedulously conceals his fatal purpose. Even the resolution may be fixed, but the time and means not determined upon. The most willful, deliberate, and premeditated murders would often go unpunished, unless some means existed of proving the intention, independent of the admissions or declarations of the homicide. We are of the opinion that such means are furnished by the rule 'that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act.' 2 Starkie, Ev. 738, and the authorities there referred to." As shown in the case of *State v. Morrison*, 48 W. Va. —, 38

S. E. 481, recently decided by this court, the distinction between murder in the first degree and murder in the second degree is that in the former a specific intent to take life shall accompany the act of the accused, and that in the latter such specific intent is not required to constitute the crime. It is clear from what is quoted from the opinion in Hill's Case that the instruction under consideration here is intended to mark, and in the trial of persons charged with murder effectuate and enforce, this distinction. It would seem, also, that this instruction is applicable more properly to those cases in which extenuating circumstances are relied upon by the defense, rather than to those in which the act of killing is denied by the accused, without relying upon extenuating circumstances to justify, excuse, or mitigate.

It is also insisted that the court erred in giving instruction No. 2, asked for on behalf of the state, which is as follows: "The court instructs the jury that if they believe to a moral certainty, beyond a reasonable doubt, that the defendant, Samuel Sheppard, on the night of the 21st day of August, 1900, gave to Allie Sheppard a mortal blow on the head with a deadly weapon, inflicting a mortal wound, from which she lingered until the last day of August, 1900, and died from the effect of said mortal blow, then the prisoner is prima facie guilty of willful, deliberate, and premeditated killing, and unless the defendant prove extenuating circumstances, or they appear from the case made by the state, he is guilty of murder in the first degree, and the jury should so find." There is no reference in this instruction to the evidence in the case. It is a rule of law, too well known and understood for discussion, that every instruction must be grounded upon the evidence. The jury can found their belief upon nothing but the evidence, and instructions ought not to be so drawn as to leave it open to the jury to base it upon anything else. The omission was no doubt a mere oversight, but to let it pass might be setting a dangerous precedent. "For the purposes of public justice, it is essential to maintain with rigor the distinction between juridical and moral truth. I may have, for instance, as a juror, a moral conviction of the guilt of the defendant on trial. He may have confessed his guilt to me, or I may have learned from persons not called as witnesses facts inconsistent with his innocence. This, however, is not to be permitted to have the slightest effect on my juridical reasoning; for to punish even a guilty man without juridical certainty of his guilt would be recognizing a principle fatal to public justice." Whart. Cr. Ev. § 4.

Instruction No. 3, given for the state, is as follows: "The jury is further instructed that one charged with crime may be convicted by a jury upon circumstantial evidence alone, if the jury believe to a moral certainty, beyond a reasonable doubt, by said circumstantial evidence, that the per-

son so charged is guilty of the crime alleged against him. Therefore the court instructs the jury in this case that they have the right to convict the defendant upon circumstantial evidence alone, if the jury believe from the said circumstantial evidence the guilt of the defendant to a moral certainty, beyond a reasonable doubt. And the court further instructs the jury that circumstantial evidence in criminal cases is not only competent evidence, but is sometimes the only mode of proof, and therefore, if the jury believe, from the evidence and circumstances in this case, to a moral certainty and beyond a reasonable doubt, that the defendant, Samuel Sheppard, with a deadly weapon, gave to Allie Sheppard a mortal wound, without any provocation, from which wound she died within a few days from the time it was so inflicted, the said defendant, Samuel Sheppard, was guilty of willful, deliberate, and premeditated murder, unless he shows extenuating circumstances, or they appear by the case made by the state; and if he fails to show extenuating circumstances, and they do not appear from the case made by the state and all the evidence considered, the jury should find him guilty of murder in the first degree." Exception was taken to the giving of this instruction. The only objection to it offered by the defendant's counsel is that there were no circumstances in the case to connect the defendant with the crime for which he was tried, and that the circumstances were mere inferences based upon inferences. The evidence, except what has already been shown to have been improperly admitted, was competent; and it was for the jury to say whether from it, although in its nature what is generally termed by the courts and law writers "circumstantial evidence," they were convinced, beyond a reasonable doubt or to a moral certainty,—these two phrases being equivalent, as held in *Com. v. Costley*, 118 Mass. 1,—that the defendant was guilty of the crime with which he was charged. As reasonable men, duly impressed with the gravity, importance, and responsibility of their situation, it was for them to say whether they believed from this evidence that the defendant was the perpetrator of this horrible crime. The instruction merely tells the jury that, in order to find the defendant guilty, they must believe, to a moral certainty and beyond a reasonable doubt, that he did commit the crime, and that this conviction on their part must spring from the evidence and circumstances in the case, and that if, from it, they thus believed him guilty, they must so find, notwithstanding the evidence was circumstantial. To hold this instruction improper, it would be necessary to say that there was no evidence in the case which the jury might consider. This would be an invasion of the province of the jury, for it would be a determination upon the part of the court as to the weight

of evidence, which is a matter for the sole consideration of the jury, unless the evidence is clearly insufficient to warrant a verdict. What the evidence may be on the next trial of this case it is impossible to tell. Additional evidence against the prisoner may have been, or may be, found, and the question of the sufficiency of the evidence to support the verdict may come to this court after the next trial. For this reason it would be improper to indicate any opinion now respecting the sufficiency of the evidence to warrant the giving of this instruction or to support the verdict. For the present, therefore, the instruction must be held to have been properly given.

Another ground of exception is the giving of instruction No. 4, asked for on behalf of the state, which is as follows: "The court instructs the jury that reasonable doubt, to warrant acquittal in criminal cases, is not a mere possible doubt, but is such a doubt as, after mature comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, or for which reason can be given." The phrase "reasonable doubt" is used in a number of instructions given both for the state and for the defendant. If it were possible to exactly define the term or expression, and thus aid the jury in coming to a just conclusion, it would be proper to do so. But it is said in 3 Greenl. Ev. (15th Ed.) § 29, note, that "jurists have not been very successful in defining what is a reasonable doubt, and are disinclined to be held to any form of words. A moral certainty has been said to be necessary to conviction. But this is as difficult to define as the former, and the court has refused to adopt this phrase as a necessary test in *Com. v. Costley*. And the courts generally are disinclined to enter into any explanation of what the terms 'reasonable doubt' and 'moral certainty' mean; and with good reason, for, while these terms are well calculated to convey to the jurors a correct idea of what is expected of them, yet many subtleties and refinements might be imposed upon them by any attempt to limit the meaning." The instruction complained of was no doubt taken from the opinion in *Webster's Case*, 5 Oush. 320, where it is said: "It is not mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." The last clause of the instruction, "for which reason can be given," is in harmony with the authorities, if it had been inserted in the proper place; for it is said in the note just

referred to that "all the authorities agree that such a doubt must be actual and substantial, as contradistinguished from a mere vague apprehension. An undefinable doubt, which cannot be stated, with the reason upon which it rests, so that it may be examined and discussed, can hardly be considered a reasonable doubt, as such a one would render the administration of justice impracticable." The language of the instruction is also found in Whart. Cr. Ev. § 1, as quoted from Chief Justice Shaw in Webster's Case, and is approved by that author. In 9 Am. & Eng. Enc. Law, 737, it is said: "The term 'reasonable doubt' does not mean every vague or conjectural doubt, but it is a substantial doubt—a reasonable hypothesis—arising from the evidence, or a lack of evidence, inconsistent with the theory of the defendant's guilt. It should be accurately defined to the jury in each case, in language not to be misunderstood, which conveys that idea." Upon general principles it would seem to be eminently proper that the court, having used the term "reasonable doubt" in several of the instructions given in the case, should be permitted to define it and give its meaning. In doing so, the court below has given a definition which has been approved by some of the highest courts and most reputable law writers; but the connection of the last clause is such as to make the instruction bad. Whether it qualifies the word "doubt," or the word "conviction," is uncertain, to say the least. This makes it uncertain in meaning, and therefore misleading. A conviction for which a reason can be given is not sufficient. The conviction must be such as to exclude any doubt for which a substantial reason can be given.

The defendant requested the court to give seven instructions and all of them were given, except instruction No. 3, which is as follows: "The jury is further instructed that the evidence in this case is circumstantial, and in this case it is necessary—First, that the circumstances from which the conclusion is drawn should be fully established; second, that all the facts should be consistent with the hypothesis as claimed by the state; third, that the circumstances should be a moral certainty, actually excluding every hypothesis but the one proposed to be proven, and that the circumstances should be so connected as to make a perfect chain of evidence, and that unless the jury believe from the evidence and circumstances proven in this case that the defendant is guilty to a moral certainty and beyond a reasonable doubt, and to the exclusion of every hypothesis of his innocence, they should find him not guilty." A sufficient reason for refusing this instruction is that everything contained in it is given in the other instructions asked for by the defendant. In instruction No. 4 the jury are told that circumstantial evidence must always be scanned with great caution, and the circumstances proved must be of such

character and tendency as to produce a moral conviction of the guilt of the accused. In No. 5 they are instructed that, where the state relies wholly upon circumstantial evidence, it must make out its case by a chain of circumstances so intimately connected as to prove to a moral certainty and beyond a reasonable doubt the guilt of the defendant. In No. 6 they are instructed that all the circumstances from which the conclusion of guilt is to be drawn must be established by full proof, and every circumstance essential to the conclusion must be proved in the same manner and to the same extent as if the whole issue rested upon the proof of each individual and essential circumstance, and that, if the jury believe that any one of the circumstances from which the conclusion is to be drawn, and without which it could not be drawn, has not been proved and established by full proof, then the chain of circumstances necessary to the conclusion is not established, and the defendant is entitled to a verdict of not guilty. In No. 7 they are instructed that all essential facts and circumstances so proved and established must be consistent with the hypothesis of the guilt of the accused, and inconsistent with any other hypothesis, and that all such facts and circumstances should be of a conclusive nature and tendency. From this it is clear that instructions 4, 5, 6, and 7 contain all that was asked for in No. 3. They also contain the law of circumstantial evidence as announced in Flanagan's Case, 26 W. Va. 117, as well as that enunciated in Baker's Case, 33 W. Va. 319, 10 S. E. 639. Upon that doctrine they are full and complete, and the court was not bound to repeat it, or any part of it, by giving instruction No. 3. It was, therefore, properly refused. *Kerr v. Lunsford*, 31 W. Va. 662, 8 S. E. 493, 2 L. R. A. 668; *Morrison's Case*, 43 W. Va. —, 38 S. E. 481.

The next ground of complaint is that the following testimony was given by a witness for the state in the absence of the prisoner: "Q. What is your name, please? A. Flora Ayers. Q. What is your husband's name? A. Jont Ayers." The court certifies that while these questions were asked and answered the prisoner was not in the court house, but was then in the jail, and was afterwards brought into court, and then the prosecuting attorney asked the witness the same questions, and to them she gave the same answers, but that the witness was not sworn in the presence of the prisoner. The absence of the prisoner was noticed by the court, and the trial was suspended until he was brought in. No objection or exception was taken at the time, but, after the verdict was brought in, the prisoner moved the court to arrest the judgment and set aside the verdict because he was not in court during all the trial, which motion the court overruled. This was a fatal error, for which the judgment must be reversed, the verdict set aside, and a new trial granted. In *Bish. Cr. Proc.* § 657, it is

said: "The prisoner cannot be deprived of his right to be present at all stages of the trial." The same author says, at section 688: "In a case of felony or treason, the prisoner must be present during the whole of the trial, including the giving in of the evidence and the rendition of the verdict." In *Andrews v. State*, 2 Sneed, 550, it was held that "in criminal cases of the grade of felony, where the life or liberty of the accused is imperiled, he has the right to be present, and must be present, during the trial and until the final judgment." In *Crump's Case*, 1 Va. Cas. 172, it was held "that in no case, whatever, except where some statute hath otherwise directed, must judgment of imprisonment or unusual corporal punishment be rendered, unless the defendant be present in court." It was held in *Sperry's Case*, 9 Leigh, 623, and *Hooker's Case*, 13 Grat. 763, that it is absolutely necessary to a valid conviction that the prisoner shall be present in court when anything is done in any way affecting his interest. A leading Virginia case on this subject is *Jackson's Case*, 19 Grat. 656. There, after the evidence was closed and the jury had retired, they came back into court and the court permitted a portion of the testimony of one of the witnesses, as taken down during the trial, to be read to them, at their request, in the absence of the prisoner as well as of the witness. During the reading of the notes the prisoner was brought back into court, and afterwards the witness, being then present, was re-examined by consent of all parties. This was held to be sufficient cause for setting aside the verdict, and upon this state of the case Judge Dorman, after quoting from several authorities, says: "These are citations sufficient to show the strict adherence to the rule in all trials where the life and liberty of the accused is in jeopardy. The law is made for the protection of the citizen, and all alike are amenable to its penalties and entitled to its immunities. Whatever may be the turpitude of his offense, however great his criminality, every man has a right to an impartial trial according to law, and, till found guilty by his peers, that law presumes him innocent, and gives him the right to be present to see and know all that is said or done by the court affecting his case. From reason and authority it seems to be clear that the court erred in permitting any part of the testimony taken down to be read over to the jury in the absence of the accused." In this opinion the following is quoted from *Wade v. State*, 12 Ga. 25, and approved: "The court has no more authority under the law to read over testimony to the jury affecting the life or liberty of the defendant in his absence than it has to examine the witnesses in relation thereto in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be present, and see and hear all the proceedings which are had against him on the trial before the court.

It is said the presumption must be that the court read the testimony correctly, and read over all that was declared against the defendant; therefore he was not injured. The answer is, it was the legal right and privilege of the defendant to have been present in court when this proceeding was had before the jury in relation to the testimony delivered against him; and he is to be considered as standing upon all his legal rights, waiving none of them."

Upon this question the decisions of this court have been uniform, and have enforced this rule with all the rigidity and strictness that characterize the Virginia decisions. Thus, in *Younger's Case*, 2 W. Va. 579, it was held: "A prisoner indicted for felony must be personally present during the trial therefor, and the record can alone be looked to for the evidence to prove such presence at every stage of the trial." In *Conkle's Case*, 16 W. Va. 736, this court held that a person indicted for felony must be personally present during the trial, and such presence must be shown by the record. See, also, *Sutlin's Case*, 22 W. Va. 771. The very question we have here arose in *Greer's Case*, 22 W. Va. 800. In that instance the prisoner, by permission of the court, retired in charge of the jailer, and, upon the prisoner's request, the jailer put him in his cell, without the knowledge of the court or the counsel on either side, and then returned to his seat in the court room. The court and counsel, not observing the absence of the prisoner, and supposing he had returned with the jailer, proceeded with the cross-examination of a witness, and two questions were asked and answered before it was discovered that the prisoner was absent. The examination of the witness was immediately stopped, the jury were instructed to pay no attention to the evidence introduced in the absence of the prisoner and same was ruled out, and when the prisoner returned the same questions were put to the witness and the same answers received from him. This court held in that case that the court below erred in refusing to set aside the verdict because of the absence of the prisoner while a part of the evidence was being introduced. Johnson, P., quotes and approves the strongest part of the opinion in *Jackson's Case*, and then says: "We will not inquire whether the prisoner was unfavorably or otherwise affected by the cross-examination of the witness in his absence. He had the right to be present, which he did not and could not waive. He had the right to observe every look, gesture, or move of the witness while he was testifying; and it mattered not that the court excluded the evidence and certified that it was repeated in his presence." From these authorities it is clearly a matter of no consequence that the evidence introduced in this case in the absence of the prisoner may not have affected him, and that he did not at the time take an exception. To be

present during every part of the trial was a constitutional right which he could not waive. Until this time, this court has not only held that the right could not be waived, but also that such an error cannot be cured. Greer's Case, *supra*.

The last assignment of error is based upon the action of the court in overruling the motion for a new trial. It was supported by numerous affidavits tending to show that one of the jurors was disqualified and that new evidence had been discovered after the trial. In resisting the motion, the prosecution filed an array of counter affidavits denying the facts alleged in support of the motion. As the judgment must be reversed and the verdict set aside upon other grounds, it is unnecessary to inquire into the propriety of the action of the court on said motion. For the reasons herein stated, the judgment must be reversed, the verdict set aside, and a new trial granted, and the cause remanded to the circuit court of Wirt county, to be further proceeded in according to the principles herein announced.

(49 W. Va. 554)

DANIEL v. SIMMS et al.

(Supreme Court of Appeals of West Virginia.
Sept. 7, 1901.)

ELECTIONS—PREPARATION OF BALLOTS—VALIDITY—INTENT OF VOTERS—CONSTRUCTION OF STATUTE—BOARD OF CANVASSERS—MANDAMUS.

1. A ballot, prepared and perfected under the provisions of section 34 of chapter 3 of the Code, is one of the columns on the ballot sheet described in said section, so changed as to suit the wishes of the voter, and is a list in one of such columns of the names of all the persons for whom the voter desires to vote, with the designation of the office he desires each of them to fill; and every other column on the ballot sheet must be defaced in the manner prescribed in said section.

2. The provisions of said section, requiring the names of all persons for whom the voter desires to vote to be placed in one of such columns and all other columns on the sheet to be defaced, are mandatory; and if the voter, in the preparation of his ballot, violates said provisions, his vote cannot be counted, although his intention to vote for certain candidates may be clearly expressed upon the ballot sheet.

3. The courts are strongly inclined to uphold the legality of ballots not entirely conforming to the requirements of law, if the intention of the voter can be ascertained; but statutes prescribing the form of ballots and kind of paper on which they are to be printed, and prohibiting marks, figures, or devices thereon by which one can be distinguished from another, are designed to preserve the secrecy of the ballot and to prevent fraud, intimidation, or bribery; and they are generally held to be mandatory, and are always so held when such statutes provide that a ballot varying from such requirements shall not be counted.

4. Such regulations of the constitutional right of the citizen to vote are reasonable, and do not abridge or unduly impede the exercise of such right, although by disregarding them the voter disfranchises himself, provided such regulations are plain and may be easily observed.

5. Where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circum-

stances, the history of the times, and the defect or mischief which the statute was intended to remedy.

6. The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons.

7. The popular or received import of words furnishes the general rule for the interpretation of public laws, as well as of private and social transactions.

8. All former statutes on the same subject, whether repealed or unrepealed, may be considered in construing provisions that remain in force; and a repealed section which defines a term does not change the meaning of the term when found elsewhere in the original connection, and the section repealed may be referred to, to determine the meaning of such terms.

9. When words in a statute have acquired through judicial interpretation a well-understood legislative meaning, it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears.

10. If a board of canvassers adjourn without having legally performed its duties under section 68 of chapter 3 of the Code, such board may be reconvened by writ of mandamus, under section 59 of said chapter, and compelled thereby to correct any errors it may have committed in attempting to perform such duties.

Dent, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Fayette county; J. M. McWhorter, Judge.

Application by N. Daniel for a writ of mandamus to M. J. Simms and others. Writ granted, and defendants bring error. Affirmed.

St. Clair, Walker & Summerfield and McWhorter & Lowenstein, for plaintiffs in error. Molohan, McClintic & Mathews and Payne & Hamilton, for defendant in error.

POFFENBARGER, J. At the election held in Fayette county, November 6, 1900, N. Daniel was the candidate on the Republican ticket for the office of sheriff, and P. M. Snyder the candidate on the Democratic ticket for the same office. The face of the returns, as laid before the board of canvassers, showed that Daniel had received 4,116 votes and Snyder 4,396. Daniel demanded a recount. Such recount was had, and as the result thereof it was found that Daniel had received 4,137 votes and Snyder 4,450. During the recount Daniel objected to the counting for Snyder of more than 400 votes, and, his objections being overruled and the votes counted for Snyder, he objected, at the conclusion of the recount, to the granting of a certificate of election to Snyder, and his objection was overruled, the result declared, and said certificate granted. Then, upon the petition of Daniel, the judge of the circuit court of said county issued an alternative writ of mandamus, commanding the board of canvassers to reconvene and recount the ballots, and reject the ballots to the counting of which for Snyder Daniel had objected, and then to declare the result according to the facts. On the 27th day of December, 1900, two of the members of the board of can-

vassers and Snyder appeared and moved to quash the alternative writ. The petitioner then amended the petition, with leave of the court, by making Snyder a party thereto. This was objected to by the defendants, but their objection was overruled, and they then renewed their motion to quash the writ. On the 31st day of December, 1900, the cause came on for hearing, the motion to quash was overruled, the ballots in question, having been brought into court, were examined, and the court, being of opinion that they should not have been counted for Snyder, but should have been rejected and not counted at all, awarded a peremptory writ of mandamus, commanding the board of canvassers to reconvene as such and recount the original ballots, and absolutely reject and not count certain ballots as to the office of sheriff. There were 490 of these ballots, and the defendants have brought the case here on a writ of error.

It is conceded in the argument that enough of these ballots to change the result shown on the face of the returns are in the same condition as were those rejected under the mandate of this court in the case of *Morris v. Board*, 48 W. Va. —, 38 S. E. 500. The ballot sheet contained five ballots, columns, or tickets. The first or left-hand column was the Democratic ballot. Next to it was the Prohibition Party ballot. Next to this was the People's Party ballot. After that was the Social Democratic Party ballot. The last or right-hand column was the Republican ballot. In each of these columns appeared —First, the names of candidates for presidential electors; second, candidates for state offices; third, candidates for representative in congress; fourth, candidates for state senator; fifth, candidates for county offices, under the designation of "County Ticket"; sixth, candidates for district offices. The rejected ballots were marked in the following manner: All the columns, except the Republican and Democratic, were completely defaced by lines drawn clear down through them from the top to the bottom. A line was drawn through the Democratic ballot from the top down to the words "County Ticket"; the balance of it remaining undefaced. Then a line was drawn from the words "County Ticket" on the Republican ballot down to the bottom, leaving the national, state, congressional, and senatorial tickets undefaced. Although it was clearly the intention of the persons depositing these ballot sheets to vote the Republican national, state, congressional, and senatorial tickets, and the Democratic county and district tickets, the votes so intended for Snyder were properly ordered by the circuit court to be rejected, for the reason that that intention is not expressed in the manner prescribed by law. The reasons assigned in the opinion in *Morris v. Board*, prepared by Judge Brannon, are sufficient, conclusive, and based upon the undoubted weight of authority. But in view

of the thorough argument of this case, and of the criticism and argument found in Judge Dent's dissenting opinion in that case, further discussion of the principles involved is deemed appropriate. The solution of the question requires the construction of sections 34 and 66 of chapter 8 of the Code, which are as follows:

"Sec. 34. All ballots prepared under the provisions of this chapter shall be printed on white paper of uniform size, of the same quality, and sufficiently thick that the printing cannot be distinguished from the back; and shall contain the name and residence of every candidate whose nomination for any office has been certified or filed according to the provisions of this chapter, and no others. The names of all candidates nominated by each political party, respectively, shall be printed upon the ballots in columns, one column for each political party, each column containing the names of candidates nominated by the same political party, and no others; and if any candidate be nominated by a convention or primary election for any office, the name of any other candidate nominated in any other way provided for in this chapter, for the same office, shall not be printed on the ballots in the same column with the name of said candidate nominated by said convention or primary election; and the candidates shall be arranged in groups, under the designation of the offices for which they are respectively nominated. At the head of each column of political party nominations shall be printed in clear, bold type, the name of the political party (or principle) which the candidates represent, as contained in the certificates of nomination; and sub-headings may be placed over each group to indicate the political division for which the respective groups are to be elected. Immediately after the name of each candidate there shall be left a blank space between that and the next name or whatever is printed thereon at least one-half inch. A voter desiring to erase the name of any candidate from the ballot he intends to vote, or to vote for any other candidate or person in his stead, may strike out the name so printed on said ballot, and write in the blank space next following the name of the candidate or person for whom he so desires to vote. But if he fails to strike from said ballot the name printed thereon, the name written in said blank shall alone be counted as to said office. The several ballots to be voted at any election shall be printed side by side on the same sheet of paper, the Democratic ballots on one side thereof and the Republican ballots on the other, and the other ballots, if any, between them, with one black line between each of them, and all candidates or persons voted for by any voter shall be those whose names are printed or written as aforesaid thereon: and every other ballot on the same sheet shall be defaced by drawing one or more lines with pen and ink or indelible pen-

cil from the top to the bottom thereof, or across the heading thereof, or in any other way indicating that the same has not been voted by the voter. But if more than one of said ballots have nothing on them to indicate which of them was not so voted, then neither of them shall be counted."

"Sec. 66. If two or more ballots be found folded or rolled together and the names thereon be the same, one of them only shall be counted; but if the names thereon be different, in any particular, neither of them shall be counted except as hereinbefore provided; and, in either case, the commissioners of election shall, in writing in ink, place a common number on said ballots and state thereon that they were folded or rolled together when voted. If any ballot be found to contain more than the proper number of names for any office, such ballot shall not be counted as to such office. In any election for senator, if a person be voted for on any ballot who is not a resident of the proper county, as required by the fourth section of the sixth article of the constitution, such ballot shall not be counted for said office. Any ballot which is not indorsed with the names of the poll clerks, as provided in this chapter, shall be void and shall not be counted; and any ballot, or part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate or candidates affected thereby. On completing the count, and recording the same on tally sheets, the commissioners of election shall immediately make a memorandum of the total vote cast for each candidate, deliver a copy thereof to each member of such board, and post a copy thereof on the front door of the polling room, and transmit a copy thereof to the clerk of the county court, who shall post the same in his office for public inspection."

That part of section 34 which is here involved is directed to the voter mainly, and prescribes the manner of preparing his ballot or ticket. Section 66 is directed to the precinct election officers, and tells them how they shall proceed in ascertaining the result of the election at the precinct. The meaning of the word "ballot" as used in each of these sections, is of vital importance. As found in some parts of section 34, it undoubtedly means the whole sheet of paper on which all the columns are printed; but the important question is, what does it mean in that part of the section which reads: "The several ballots to be voted at any election shall be printed side by side on the same sheet of paper, the Democratic ballots on one side thereof and the Republican ballots on the other, and the other ballots, if any, between them, with one black line between each of them, and all candidates or persons voted for by any voter shall be those whose names are printed or written as aforesaid thereon; and every other ballot on the same sheet shall be defaced by drawing one or

more lines with pen and ink or indelible pencil from the top to the bottom thereof, or across the heading thereof, or in any other way indicating that the same has not been voted by the voter. But if more than one of said ballots have nothing on them to indicate which of them was not so voted, then neither of them shall be counted." Now it is contended, presumably for two reasons, that the word "ballot" here means the separate offices and candidates to be voted for, and not either the sheet or the column. The first reason is that the word is plural in some places, and the second that a ballot has been defined as "a piece of paper, or suitable material, with the name written or printed upon it of the person to be voted for." Cush. Law & Pr. Leg. Assem. § 103; Cooley, Const. Lim. 760. Why the word is here made plural does not appear, and no satisfactory reason can be assigned for it. That it does not mean the separate offices and candidates to be voted for—a large number of imaginary ballots, all in one column, under the designation of "Republican Ticket" or "Democratic Ticket"—is clear from the language of the section as well as from the context. This statute contemplates and means that the voter shall cast one ballot. The first thing the voter shall do, after obtaining the ballot sheet from the clerk, is to select "the ballot he intends to vote,"—not the ballots he intends to vote; for it says, "A voter desiring to erase the name of any candidate from the ballot he intends to vote." That the word "ballot" here means the whole column is apparent from this language. If it only meant that part of the column sufficient to contain the name of one candidate, the statute, instead of saying "erase the name of any candidate from the ballot," would say "erase the name of the candidate from the ballot." If the word "ballot" in this section means only the name of one candidate, then one man is all the voter could vote for; for he is directed to prepare one ballot, and the statute says "every other ballot on the same sheet shall be defaced." It further says, "If more than one of the said ballots shall have nothing on them to indicate which of them was not so voted, then neither of them shall be counted,"—showing conclusively here again that the voter is only permitted to deposit one ballot. The language of the statute, indicating how a ballot not voted is to be defaced, shows that "ballot," as there used, means a column. It may be done by drawing one or more lines "from the top to the bottom thereof." Is it reasonable to suppose this direction relates to a portion of the sheet, the vertical dimension of which is little more than one-half inch, while the horizontal dimension is all of two inches? It may be defaced by crossing out the heading of it. There is no heading to the imaginary separate portions of the column containing many of the names. The section speaks of headings and subheadings. The heading can be noth-

ing but "the name of the political party (or principle)," printed in clear, bold type "at the head of each column." "Every other ballot * * * shall be defaced by drawing one or more lines * * * across the heading thereof." Nothing on the sheet but the column has a heading. It is a physical impossibility to deface anything on the sheet in that way but the column. Therefore nothing can be meant by the use of the word "ballot," in this connection, but the column. The voter being required to deface every column on the sheet but one, all that is left for him to use is the remaining column, and that must be his ballot. To reach the conclusion that the word "ballot," used in this direction to the voter, means a single name on a ballot sheet, and that the words "Democratic ballots" and "Republican ballots" mean the several names appearing, respectively, in the Democratic and Republican columns on the sheet, not only requires an analysis of the language too intricate and refined to have been intended by the legislature to be unraveled by the ordinary citizen, but is found, also, to be illogical and contradictory of the terms of the statute itself. "Ballot" means what the legislature, the people, and the courts of this state understood it to mean at the time of the passage of the act, and had understood it to mean for more than 28 years prior thereto,—a single piece of white paper containing the names of all the persons for whom the voter wishes to vote and the designation of the office he desires each of them to fill, without any other name on it, or any mark, save those sanctioned by the act itself, namely, the names of the poll clerks on the back of it and the defaced columns on the face of it.

Section 34 is not ambiguous; but, if it were, the application of the familiar rules of interpretation and construction brings us irresistibly to the same conclusion. Under the law as found in the Code of 1860 (chapter 7, § 12), the mode of voting in the state of Virginia, of which this state was then a part, was *viva voce*, although it was provided (section 12, c. 7) that "in an election for electors for president and vicepresident of the United States, the officer shall receive from each voter a paper or ticket containing the names of as many persons for electors as the state may be entitled to for the time being. The name of the voter shall be written on the back of the paper, and he shall also declare *viva voce* for whom he votes as electors, either by repeating the name of each person voted for, or by any other distinct designation of them collectively: provided, that if he be dumb, he may vote by ballot." In 1863, under the old constitution, the legislature, in section 18 of chapter 3 of the Code, provided that "every person offering to vote at an election shall present to one of the inspectors a single ballot, written or printed upon white paper, which shall be folded or rolled so that its contents cannot be seen, and if

there be any mark, color, or device visible on the same, intended to distinguish it from other ballots voted at the election, it shall not be received. The ballot shall contain the names of the persons for whom he wishes to vote, and designate the office he desires each of them to fill." From that time until the passage of the act of 1891, this portion of the law, prescribing the mode of voting and defining a ballot, underwent some slight changes, but remained substantially the same. Under the new constitution, that portion of the act which required the ballot to be folded or rolled so that its contents could not be seen could not be retained, and was stricken out, for the reason that the present constitution guarantees to the citizen the right to vote an open ballot. Immediately before the passage of the act of 1891, providing for the present system of voting, section 13 of chapter 3 of the Code provided that "every person offering to vote at an election shall present to one of the commissioners a single ballot, written or printed upon white paper, and if there be any mark, color or device visible on the same, intended to distinguish it from other ballots voted at the election, it shall not be received. The ballot shall contain the names of the persons for whom he wishes to vote and designate the office he desires each of them to fill." Acts 1882, c. 155, § 13. The present constitution of this state was adopted in 1872, nearly 20 years prior to the passage of the act of 1891; and section 2 of article 4 of that instrument reads: "In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote either an open, sealed or secret ballot as he may elect." What did the people, in adopting this constitution, understand the word "ballot" to mean? Having used as a ballot, in all their elections for 10 years, at least, a piece of white paper containing all the names of all the persons and propositions for whom and which they had voted in any one election, can it be possible that they understood it to mean only one name on that paper? It is within the power of the legislature, of course, to change the form and definition of the ballot, and this is only referred to, in connection with what precedes it, to show what "ballot" was understood to mean. The people of this state, for at least 28 years, having used and recognized in all their elections a piece of white paper, containing all the names of all the persons for whom any person intended to vote in any election, as the ballot, and the legislature and the courts having so recognized and understood it, can it be possible that the legislature, in section 34 of the act of 1891, giving to the voter directions for the preparation of his ballot, contemplated or intended a sort of thing that the most vivid imagination would never detect or discover, except in the exigency of some particular case, and with the aid of learned and astute counsel?

Under this old system of voting, which

was not peculiar to this state, but obtained practically throughout all the states, the door was wide open to fraud, and every election precinct was a scene of confusion and uproar. The ballots were not furnished by the officials, but by individuals, generally by the executive committees of the contending political parties. Anybody could have printed and distributed among the people such "ballots," or "tickets," as they were termed, as he desired. Democratic tickets might be printed and distributed around the polling places with the name of one Republican candidate cunningly and fraudulently inserted in a place where the name of a regularly nominated Democratic candidate ought to be, or the name of some Democrat who was not a candidate might be inserted there. A voter, coming upon the ground and desiring to vote the Democratic ticket, might have one of these fraudulent tickets placed in his hands, and, without examining it closely, deposit it, and thus be defrauded out of his vote as to that particular office in which he felt most deeply interested. The Republican, and all other, tickets might have been dealt with in the same way. Tickets could be prepared by persons who, by reason of employment, credit, or other cause, had control over voters, and these persons so under control could be supplied with tickets which they did not desire to vote, and rushed, under compulsion and intimidation, to the polls, and made to express, not their own sentiments and will, but the wishes of some other person. The purpose of the act of 1891 was to reform our entire election system, and break up and render impossible, as far as could be done, this confusion and fraudulent conduct about the polling places. To show that the legislature recognized, in this act, that the voting in this state, as elsewhere, was directed and controlled by political organization, and that each political party nominated and presented to the people its "ticket," and desired the names of all of its candidates—its entire ticket—upon its own ballot, and that the legislature so provided, it is only necessary to examine the act generally. Section 18 defines a "convention," and says it "is an organized assembly of voters or delegates of any political party" for the purpose of nominating candidates. Section 19 defines a "primary election," and says it "is an election held by voters who are members of any political party" for the purpose of nominating candidates. Section 21 provides for certifying the names of candidates nominated by a convention by the presiding officer and secretary of the convention. Section 22 provides for certifying nominations made by primary elections. Section 23 prescribes the form of the certificate, and contains a blank for the name of the political party. Section 24 provides for the nomination of candidates otherwise than by conventions and primary elections. Section 26 provides for the appointment of state, congressional, judicial, senatorial, dis-

trict, and county executive committees of political parties. There are other portions of the act which recognize and relate to political organizations. Each of the two leading parties must be represented on the board of ballot commissioners, in the commissioners of election at the precincts, and in the clerks of the election. Section 34 recognizes by name the existence of two political parties in the state. All of this shows that it was not the purpose of the legislature to break up or interfere with the existence or the general practices of the political parties then in existence, or thereafter to come into existence, in this state, but to regulate and legally sanction them. No reference to such organizations is found in any preceding legislation.

The practice under the election system then in existence was for the vast majority of the voters of the state to identify themselves with the two political organizations named in the statute. They then went to the polls, and each selected, on the grounds on the outside of the election room or in the election room, or had selected before he reached the voting place, a ticket or ballot, obtaining it from whomsoever he might be able to get it. This ballot ordinarily contained the names of the candidates of the political party to which he belonged. Until he made changes in it, it contained no other names. It contained exactly what the legislature, in the act of 1891, requires to be put in the column at the head of which stands the name of the political organization to which the voter belongs. When the voter now looks upon that column, he sees exactly what would be the old ballot, which he had been accustomed to vote, in that portion of the paper on which it is printed, if it were cut off from the balance of the sheet. The legislature has provided that all the ballots to be used in an election now shall be printed on one piece of paper side by side; that they cannot be handled by any person outside of the election room on election day; that they shall be printed and prepared by officers appointed for that purpose, who shall keep them in their custody and control until required for the use of the voter at the very moment he proposes to vote; that the voter, upon obtaining one of these sheets, shall first select from all of those on the sheet, instead of from the hand of a neighbor, the ballot he intends to vote; then permits him to make such changes in it as he desires to make, in substantially the same manner in which formerly he changed his old ballot; and that, after having made such changes in it as he desires to make, he shall then deface every other ballot on the sheet. Having done this, he has before him just what he handed to the commissioner under the former law,—a list, in one column, of the names of all the persons for whom he desires to vote, with the designation of the office he desires each of them to fill, written

or printed upon white paper. That was the ballot then. It is the ballot now.

How are statutes to be construed? How is the meaning of words in a statute to be ascertained? How far is it permissible to inquire into the conditions existing at the time of the passage of the act? From what sources and by what rules is the legislative intent to be ascertained? Are the matters of history and legislation, above detailed, entitled to any weight or consideration in the solution of this question? The answers come from the highest court in the land. "Where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy." *Smith v. Townsend*, 148 U. S. 400, 13 Sup. Ct. 634, 37 L. Ed. 533; 23 Am. & Eng. Enc. Law, 336. Our statute requires the board of ballot commissioners to distribute to the election precinct cards of instruction and sample ballots. These are to be posted up around the polling places and in the booths; the sample ballots marked according to the instructions printed on the cards. It is a well-known fact, which is not denied, that these sample ballots in the election of 1900, and all former elections held under the present law, were marked by the election officers at the precincts, so as to show that the names of all candidates for whom the voter desired to vote should be in one column. That such were the instructions and the mode of voting in Fayette county is apparent from the fact that, of the more than 8,000 ballots there used, less than 500 were prepared in a different way. Moreover, such were the instructions and sample ballots sent out to the public by the executive committees of the leading political organizations. The election officers, therefore, so construed the statute as to require all the names to be in one column, and thus construed the word "ballot" to mean the column. "The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons." *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; 23 Am. & Eng. Enc. Law, 339. As has been shown, the people of the state understood an election ballot to be a list of all the names of all the candidates for whom the voter intended to vote. "The popular or received import of words furnishes the general rule for the interpretation of public laws, as well as of private and social transactions." *Maillard v. Lawrence*, 16 How. 251, 14 L. Ed. 925; 23 Am. & Eng. Enc. Law, 326. In the opinion of the court in this case, delivered by Mr. Justice Gray, it is said: "If language which is familiar to all classes and grades and occupations—language the meaning of which is impressed upon all by the daily habits and necessities of all—may

be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society." Prior to the enactment of the present election law, the legislature of the state had defined an "election ballot" to be a piece of white paper, containing the names of the persons—not one name, but all the names—for whom the voter wished to vote, with the designation of the office he desired each of them to fill. "In cases of doubt or uncertainty, acts in parl materia may be referred to in order to discern the intent of the legislature in the use of particular terms." *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310; 23 Am. & Eng. Enc. Law, 315. In *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776, the following is found in the opinion: "But it is a familiar canon of interpretation that all former statutes on the same subject, whether repealed or unrepealed, may be considered in construing provisions that remain in force." In *U. S. v. Le Bris*, 121 U. S. 278, 7 Sup. Ct. 894, 30 L. Ed. 946, it is held that "a repealed section which defines a term does not change the meaning of the term when found elsewhere in the original connection; and the section repealed may be referred to, to determine the meaning." *Forquaran v. Donnally*, 7 W. Va. 114. Whenever the courts of this state have used the word "ballot," under the legislation prior in date to the act of 1891, they must have used it as defined in that legislation. They could not have used it in any other sense. "When words in a statute limiting the power of this court in the review of cases have acquired through judicial interpretation a well-understood legislative meaning, it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears." *The Abbotsford*, 98 U. S. 440, 25 L. Ed. 168; *Minor v. Bank*, 1 Pet. 46, 7 L. Ed. 47. These are rules of interpretation and construction universally recognized and followed. They are directly applicable to this question and conclusively settle it.

It was not contended in the argument of this case, nor seriously in the *Morris* Case, that section 34 means anything else than a direction to the voter to place the names of all persons for whom he desires to vote in one column. It was, and is, insisted, by those who claim that the ballots in question here are legal, that the provisions of section 34 are directory, and not mandatory, and, therefore, that the preparation of the ballot in a manner different from that directed by the law does not invalidate the vote of the person depositing the ballot so prepared. On the other hand, counsel for Daniel insist that these provisions are mandatory, and that any departure from them invalidates the votes. This question is so thoroughly discussed in the opinion in the *Morris* Case that it is deemed unnecessary to devote much

time to it here. If the word "ballot" means a column, as is here held, the rules by which to determine whether the provisions of the statute are mandatory or directory show that in this instance they are mandatory and must be observed. Lord Mansfield's rule is that the question depends upon whether that which was directed to be done was or was not of the essence of the thing required. *Rex v. Loxdale*, 1 Burrows, 447. The supreme court of New York, in *People v. Cook*, 14 Barb. 290, has held that "statutes directing the mode of proceeding by public officers are directory, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute." Judge Cooley says: "This rule strikes us as very general, and is likely to include within its scope in many cases things which are of the very essence of the proceeding." Cooley, *Const. Lim.* 89. In *People v. Schermerhorn*, 19 Barb. 540, the same court holds: "Statutory requisitions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than of substance." After considering this and other cases, Judge Cooley lays down this rule: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute." Cooley, *Const. Lim.* 93, citing numerous decisions, which he says might easily be largely increased. Now look at the qualification he puts upon this rule: "But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed." Cooley, *Const. Lim.* 93. Then immediately follows this caution: "Even as thus laid down and restricted, the doctrine is one to be applied with great circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain the proceedings of careless and incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the legislature."

In the construction of this statute, the qualification of the general rule must be applied; for there are words in the statute which "by necessary implication forbid the doing of the act in any other manner than as directed." After directing the voter how to prepare his ballot, the statute provides that "every other ballot on the same sheet shall be defaced by drawing one or more lines with pen and ink or indelible pencil

from the top to the bottom thereof, or across the heading thereof, or in any other way indicating that the same has not been voted by the voter." The statute also contains an express prohibition of the preparation of the ballot in any manner other than that directed, as well as denounces a fatal consequence of disobedience, in the clause: "But if more than one of said ballots have nothing on them to indicate which of them was not so voted, then neither of them shall be counted." Thus, by the highest test known to the courts and the law writers, the provisions of the statute in question are shown to be mandatory. It is not always necessary that a negative clause be used to make it mandatory. Judge Cooley says: "There are cases where whether a statute was to be regarded as merely directory or not was made to depend upon the employing or failing to employ negative words plainly importing that the act should be done in a particular manner or time and not otherwise. The use of such words is often conclusive of an intent to impose a limitation, but their absence is by no means equally conclusive that the statute was not designed to be mandatory." Cooley, *Const. Lim.* 89. This work is quoted thus extensively, partly for the reason that it is so often referred to and so extensively relied upon in the argument by counsel for plaintiffs in error. While it is true that the courts struggle to uphold the legality of ballots, where they do not conform to the requirements of the law, if the intention of the voter can be ascertained, yet it must be admitted that statutes prescribing the form of ballots, kind of paper, and prohibiting marks, figures, or devices by which one can be distinguished from another are generally held to be mandatory. "These statutes, being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory, and this will be so in all cases where the statute provides that a ballot varying from the requirements of the law shall not be counted; but if this provision is lacking, while it is the duty of the election officers to refuse to receive the ballots if deviations from the law are manifest, if they have been received they should not be rejected, if the variations are but trifling." 8 Am. & Eng. Enc. Law, 349. This is a general proposition of law, and is supported by numerous cases cited. The statute here considered is one which "provides that a ballot varying from the requirements of the law" in the particular in question "shall not be counted." Hence, by this rule and classification, it is mandatory.

The legislature having so expressed its will, it is unnecessary to inquire why it compels the voter to put the names of all persons for whom he desires to vote on one ticket or ballot. It may be to preserve the secrecy of the ballot, and to prevent fraud, intimidation, or bribery, by requiring all ballots to

be in the same form. That the legislature designed and intended that the ballot shall not be so distinguishable from another as to make it possible for any voter to disclose, by the form of his ballot or by any mark or device on it, how he voted, is perfectly clear. Section 79 of the statute makes it a felony, punishable by imprisonment in the penitentiary for not less than one nor more than two years, for any voter to place any mark upon his ballot, or to suffer or permit any other person to do so, by which it may be afterwards identified as the ballot voted by him. It has been seen that under the former legislation of this state no ballot was permitted to be received which had any mark, color, or device visible on the same intended to distinguish it from the other ballots voted at the election. The liberal rule of construction whereby it is sought to give effect to the intention of the voter obtains in Illinois. *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227, cited by counsel for plaintiff in error, holds: "A requirement that the ballot be marked by a cross in the appropriate margin or place opposite the name . . . is directory, and not mandatory, and under it the voter's intention should be given effect, if it can be gathered from his ballot without laying down a rule which may lead to the destruction of its secrecy." The court held, nevertheless, that where a voter, instead of making the cross, had written the word "Democratic" at the head of the Democratic ticket, his ballot could not be counted. It further held that a ballot marked by a single mark through the circle or square, or marked with a circle or irregular character within the circle or square, or marked with crosses entirely outside of the squares, must be rejected, as disregarding the plain directions of the law and as furnishing the means whereby the secrecy of the ballot could be destroyed. It was also held that where the mark on the ballot bore no resemblance to a cross, nor any attempt to make a cross, it could not be counted. The reasoning of that court, applied to the contention of counsel for the plaintiff in error here, utterly demolishes it, although it holds the statute to be directory. The political complexion of that court is unknown to us; but, as there have been some accusations of partisanship against some of the courts in respect to the rules of construction applied here, it is noted that in *Parker v. Orr* the Democratic candidate had been declared elected by one vote, and the supreme court, which finally decided the case, did not reverse the lower court. If such irregularities as are mentioned in that case are subversive of the secrecy of the ballot, certainly a voter, by preparing his ballot in a form different from that prescribed by the law, might much more clearly identify it by its form, and thereby commit a much graver offense against the principle of secrecy in elections. If this were permitted, voters might be organized at the various precincts

with the understanding that, for good or evil purposes, they would thus identify their ballots. The law does not permit it for any reason or for any purpose. It is absolutely inhibited and made penal in this state. In the brief of counsel for plaintiff in error there is set forth the written opinion of an able and prominent lawyer of this state on the subject of marking the ballot, in which it is attempted to be shown that ballots marked as are those in question here are legal ballots and must be counted, and in the brief it is said this opinion was printed and 7,000 copies of it distributed throughout Fayette county immediately before the election. There is no reason for doubting that this was done from pure and patriotic motives. At the same time, it must be remembered that, upon some other occasion, in some other place, and by persons other than those concerned in the management of the campaign for county officers in Fayette county, the same method or plan might be pursued as a part of a scheme of corruption and debauchery or intimidation such as the legislature may have intended to prevent by the provision here construed.

The opinion so distributed was founded, in part at least, upon the decision of this court in the case of *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956. Point 1 of the syllabus of that case is quoted at length in it. It was requested in the argument that the record, briefs, and opinion in the *Dunlevy* Case be carefully considered in the decision of this case. An examination of them fails to disclose that the question presented here and in the *Morris-Werts* Case was raised there. Not a word of discussion of it appears in the briefs. The original ballots were not before this court, but there are samples of them in the record. Exhibit No. 20 is marked with a cross above the headings of all the columns, except the Republican column, and *Dunlevy's* name is transferred to the Republican column, and his competitor's name stricken out of it. No. 21 is marked with a cross above the heading of each of the columns, except the Democratic column. No. 40 is marked with two large crosses in each of the columns, except the Republican column, and *Davis's* name is stricken out in that and *Dunlevy's* inserted, and the crosses are large enough to cover all the names except one in every column. No. 41 is marked with lines drawn through all the columns, except the Republican, and *Dunlevy's* name is transferred to that column, and *Davis's* stricken out; but the defacing lines do not reach throughout the entire length of the columns, the names of the congressional candidates only being not covered by the lines. No. 42 shows all the columns defaced, except the Prohibition column, by lines drawn from the top to the bottom. *Dunlevy's* name is transferred to that, but is not in the blank space under the name of his competitor. In No. 43 every name in every column, except the Democratic column, is marked out. In No.

45 all of the columns, except the Republican column, are defaced by five crosses made in each of them and practically covering every name on them. In the Republican column Davis' name and the designation of the office for which he was a candidate are marked out, and Dunlevy's name written in the blank below. In No. 46 all of the columns, except the Republican, are defaced by lines drawn from the top to the bottom, and Dunlevy's name transferred as in No. 45. No. 47 is substantially like No. 41. In No. 48 all of the columns, except the Democratic, are defaced by lines drawn from the top to the bottom with an ordinary lead pencil. No. 49 is substantially like No. 41, except that the Democratic, instead of the Republican, column is undefaced, and only one of the lines fails to be the full length of the column; thus leaving the name of the Republican candidate for congress undefaced. No. 50b has all the columns, except the Republican, defaced by lines drawn from the top to the bottom, and Dunlevy's name transferred to the Republican ticket. It appears that in every one of these samples, representing the ballots in question in the Dunlevy Case, there was a clear intention shown on the part of the voter to vote one column as his ballot and deface every other column on the sheet, and they were so marked as to clearly show they had not been voted. Judge Brannon was therefore entirely correct in saying in the Morris Case that this question did not arise in the Dunlevy Case. Is it covered by the principle laid down in the Dunlevy Case? If, in reading the syllabus of that case, it is borne in mind that the word "ballot" means "column," and does not mean "ballot sheet," it will be seen that there is no conflict between it and the principles laid down here or the law as announced in the Morris Case. It relates to the counting of the ballots by the voter. It is or should have been a construction of section 66 of the act of 1891, and not of section 34; the provisions of the latter section, here involved, having been obeyed by the voters in preparing their ballots. It simply reiterates what section 66 means, namely, that, if it is possible to ascertain from the ballot what the intention of the voter was, it should be counted, presupposing, as section 66 necessarily does, that the voter has prepared his ballot as directed in section 34, and as, in fact, he had in the Dunlevy Case, and that the names of all persons for whom he has voted are in one list or column. In that section the word "ballot" can mean nothing but the "column." It is not operative until after the voting is done. It presupposes that the voting was done according to law, and that all the columns except one had been defaced. As applied to the column, it is directory, although it is not affirmatively stated to be so in the section. If the voter has placed the names of all persons for whom he offers to vote in one column, and has thus prepared his bal-

lot, his vote should be counted, if his intention can be ascertained from that ballot, although he may not have written the names in the exact places in the column designated by the statute.

But it is claimed that, if the statute is mandatory, then it abridges or unreasonably impedes the constitutional right of the citizen to vote, and is therefore unconstitutional. To what Judge Brannon has said on this subject nothing need be added. To the same effect the following is quoted, however, from Cooley, Const. Lim. 757: "All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, to guard against fraud, undue influence, and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential." What is unreasonable in this regulation? It is one of the most easily understood systems of voting known. It is, as has been shown, the old system, under which we have voted ever since the organization of the state, worked over, modified, and in fact simplified.

The next question is whether the petitioner has mistaken his remedy. This court has decided in numerous cases that mandamus does not lie at common law, except in purely ministerial matters. *Board v. Minturn*, 4 W. Va. 300; *State v. County Court*, 33 W. Va. 580, 11 S. E. 72; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *State v. Herald*, 36 W. Va. 721, 15 S. E. 974; *Marcum v. Commissioners*, 42 W. Va. 263, 26 S. E. 231, 36 L. R. A. 296; *Satterlee v. Strider*, 31 W. Va. 731, 8 S. E. 552. But it was held in *Marcum v. Commissioners*, cited, that "section 89 of chapter 3 of the Code, as reenacted in chapter 26, Acts 1893, in cases involving duties of ballot commissioners under said chapter, gives the writ of mandamus more scope than at common law, rendering it a process to control them as to all acts ministerial or judicial." In *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, this court held: "While mandamus is the proper, legal, and efficacious remedy provided by the statute for the purpose of compelling the election officers to discharge their duties in conformity with the law, when such officers, in violation of their ministerial duties, assume the exercise of judicial functions, certiorari may be resorted to for the purpose of reviewing their erroneous rulings, although mandamus would furnish more speedy, less expensive, and more adequate relief." In the *Morris-Wertz Case*, the question of the propriety of the writ was not raised nor passed upon, but the court decided the case upon its merits. Section 89 of chapter 3 of the present Code provides that "any officer or person upon whom any duty is devolved by this chapter may be compelled to perform the same by writ of

mandamus. The circuit courts, or the judges thereof in vacation, shall have jurisdiction by such writ, and shall, upon affidavit filed, showing a proper case, without a rule to show cause, issue such writ, to be returned, heard and determined without unnecessary delay." The board of canvassers are officers upon whom said chapter devolves the duty, among other things, of opening and examining and recounting the ballots, upon the demand of any candidate voted for at the election, the returns of which they are canvassing, and, after having done that, to declare the result of the election and issue certificates to the person voted for, showing the result. The language of the statute conferring this jurisdiction by mandamus is general. It says any officer may be required by that writ to perform any duty required of him by said chapter. But at common law it might have been invoked to compel any inferior court, board, or tribunal to act, but not to control or reverse the action of such court, board, or tribunal, or of an officer, where such action is one involving discretion, judicial or quasi judicial, but only where such action is merely ministerial. *Marcum v. Commissioners*, cited.

Is the recounting of votes by the board of canvassers a judicial or ministerial function? In *Brazle v. Commissioners*, 25 W. Va. 213, Judge Snyder says: "It is the duty of the county commissioners to determine ministerially the result, but necessarily by the exercise of discretion and judgment. They must first determine that the ballots, poll books, and certificates before them are genuine, and that they are certified in form and manner substantially according to the requirements of the statute, or to correct and put or have them put in form if they are not so, and that they are, in fact and in law, the returns of the election. This involves the exercise of quasi judicial power. While the duties and powers of the commissioners are mainly ministerial, they are quasi judicial, so far as it is their duty to determine whether the papers laid before them by the clerk and purporting to be returns are in fact such genuine, intelligible, and authenticated returns as are required by law. To the extent here indicated a judgment in the nature of a judicial function is necessarily exercised; for, if it be otherwise, the whole law is inoperative in respect to the power of the county commissioners to do any act whatever. But, aside from these judicial functions, the commissioners possess no discretionary powers. Their duties are purely ministerial." While the action of the board in determining whether a ballot is illegal, by reason of its informality or otherwise, is not specifically named in the foregoing quotation as a judicial function, it certainly involves the exercise of as much discretion and judgment as the other acts specifically mentioned, but it requires no extraneous evidence. Judge Cooley says: "The several

boards act for the most part in a ministerial capacity, and are not vested with judicial powers to correct the errors and mistakes that may have occurred with any officer who preceded them in the performance of any duty connected with the election, or to pass upon any disputed fact which may affect the result. Each board is to receive the returns transmitted to it, if in due form, as correct, and is to ascertain and declare the result as it appears by such returns; and if other matters are introduced in the returns than those which the law provides, they are to that extent unofficial and unauthorized, and must be disregarded. If a district or state board of canvassers assumes to reject returns transmitted to it on other grounds than those appearing upon their face, or to declare persons elected who are not shown by the returns to have received the requisite plurality, it is usurping functions, and its conduct will be reprehensible, if not even criminal. The action of such boards is to be carefully confined to an examination of the papers before them, and a determination of the result therefrom, in the light of such facts of public notoriety connected with the election as every one takes notice of, and which may enable them to apply such ballots as are in any respect imperfect to the proper candidates or offices for which they are intended, provided the intent is sufficiently indicated by the ballot in connection with such facts, so that extraneous evidence is not necessary for this purpose. If canvassers refuse or neglect to perform their duty, they may be compelled by mandamus." *Cooley*, *Const. Lim.* 782. This author also carefully marks the distinction between those acts which involve extraneous inquiries and evidence and those which do not, but fails to say whether the function in question is ministerial or judicial. In *Dunlevy v. County Court*, cited, Judge Dent, delivering the opinion of this court, said: "When the legislature re-enacted the election law of this state in 1891, it undoubtedly intended to take away all judicial functions from the election officers, and by careful provision make all their duties purely ministerial, subject to the control of the writ of mandamus."

Whether, at common law, the ascertainment and declaration of the result from the returns, including the ballots, upon a recount, is judicial or ministerial, it seems to have been the intention of the legislature to render that duty ministerial only, or to change the nature of the writ of mandamus and make it applicable to all the duties of election officers, whether ministerial or judicial, and to enlarge the scope of the writ of mandamus, and, as to the latter duties, make it operate as a certiorari, and thus summarily review the action of such officers. This is undoubtedly true as to the duty of a board of canvassers in respect to some offices, if certain portions of the section are to have any meaning. Section 89 proceeds

thus: "If a circuit court, or a judge thereof in vacation, shall proceed against any board of canvassers by mandamus, or otherwise, to control, in any manner, the action of said board in the performance of its duty, under the provisions of section 68 of this chapter, in any case concerning the election of a member of the house of delegates, or a state senator, and shall fail to enter a final order in such proceedings, settling all questions presented therein, within 15 days from the commencement of such proceedings, unless delayed by proceedings of the supreme court of appeals, or a judge thereof in vacation, the same shall be dismissed." In another place this section reads: "A mandamus shall lie from the supreme court of appeals, or any one of the judges thereof in vacation, returnable before such court, to compel any officer herein to do and perform legally any duty herein required of him." If, by mandamus, a circuit court may control the action of the board of canvassers "in the performance of its duty, under the provisions of section 68," respecting the election of a member of the house of delegates or a state senator, it can most assuredly do so in respect to any other officer. If the writ of mandamus will lie from the supreme court to compel such officers to perform legally their duty, no reason is perceived why the legislature should not have intended the writ to operate in the same way when issued by a circuit court, or a judge thereof in vacation. While there have been some expressions of doubt as to the jurisdiction, this court has declared in two cases that mandamus is the proper remedy, and in another has exercised the jurisdiction. The question being one of remedy, these precedents ought to be regarded as conclusive of it.

Another contention is that as the board of canvassers, at the time of the issuance of the writ, had completed the recount, declared the result, issued a certificate of election, and finally adjourned, such writ, even if proper during the progress of the recount or before the completion thereof, was then improper, because the board was then functus officio. Upon this question Judge Cooley says: "Though as these boards are created for a single purpose only, and are dissolved by an adjournment without day, it has been held that, after such adjournment, mandamus would be inapplicable, inasmuch as there is no longer any board which can act. But we should think the better doctrine to be that, if the board adjourn before a legal and complete performance of their duty, mandamus would lie to compel them to meet and perform it." Cooley, Const. Lim. 784. The case of *Rosenthal v. Board* (Kan. Sup.) 32 Pac. 129, 19 L. R. A. 157, is cited by counsel for plaintiffs in error in support of this contention. In that case, the clerk of the county court, in transmitting the returns to the state board of canvassers, by accident, mistake, or design, transposed the totals of the votes re-

ceived by two opposing candidates for the house of representatives, and thereby certified that the man who had not been elected had been. Before this mistake was discovered, the state board of canvassers met and canvassed the returns, including this wrong abstract, declared the result, and finally adjourned. About three weeks after the adjournment, the clerk of the county court sent up another certificate, with the correct returns, stating that his former abstract was incorrect and erroneous. The supreme court of Kansas held that mandamus would not lie to compel the board to reconvene and correct this mistake, because it had legally and completely performed its duty, for the reason that it had acted upon the returns from all the counties and without any notice of any error in any of them. So far as the members of the board knew, the certificate from the county in question was correct. But the court says: "If no abstract from Haskell county had been received by the secretary of state before the final adjournment of the board, on December 1, 1892, and if the state board had had no abstract or returns before them from Haskell county to act upon, it is possible that under the decision of *Lewis v. Commissioners*, 16 Kan. 102, mandamus would lie, upon the ground that only a partial canvass had been made. But that is not this case." The court goes on and remarks that the abstract was incorrect, but had come from the proper officer, was signed and certified by him, was duly authenticated by him, was not challenged or objected to, and there was nothing in the returns, or in the manner in which they were transmitted or received, to cause suspicion, or to demand any other action thereon than is usual and customary in such cases. Here is a plain intimation from that court that, if it had been shown that the state board of canvassers had not legally performed their duties, mandamus would have applied, and they could have been reconvened thereby and compelled to do their duty. In *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863, the proceeding was by certiorari, and this defense was there set up; but the court held that it was untenable, and that the board could be reconvened, and the cause remanded to them for further proceedings, although they had finally adjourned.

These views result in the conclusion that the provisions of section 34 of chapter 3 of the Code, requiring the names of all persons for whom the voter desires to vote to be in one of the columns on the ballot sheet, are mandatory; that any departure therefrom invalidates the ballot; that the writ of mandamus from a circuit court or a judge thereof in vacation lies to compel a board of canvassers to perform legally its duties; and that by such writ they may be reconvened, after adjournment, and compelled to correct errors committed by them in the discharge of their duties. The judgment and order of

the circuit court of Fayette county, entered in this case December 3, 1900, must therefore be affirmed.

MENT, J. I cannot concur in defeating the plainly-expressed will of the people, unless in submission to a positive, unequivocal enactment of the legislature, as to the meaning of which reasonable minds learned in the law cannot differ. In cases where the legislative enactment is evidently susceptible of two constructions, depending on the political bias of the construing mind, the will of the people should solve all doubts in their favor. This is a case strictly of this character. The legislative enactment being uncertain and silent wherein it could easily have been made certain and positive, the people took the advice of those learned in the law and followed it. The returns of the precinct commissioners, and the ascertainment of the canvassing board on recount demanded, showed the election of the Democratic candidate by a fair majority over the Republican. The will of the people was plain. The circuit judge, however, proceeded to overthrow it, not because from the face of certain ballots the choice for sheriff was not plain, but because the voter had permitted the names of certain candidates for offices, in nowise affecting the sheriffalty, to remain in the Republican column uneras-ed; thereby holding that, because the voters did not erase all the names of the candidates for all the offices in the Republican column, their votes could not be counted for sheriff, although they did erase the name of the Republican candidate, and plainly indicated their intention to vote for the Democratic candidate. The judge then proceeds to reject a sufficient number of votes to change the result of the election. Thus is the will of the people nullified and the will of the circuit judge substituted therefor. This court sustains the finding of the circuit judge, rather than that of the election officers. No reasoning, however learned, specious, or often repeated, can make wrong right, or right wrong, although, because of the temporary power of the reasoner, it may place "right upon the scaffold and wrong upon the throne." It is conceded in the court's opinion that the construction of the law by the election officers charged with the duty of executing it should not be overruled, except for cogent reasons. The word "cogent," here used, may be made to mean just,—that is, consistent with abstract justice,—or merely plausible, justified by political expediency. The latter meaning is often confounded with the former by him whose mental bias is such that he is unable to discriminate between them. This may result from a defect of judgment, rather than an error of the heart, and be the outcome of pure or selfish motives. Some persons are totally incapable of administering abstract justice, when they have any interest at

stake, however remote. They are to be pitied with a fellow-feeling pity, rather than condemned; for they labor under a natural mental blindness, which prevents a clear conception of the truth. For this cause the uniform decisions of the courts of all lands, from the highest to the lowest, have tacitly established a rule of practice as firmly as any rule of law; and this is that in all political cases a political conclusion, if plausible, will prevail over abstract justice. There have been notable exceptions to this rule, sufficient in number to prove it; but they are not so numerous as the stars in the heavens or the sands on the seashore. Whether this case comes under the rule or the exceptions is for the people to decide. Ordinary courts cannot be expected to arise to such sublime heights of justice. To do so is to court political martyrdom at the hands of political associates. Occasionally an exalted attempt is made to overthrow the rule, only to result in wormwood and gall. The people act on it presumptively, yet when an opportunity affords they sometimes administer a wholesome rebuke to its too strict adherents, while lesser offenders may go unpunished or apparently receive a rich reward for party fealty. Such is human justice, and as such it must be accepted and submitted to until the time of the restitution of all things, when the crooked shall be made straight, for to overcome it is a superhuman task. When men learn that to do justice is better than to win victories by injustice, this rule will perish away, but not until then. It is better than that confusion should continue to prevail in our elections that the questions here raised should be settled according to precedent, though settled unjustly, although it is better still if they are settled justly.

(39 Va. 625)

KING v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

DEEDS—CONSTRUCTION—CONDITIONS SUBSEQUENT—EJECTMENT—STATUTES.

1. A judgment sustaining a demurrer to both the declaration and bill of particulars will not be reversed for having included both, where the counsel agreed in writing that the case as made by both should be considered.

2. A suit construing certain deeds and the rights of the parties thereunder will not be considered *res judicata* of an action of ejectment founded on an alleged breach of the conditions in the deeds.

3. Two deeds dated 1848 and 1852, conveying land to a railroad company, contained provisions that the company should have no right to sell or convey the land to any other person, or to use any portion of the land for any purposes other than those strictly connected with the business of the road, with no right to erect any buildings on the land for residence of the agents or servants of the company. An action of ejectment was brought by the alienee of the grantor on the ground that the provisions were conditions subsequent, and had been breached, entitling him to a re-entry. *Held*, that the pro-

visions were covenants, and not conditions subsequent, and hence an action of ejectment was properly dismissed as not the proper remedy for breach of covenant.

4. Code, § 2730, declares that plaintiff in ejectment shall state whether he claims in fee, for life, or for years, specifying the duration of his term; and section 2748 provides that the verdict in such suit shall specify the estate found in the plaintiff. *Held* that, where plaintiff's estate was only a right to use land conveyed to a railroad company until the company should desire to use the same for railroad purposes, his estate, being one for an indefinite period, which period was not capable of being stated, was not an estate for which ejectment would lie under such sections.

Error from corporation court of Bristol.

Action by Joseph L. King against the Norfolk & Western Railway Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Bullitt & Kelly, D. D. Hull, Jr., and Curtin & Haynes, for plaintiff in error. Jos. I. Doran and Fulkerson, Page & Hurt, for defendant in error.

HARRISON, J. This action of ejectment was brought to recover the possession of certain real estate in the city of Bristol. The declaration is in the usual form, and unexceptionable on demurrer. In response to the demand of the defendant, and in pursuance of the court's order requiring the same, the plaintiff filed a statement or bill of particulars setting forth fully the grounds of his claim. The demurrer was directed to the declaration and the bill of particulars as being insufficient in law. This court has held that the bill of particulars required by section 3248 of the Code is no part of the declaration, and a demurrer will not lie for defects in such bill. *George Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167. Under this ruling it would be necessary to reverse the judgment of the trial court sustaining the demurrer, but for the agreement in writing between counsel, filed with the record, that we may consider on demurrer the case made by the declaration as supplemented by the bill of particulars.

Considering the case thus made, we are of opinion that the defendant in error cannot rely upon the case of *King v. Railroad Co.*, 90 Va. 210, 17 S. E. 868, as an adjudication of all the questions raised in this litigation. The scope of that decision was to construe the deeds of 1848 and 1852, and the rights of the grantor and grantee thereunder, irrespective of any allegation of a breach by the grantee of the alleged conditions of the deeds. See pages 215 and 217 of the court's opinion, and pages 870, 871, 17 S. E.

The gravamen of the complaint in this case is alleged breaches of conditions in the deeds, which, it is insisted, entitle the plaintiff in error to an absolute recovery of all the premises.

It appears from the bill of particulars that about 50 years ago, by two separate deeds, mes King, Sr., through whom the plaintiff

in error claims title, conveyed to the Virginia & Tennessee Railroad Company, the predecessor in title of the defendant in error, the lands now in controversy, for railroad purposes. The two deeds referred to are dated, respectively, June, 1848, and June, 1852, and the language material to the present consideration is as follows:

First deed: "Provided, however, that the said company shall have no power to sell or convey said land to any other person, nor shall the said company have the right to use any portion of said land for any other purposes than those strictly connected with the business of the road, nor shall said company have the right to erect any buildings on said land, designed for residence for the agents or servants of the company or for any other person."

Second deed: "Provided, however, that the said company shall have no power to sell and convey said land, or any portion of it, to any other person whatsoever; nor shall they have the right to use any portion of said land for any other purpose than those strictly connected with the business of the road."

The contention of the plaintiff in error is that these provisions, taken together, constitute conditions subsequent, the nonfulfillment of which results in a forfeiture of the estate, giving the grantor the right to re-enter and possess himself of his former estate; and that this right has passed to the plaintiff in error as alienee of the original grantor.

Conditions subsequent are not favored in law, because they tend to destroy estates. When relied upon to work a forfeiture, they must be created by express terms or clear implication, and are strictly construed. If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter, and adopt the more benignant construction upholding the instrument, and leaving the parties to pursue their appropriate remedies for the breach of covenant. 4 Kent, Comm. pp. 129, 130.

We are of opinion that the language employed in the deeds under consideration is apt language to create a fee simple, and that the superadded words, under the authorities, amount to covenants, rather than conditions. The deeds are not voluntary, as contended, but are based upon the benefits to accrue to the reserved property of the grantor by reason of the use of the granted premises as a railroad terminal; hence they must be interpreted as any other deeds based upon a valuable consideration. The language is to be taken most strongly against the grantor, and most favorably to the grantee.

The stipulation against alienation does not, as contended, constitute the estate granted a fee qualified or base fee. Such an estate is one that may, by its limitation, continue forever, but has a qualification annexed in pursuance of which it may be determined at any moment. 2 Minor, Inst. 87.

The law favors the free alienation and

transfer of property, and it is not a strained construction to hold that an alienation by one railroad company to another, for the purposes originally contemplated by the grantor, would not violate the spirit of the instrument. The question that such an alienation does not work a forfeiture in this case has been adjudicated by the former decision of *King v. Railroad Co.*, 90 Va. 210, 17 S. E. 868, for that suit was by the predecessor in title to the present plaintiff, and against an alienee of the original grantee.

The intention of the parties to the instrument is of controlling efficacy. 4 Kent, Comm. p. 132. In ascertaining the intention of James King, Sr., it is to be observed that neither deed contains a clause of re-entry. While the presence of a clause of re-entry is not essential to the creation of a condition subsequent, the absence of such a clause, in connection with other circumstances, tends to sustain the construction that a covenant, rather than a condition, was intended. There being no clause of re-entry, we are left untrammelled to ascertain the intention of the parties in the light of all the circumstances surrounding them at the date of the execution of the deeds, as disclosed by the deeds themselves and by the facts set forth in the bill of particulars.

In the light of these sources of information, and of the authorities, we are of opinion that by the deeds in question James King, Sr., intended, without thought of a possible reverter to himself, to establish upon the land granted a railroad terminal, the prime object being to enhance the value of his remaining lands lying adjacent to those granted; that the parties did not propose, by the language of the deeds, to create technical conditions, a breach of which would work a forfeiture of the estate, but only intended to create such restrictions as were thought necessary to regulate and to secure their permanent occupancy strictly for railroad purposes. In this connection it may be remarked that the uses to which the property has been put, as set out in the bill of particulars, appear to be all connected with the business of the defendant company.

The fact that in the original litigation the plaintiff did not rely upon the alleged grounds of forfeiture, then existing, which are now insisted upon, is significant, in that it shows the construction placed by the parties upon the deeds at that time, and such construction is entitled to weight when the language employed is ambiguous, and the intention of the parties is the subject of inquiry. The conclusion being that covenants, and not conditions, were contemplated, it follows that the demurrer was properly sustained, as ejectment does not lie for the breach of a covenant.

Under paragraph 7 of the bill of particulars it is claimed that portions of the land in question are not now, and never have been, used by the defendant railroad company, and

that the plaintiff is entitled to their possession under the deeds, as construed by this court in its former decision, and has the right to recover such unused portions in this action. In the former case the deeds in question, which are made part of the bill of particulars, were construed, and the rights of the parties thereunder clearly defined and settled, particularly with respect to the right of the grantor to the use of that portion of the land not used by the defendant company, the court holding that "the deeds in question were valid conveyances, and should be construed together. That they invest the grantee with a fee-simple title to the land of the grantor covered or embraced by them, or either of them, subject to certain restrictions and reservations. * * * That under the reservation in the deed of the grantor to use any portion of the land not required by the railroad company for its purposes, yielding possession thereof whenever required or needed for the purposes of said company, the grantor or those claiming under him have no right to make any permanent changes in the property, but merely to use it in the condition in which it is, to cultivate and take from it such products as it may yield, and for that purpose he may inclose the part so cultivated, provided that the part so cultivated is not needed by the railroad company for any of its purposes; and provided, further, that no inclosure shall interfere with the rights of the railroad company in the use of the remainder of the land conveyed; but the grantor has no right to place any of said land in such a condition that he cannot yield it up in the condition in which he received it, when it is needed for the purposes of the railroad company. * * * It was the intention and legal operation of the deed to grant and to acquire, respectively, land to be subsequently used as the needs and enterprise of the grantee should develop. The grantor's use is, by the express terms of the deeds, subject at any and all times to the right of the grantee to take possession whenever the lands should be needed by the company." *King v. Railroad Co.*, 90 Va. 210, 17 S. E. 868.

The claim made by the declaration is to the whole premises in fee simple absolute, while the claim asserted under clause 7 of the bill of particulars is to the use of that portion of the land not required by the defendant company for its purposes. Under the construction put upon the deeds by the former decision, the plaintiff in error could only assert a right to the mere use of the unemployed lands, and that for an uncertain and indeterminate period,—only until the same might be required by the defendant for its purpose; an indefinite time, which could not be stated in advance.

Section 2730 of the Code provides that "the plaintiff shall state [i. e. in his declaration] whether he claims in fee or for life, or the life of another, or for years, specifying such lives or the duration of such term, and when

he claims an undivided share or interest he shall state the same."

Section 2748, following the language of 2730, provides that "the verdict shall also specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be a term of years and specifying the duration of such term."

The plaintiff in error does not assert title to, and under the deeds as heretofore construed cannot assert title to, any such estate as is contemplated by these sections, and therefore cannot maintain ejectment to recover the right to the use of the land in question.

Upon the whole case, the judgment must be affirmed.

Affirmed.

(99 Va. 640)

SUPERVISORS OF WASHINGTON COUNTY v. SALTVILLE LAND CO.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

TAXATION — HIGHWAY PURPOSES — SCHOOL PURPOSES — STATUTES.

1. As Const. art. 7, § 2, authorizing the county board of supervisors to fix the county levy, does not specifically authorize the board to impose a road tax for county purposes as part of such levy, Acts 1895-96, p. 290, exempting property in a certain town from all road taxes, providing the town kept the roads and streets in good condition, was valid.

2. Const. art. 8, § 8, provides that the general assembly shall apply certain taxes to the school fund for the benefit of all children in the state, and that each county and public free-school district may raise additional sums by a tax on property for school purposes. Code, § 833, as amended (Pollard's Supp. p. 89), authorizes the board of supervisors of each county to levy a tax on all property in the county assessed with state taxes. *Held*, that a county board of supervisors had authority to levy a tax for county public-school purposes, and that Acts 1895-96, p. 290, exempting property within a certain town in the county from all school taxes, provided the town maintained its own schools, was void, the town being part of the county for county purposes.

Error from circuit court, Washington county.

Action by the Saltville Land Company against the supervisors of Washington county. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Honaker & Hutton, for plaintiff in error. White & Penn, for defendant in error.

BUCHANAN, J. By section 2 of the charter of the town of Saltville, the territory within its corporate limits, which is partly in the county of Washington and partly in the county of Smyth, is made a separate road and school district, and all persons and property therein declared to be exempt from all road taxes, taxes for the support of the poor, and from county and district public school purposes, provided the town keeps its streets and alleys and the public roads within its limits in good order, supports its own poor,

and maintains its own public schools. Acts 1895-96, p. 290.

The authorities of the county of Washington, denying the validity of so much of the charter provision of the town as exempted the property within its limits from taxation for county purposes, assessed the same with taxes for the year 1899.

To be relieved from such assessment on its land, the defendant in error made an application to the county court of Washington county. That court denied the relief sought, but upon a writ of error its judgment was reversed by the circuit court, and the defendant in error exonerated from the payment of taxes assessed on its land for county road and county public-school purposes.

To that judgment this writ of error was awarded.

It seems to be well settled that the general assembly, in the absence of constitutional restrictions, may impose upon a taxing district, such as a town, the duty of keeping in repair the streets and roads within, and relieve it from taxation for roads without, its limits.

When the nature of the case does not conclusively fix it, says Judge Cooley, the power to determine what shall be a taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions. The right to do this where the constitution has interposed no obstacle is declared to be not now open to controversy, if, indeed, it ever was. The legislature judges finally and conclusively upon all question of policy, as it may also upon all questions of fact which are involved in the determination of a taxing district. Cooley, Tax'n, pp. 149, 150.

This statement of the rule is fully sustained by the decided cases and text writers. Desty, Tax'n, § 58, p. 276, etc.; Burroughs, Tax'n, § 272; 2 Dill. Mun. Corp. (4th Ed.) § 737. See Langhorne v. Robinson, 20 Grat. 661.

There is nothing in the constitution which prohibits or prevents the general assembly from incorporating a town whose territory lies in two counties, or from making the town a separate road district, and declaring that the lands lying within the town shall be exempt from taxes for roads lying without the town upon condition that it keeps up its own streets and alleys and the public roads within its limits.

It is conceded by the board of supervisors that there is no express provision of the constitution which authorizes them to impose a county road tax, but it is argued that the county levies are made up in part of county road taxes, and as, by section 2, art. 7, of the constitution, they are authorized to fix the county levies, therefore they have a constitutional right to impose a road tax for county purposes which cannot be taken away by the general assembly.

If the constitution had declared what taxes should constitute county levies, and road taxes had been one of them, there would be much force in the contention made; but the constitution does not so declare, and, in the absence of any express constitutional provision authorizing the board of supervisors to levy taxes for county road purposes, it cannot be said that the provision of the charter of the town exempting the property within its limits from county taxation for road purposes is unconstitutional.

We are of opinion, therefore, that the circuit court did not err in holding that the land of the defendant in error was not liable for the road taxes assessed upon it by the county.

The next question is, was it liable for county public-school taxes?

Section 8, art. 8, of the constitution, provides that "the general assembly shall apply the annual interest on the literary fund, the capitation tax provided for by this constitution for public free-school purposes, and an annual tax upon the property of the state of not less than one mill nor more than five mills on the dollar, for the equal benefit of all the people of the state, the number of children between the ages of five and twenty-one years, in each public free-school district, being the basis of such division. Provision shall be made to supply children attending the public free schools with necessary textbooks, in cases where the parent or guardian is unable, by reason of poverty, to furnish them. Each county and public free-school district may raise additional sums by a tax on property for the support of public free schools. All unexpended sums of any one year in any public free-school district shall go into the general school fund for redivision the next year: provided, that any tax authorized by this section to be raised by counties or school districts shall not exceed five mills on a dollar in any one year, and shall not be subject to redivision, as hereinbefore provided."

By this section it is made the duty of the general assembly to provide a state fund for the public free schools of the state, and as one of the means for raising it the general assembly is required to impose a tax upon property. This section also conferred upon each county and public-school district the power to raise additional sums for public-school purposes by a taxation upon property. The legislature gave effect to these provisions of the constitution by imposing a state public-school tax, and by providing such machinery as was necessary to enable the counties to levy a tax for county and public-school purposes.

By section 833 of the Code, as amended (Pollard's Supp. p. 89), the board of supervisors of each county are authorized to levy a tax upon all property in the county assessed with state taxes (with certain exceptions which do not affect this case), suffi-

cient to raise the amount recommended by the county school board in their estimates for county school purposes, or so much thereof as they might allow.

There can be no question that under these constitutional and statutory provisions the board of supervisors had the right to levy a tax for county public-school purposes upon all property within their jurisdiction upon which the state imposed taxes.

In discussing the question of apportioning taxes, Judge Cooley states, as a general principle of taxation, that "the taxing district through which a tax is to be apportioned must be the district which is to be benefited by its collection and expenditure. The district for the apportionment of a state tax is the state, for a county tax the county, and so on. Subordinate districts may be created for convenience, but the principle is general, and in all subordinate districts the rule must be the same." Cooley, *Tax'n* (2d Ed.) 141, 244; Cooley, *Const. Lim.* (8th Ed.) 610; 1 *Desty, Tax'n*, § 10, p. 28, etc.

But it does not follow, necessarily, that, because the land of the defendant in error was within the territorial limits of Washington county, it was within the jurisdiction of the board of supervisors. Land within the limits of a city may be within the territorial limits of a county, and yet not be within the jurisdiction of the board of supervisors of that county. A city is entitled, under the provisions of article 6 of the constitution, to a separate government, and, when incorporated, is no part of the county for governmental purposes. But this is not true of a town. Its people and property are still subject to the county government for county purposes.

The town of Saltville, so far as it lies within Washington county, is as much a part of the county as the county is a part of the state, not merely territorially, but governmentally. The citizens of the town have the same rights in the selection of county officials and in the management of county affairs that they had before the act of incorporation. The people and property of the town are as much within the jurisdiction of the county, for all county purposes, as they ever were.

The levy of a county school tax is manifestly for a county purpose. It is made so by the constitution. The right of the county to impose the tax, being derived from the constitution, cannot be taken away by the general assembly. *Robertson v. Preston*, 97 Va. 296, 33 S. E. 618. This being so, it follows that so much of section 2 of the charter of the town as declares that property within its corporate limits shall be exempt from county public-school taxes or levies is unconstitutional and void.

We are of opinion, therefore, that the circuit court erred in so far as it held that the land of the defendant in error had been erroneously assessed with county-school levies

or taxes. For this error its judgment must be reversed, and this court will enter such judgment as it ought to have entered.

Reversed.

(99 Va. 872)

WATTS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 12, 1901.)

CRIMINAL LAW—FORMER JEOPARDY—INDICTMENT—TRIAL—SUFFICIENCY OF RECORD—SUFFICIENCY OF EVIDENCE.

1. A trial and conviction before a police justice, which is set aside in the hustings court on defendant's appeal, on the ground that the indictment is not indorsed as a true bill, is not a trial on the merits, which will constitute former jeopardy, and bar a further prosecution.

2. A record entry in the hustings court, ordering an indictment filed in such court to be certified to the police justice for trial, is a sufficient record of the presentment of the indictment.

3. Where a prisoner was allowed by a deputy sheriff to work around the jail, and he escaped, through the negligence of the deputy in failing to lock him up while the deputy went to supper, and complaints had been made to the sheriff about allowing the prisoner to go at large, and the sheriff had full knowledge that the prisoner was not confined at all times, and had consented to the act of a bailiff in allowing the prisoner to work around the jail, a conviction of a sheriff for negligently allowing the prisoner to escape was sustained by the facts.

Error from hustings court of Staunton.

N. C. Watts was convicted of negligently allowing a prisoner to escape while he was sheriff, and he brings error. Affirmed.

Patrick & Gordon and Curry & Glenn, for plaintiff in error. A. J. Montague, Atty. Gen., for the Commonwealth.

KEITH, P. N. C. Watts, plaintiff in error, who was, on the 15th day of June, 1900, sheriff of the county of Augusta, and as such, by virtue of section 934 of the Code, keeper of the jail of said county, was on February 19, 1901, indicted for negligently suffering D. H. Taylor, a prisoner lawfully committed to his custody, to escape. A copy of this indictment was, in accordance with section 4106 of the Code, as amended by an act of 1897-98, certified to the police justice of Staunton, before whom Watts was tried, convicted, and fined \$50. From this judgment he appealed to the hustings court, assigning numerous errors; among others, that the indictment was not indorsed "A true bill"; and the hustings court, overruling all other objections to the indictment, but being of opinion that it was necessary to its validity that it should be so indorsed, set aside the judgment of the justice, and directed the clerk to forthwith certify a true copy as found by the grand jury, which was done. The copy thus certified contains the indorsement: "A true bill. Ernest Nothnagle, Foreman."

It is unnecessary for us to express an opinion upon the propriety of setting aside the judgment for this cause, but we may at this joint dispose of one contention of the plain-

tiff in error, which is that the judgment of the justice from which he appealed, and which was set aside upon his assignment of a purely formal error in the proceedings, entitled him to an acquittal. That was not a trial upon the merits, and it was set aside at his instance. It is hardly necessary to cite authority to show that these facts constitute no bar to a further prosecution.

Watts was again tried upon this indictment, and a judgment rendered against him imposing a fine of \$50, from which judgment he appealed to the hustings court, where he was tried before a jury, found guilty of a misdemeanor, and a fine imposed against him of \$50, upon which the court entered judgment.

The case is now before us upon errors assigned to the rulings of the hustings court.

It is contended by plaintiff in error that he was convicted without a warrant, and without an indictment against him.

It is urged that the indictment under section 4106 takes the place of a warrant, and constitutes the authority upon which the justice proceeds; and it is contended that it does not appear from the record that the grand jury ever found an indictment in this case, and the judgment of the general court in *Cawood's Case*, 2 Va. Cas. 527, is relied upon to establish that proposition.

It was there held that, "when a bill of indictment is found by the grand jury, and indorsed 'A true bill' by the foreman, it should be brought into court, presented by the grand jury, and then the finding should be recorded"; that "an omission to record the finding cannot be supplied by a paper purporting to be an indictment, with an indorsement 'A true bill,' signed by the person who was the foreman of the grand jury at that term. Nor can it be supplied by the recital in the record that he stands indicted, nor by his arraignment, nor by his plea of not guilty. It cannot be intended that he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury is as essential as the recording of the verdict of the jury."

To these propositions we have nothing to object, but the case before us is easily distinguished from that upon which counsel relies. It appears from this record that the following entry was made upon the records of the hustings court: "September 6, 1900. Ordered, that the indictment presented by the grand jury against N. C. Watts for misdemeanor be certified to the police justice of this city, to be by him disposed of according to law. A copy. Teste: Newton Argenbright, Clerk."

There is a case almost identical with the one under consideration, also reported in 2 Va. Cas., at page 160,—*Myers v. Com.*,—where the defendant was presented for unlawful gaming, the entry on the minute book being as follows:

"Ordered, that Joshua Myers, who was this day presented by the grand jury, be summon-

ed to appear here at May court next, to answer the said presentment."

On the trial the defendant pleaded that there was no record of the supposed presentment which he was summoned to answer remaining in said court, but the court held that there was such record, and judgment was rendered for the fine, the court being of opinion that the minute book of the clerk obviously referred to the written presentment made by the grand jury, which presentment itself was a part of the records of the court.

This case seems to be directly in point, and is conclusive of the first assignment of error.

It is assigned as error that the indictment is demurrable. We are of opinion that this indictment sufficiently recites the indictment, trial, and conviction of D. H. Taylor, that he was in the proper legal custody of plaintiff in error at the time of his escape, and that the escape was the result of the negligence of plaintiff in error. There is nothing in the record from which it can be inferred that the indictment was amended by the hustings court, or the clerk thereof. It does appear that, as originally certified to the police justice, it was an incomplete copy, in that it omitted an indorsement, which, in the judgment of the hustings court, was necessary to its validity as an indictment, but that indorsement was not interpolated by authority of the hustings court or its clerk, but the clerk, upon the order of the court, prepared and certified a true copy, in which the omitted indorsement appeared.

The objections to which we have alluded are all stated as grounds of demurrer. It is obvious that the greater part of them could not, with propriety, be considered upon demurrer, but could be presented only by a motion to quash, or a proper plea. The indictment was, we think, sufficient, and the demurrer properly overruled.

It is also assigned as error that the hustings court did not set aside the verdict of the jury as contrary to the law and the evidence, and here the objection is reiterated that there was no indictment or warrant upon which to found the case, and no charge of any offense. This we have already sufficiently considered. Secondly, that it does not appear from the evidence that Taylor was in the lawful custody of appellant at the time he escaped; and, third, that, if Taylor was in the lawful custody of the deputy sheriff, plaintiff in error is not liable.

It is charged in the indictment, and shown by the evidence, that D. H. Taylor was tried at the July term of the county court of Augusta county, in the year 1899, for breaking into an outhouse in the nighttime, and stealing two turkeys and five chickens; that for this offense he was found guilty by the jury, and sentenced to confinement in the county jail for 12 months from the 29th day of July, 1899, and to pay a fine of \$100; that on the 15th of June, 1900, while the said

judgment still remained in full force, he escaped, and is still at large. During all this period plaintiff in error was sheriff of Augusta county, and as such, by virtue of section 934 of the Code, the keeper of its jail. It is true that sheriffs are authorized by section 817 to appoint deputies in the manner therein prescribed, who are authorized to discharge any of the official duties of the principal during the continuance of his office, unless it be some duty the performance of which by a deputy is expressly prohibited by law. There is no doubt that the duty imposed upon the sheriff to be the keeper of the jail may be performed by his deputy, and in fact is, as a rule, intrusted to him. It remains, however, that the sheriff is the keeper of the jail, and the legal custodian of those who are lawfully confined in it. It is true that he is not criminally responsible for the acts of his deputy or agent. As was said by the general court in *Com. v. Lewis*, 4 Leigh, 686: "This is, in fact, a criminal proceeding against a high sheriff for the negligence or misfeasance of his deputy;" and the court very properly held that the sheriff was not criminally liable for such negligence or misfeasance, and directed an acquittal.

In this case Watts is not charged with any offense committed by his deputy, but that he "unlawfully did negligently suffer him, the said D. H. Taylor, to escape from his, said N. C. Watts', custody, and to go at large, against the peace and dignity of the commonwealth of Virginia." The charge against him is of his own personal negligence, and not the imputed negligence of his deputy or agent.

It appears from the instructions given by the hustings court that it fully recognized the principle announced in *Com. v. Lewis*, supra. The first instruction given is "that the sheriff, as such, is, by virtue of his office, jailer, but with power to appoint a deputy to discharge the duties thus devolved on him, and he is not criminally liable for the acts of such deputy, unless he actually concurred in and directed them, in which case he must be regarded as having recalled the authority theretofore given by him to his deputy, and to have committed the act himself."

It appears from the evidence of Thomas A. Dawson—doubtless an honest, but certainly not an unfriendly, witness—that he was the deputy sheriff of Augusta county, duly appointed by Watts, the sheriff, and as such he was in charge of the jail; that in July, 1899, Taylor was committed to his custody, and received into the jail; and that he escaped on the 12th day of June, 1900, his term of imprisonment not having at that time expired. In answer to the question as to how he got away, Dawson replied: "We had him working around the jail there, and about 7 o'clock on that day, after I finished supper, I went to look him up, and found

that he was gone. Q. He was then outside the jail? A. Yes, sir; he was not locked up. When I went to supper, I left him in the lower part of the jail, but he was not locked up. Q. Was this the first time that he had been turned out? A. No, sir; we had him working around the jail there for some time."

It appears that the liberty allowed the prisoner was not only notorious in the community, but was offensive to certain citizens, and that complaint was made. It seems that the deputy talked with Watts and with the county judge upon the subject, and that the judge said to him that "he saw no impropriety in letting him out in the daytime and locking him up in the nighttime. After this I talked with Watts, and he told me the same thing that the judge did. Mr. Watts told me that he talked with the judge, and that Judge Chalkley told him the same thing he told me."

Judge Chalkley, recalling the conversation which he had with Watts, said: "I saw Watts, and had a talk with him, and told him that certain citizens had come to me with the complaint that Taylor was allowed to go about the streets, and in the county, and that the sight of him in the county had incensed these people. This complaint was made to me about six weeks or two months before I saw Mr. Watts. I had nothing to do with it except as 'go-between.' I saw Watts, and told him the complaint, and suggested to him and advised that this man be kept out of sight of the public. I do not remember if I advised Mr. Watts that he should be locked up in jail, but that he should be kept out of sight of the public. I think we had a conversation about letting this man work about the jail, and I gave my consent to that. Watts represented to me that he was a very valuable man, and I advised Mr. Watts to keep the man out of the sight of the public."

Watts was put upon the stand, and his evidence differs in no material respect from that of Judge Chalkley and Dawson. His account of the interview between the judge and himself is as follows:

"I went to Newport News that night,—that was on the 28th of May,—and when I came back the judge came down to my office, and knocked on the window, and asked me to come to his office, and I went up there, and he told me about the complaint that was being made about this man going out in the county, and that he was running at large. I told him that I had the man out working, and that he [the judge] gave his authority, and I said that I thought it ought to be looked up. The judge said for me to keep him down below, and not let him out on the street."

It appears from this testimony that Watts not only had full knowledge that the prisoner was being suffered to go at large, but that it was done with his full approbation,

by his authority, and under his direction. His statement in the quotation from his evidence just made, in which he gives an account of the interview between himself and the judge of the county court, in which he uses this language: "I told him that I had the man working, and that the judge gave his authority, and I said that I thought it ought to be looked up,"—is sufficient to warrant the jury in finding not only knowledge and acquiescence, but the active participation in the offense charged, sufficient of itself to sustain the verdict of the jury.

That the offense was committed, there is no doubt; that a prisoner in lawful custody was by the official charged with his care negligently suffered to escape, cannot be questioned. If Watts be not responsible, then the offense must go unpunished, for it would be a harsh judgment which would acquit the principal and punish the deputy, who had acted within the line of duty approved by, and indeed prescribed to him by, his superior officer.

It is suggested that the facts could not do more than make Watts an accessory before the fact, but "at common law, in misdemeanors, there are no accessories, all concerned being principals." 1 Whart. Cr. Law, § 223. But we do not rest our judgment upon that doctrine. Watts was indicted for his own dereliction in the performance of his duty. The jury, upon proper instruction, found him guilty; and the evidence, in our opinion, sustains their verdict.

The judgment must be affirmed.
Affirmed.

(51 S. C. 491)

BRANHAM v. CAMDEN COTTON MILL.
(Supreme Court of South Carolina. Sept. 7, 1901.)

INJURY TO EMPLOYE—PLEADING.

A complaint alleged that plaintiff was a machinist in the employ of defendant, and while in the engine room he placed his hand on the latchet of the engine, at the request of the engineer, while the latter was making a wedge fastening, and that in so doing his hand was badly hurt; and charged negligence of defendant in furnishing defective appliances, and in not stopping the engine for repairs. It nowhere alleged that defendant required plaintiff to make any repairs while the engine was in operation, or that the engineer was his superior officer, with power to direct his services. Held not to state a cause of action.

Appeal from common pleas circuit court of Kershaw county; Townsend, Judge.

Action by Starling W. Branham against the Camden Cotton Mill. From judgment sustaining demurrer of defendant, plaintiff appeals. Affirmed.

Wm. D. Trantham, for appellant. Wm. M. Shannon and Clark & Muller, for respondent.

JONES, J. This is an appeal from an order sustaining a demurrer for insufficiency

to the following complaint: "(1) That the defendant, the Camden Cotton Mill, is now, and was at the time hereinafter mentioned, a corporation duly created under and by the laws of the state of South Carolina, and is and was operating a cotton mill at Camden, in said county and state; and the plaintiff was, on said date hereinafter mentioned, in its employ as a machinist. (2) That on November 3, 1890, he walked from the machine shop into the engine room, which were near each other, and was asked by S. B. Turner, the engineer, to assist him in adjusting the engine, which was out of gear, it being the plaintiff's duty as machinist to adjust or repair, and to assist in adjusting or repairing, any of the machinery about said mill that might need it; that the dashpot of the engine was out of order, the latch thereof not catching; and said engineer directed the plaintiff to put his hand on the latch, and hold it in place, for a minute or such matter, while he, said engineer, could make a small wooden wedge with which to tighten it; and that, while thus engaged, the plaintiff's left hand, with which he was holding said latch in place, caught in machinery, without any fault or negligence on his part, and was badly lacerated, cut, and bruised, the forefinger being mashed and cut off near the nail, and the middle finger cut, mashed, broken, and crushed nearly its full length, so that the plaintiff was thereby seriously, painfully, and permanently injured. (3) That the mill was running all the time, night and day, and the engine could not be stopped without also stopping the mill; that the engine had been out of gear two or three days immediately before said accident, which fact was known to the engineer, and also, as he is informed and believes, to John Schofield, the superintendent of the mill; that the defendant should have furnished reasonably safe machinery with which to run its mill, or should have stopped the mill while its machinery was being adjusted or repaired, and it was grossly negligent in failing to do so on this occasion." The fourth allegation relates to the damages sustained, concluding with the statement "that he [plaintiff] has been damaged through the gross negligence of the defendant, as aforesaid, in the sum of \$2,000." The specific grounds of demurrer were: "(1) Because the allegations in the complaint do not show negligence on the part of the defendant; (2) because the allegations in the complaint do show contributory negligence on the part of the plaintiff; (3) because it does not appear from the allegations of the complaint that the injury complained of resulted from the alleged negligence of the defendant as a proximate cause thereof." The circuit court sustained the demurrer, but did not state whether his order was based upon the insufficiency of the allegations as to defend-

ant's negligence, or upon the ground that the complaint shows contributory negligence on the part of plaintiff.

We approve the order sustaining the demurrer upon the first and third specifications above. As stated in *Jarrell v. Railroad Co.*, 58 S. C. 493, 88 S. E. 911: "To constitute a cause of action for negligence, the complaint must not only show that the defendant was negligent, but that the negligence of the defendant was the proximate cause of the injury." The conduct of defendant alleged to be negligent was: (1) Failure to furnish reasonably safe machinery with which to run its mill, or (2) failure to stop the mill while its machinery was being adjusted or repaired. Negligence involves a breach of some duty owing to the complaining party. Now, while it is true the master owes to his employé the duty of furnishing reasonably safe machinery with which the employé is required to operate, the rule has no application to the facts alleged in this case. The plaintiff was not required, nor was it his duty, to operate the defective engine. His business and duty as machinist was to repair defective or unsafe machinery, and it would be strange indeed if the very condition which gave rise to his employment and duty should itself be a breach of the employer's duty to him. We think it clear that the defendant did not owe any duty to plaintiff to furnish an engine with dashpot and latch in order. In reference to the disjunctive allegation that defendant should have stopped the mill while the machinery was being operated, adjusted, or repaired, there is nothing to show that it was the duty of the defendant to stop the mill. It is not alleged that defendant required plaintiff to make any repairs on said engine while it was in operation, for, while it is alleged that the engineer directed him to hold the latchet in place while the engineer prepared a wedge to tighten it, it does not appear that the engineer was his superior officer, with power to control or direct his services. It is not alleged that the defendant knew, or ought to have known, that plaintiff was attempting to hold the latchet for the engineer while the machinery was in motion; nor does it appear that plaintiff requested, or had any reason to believe or expect, that the mill would stop while he was so engaged. On the contrary, it appears that he took hold of the latchet while the engine was running and the engineer was engaged in preparing a wedge, and so without any expectation of the mill stopping. We fail to see wherein any negligence of defendant was a proximate cause of the injury, but, on the contrary, it appears that the proximate cause of the injury was plaintiff's voluntary and unnecessary exposure of his person to the moving machinery. The judgment of the circuit court is affirmed.

(61 S. C. 496)

HUTTO v. SOUTH BOUND R. CO.

(Supreme Court of South Carolina. Sept. 7, 1901.)

ACCIDENT AT CROSSING—STATUTORY SIGNALS—QUESTION FOR JURY.

1. Where a railroad company fails to give the statutory signals at a crossing required by Rev. St. § 1685, and a person on the crossing is killed thereby, the railroad company is liable, under section 1692, providing therefor, unless the person injured was at the time of the collision guilty of negligence, or was acting in violation of law, such negligence or unlawful act contributing to the injury.

2. Where a person was killed on a railroad crossing by a train running in the nighttime without giving the statutory signals, and there was no evidence that he would have been killed even if such signals had been given, the testimony was sufficient to carry the case to the jury to determine whether the failure to signal was the proximate cause of the injury.

Appeal from common pleas circuit court of Bamberg county; Gage, Judge.

Action for damages by Carrie Hutto, administratrix, against the South Bound Railroad Company for negligently killing Lucius Hutto. From judgment of nonsuit, plaintiff appeals. Reversed.

H. S. Dowling and Howell, Gruber & Bos-tick, for appellant. C. J. C. Hutson and L. F. Izlar, for respondent.

JONES, J. This is an appeal from an order of nonsuit in an action for damages for wrongful act causing the death of plaintiff's intestate. The "case" states the following: "The testimony on the part of plaintiff showed that the deceased was struck and killed by a passing locomotive and train of cars on defendant's railroad, operated by the lessees of defendant, at a public crossing in Bamberg county, to wit, the crossing of the Barnwell and Bamberg public highway, one of the main thoroughfares of this county, on the night of September 20, 1899, between the hours of 10 and 11 o'clock. It appeared from the testimony that the deceased had been spending the evening at a house in the neighborhood with a number of young negroes, and on departing to go home had gone with his companions along the said highway for some distance up to and upon the said crossing, where the company separated, some going on and leaving the deceased sitting or standing on the crossing, with the intention of going no further, but of returning along the said highway to his own home; that, as appears from the said testimony, the said locomotive and train—i. e. the agents and employes of defendant's lessees in the operation and control thereof—neither blew the whistle nor rang the bell, nor gave any signal for the said crossing or otherwise, until after crossing had been passed, and the deceased struck, when the train was caused to stop and back to the crossing for the purpose of taking on the deceased, who died in a few hours thereafter from injuries caused

by the collision. There was no testimony as to what deceased was doing at the time of the collision, which happened before his departing companions got more than a half to three-quarters of a mile away from the crossing. The foregoing is so much of the substance of the testimony as relates to the issues involved in the motion for nonsuit." The circuit court considered the action as based wholly upon sections 1685, 1692, Rev. St., and according to his construction of the statute it was not designed to cover the case of an injury to a person on the crossing who had no intention to cross, and, since the testimony showed that the deceased did not intend to cross, the nonsuit was granted.

We think there was error, for two reasons:

(1) That the statute covers the case stated; and (2) independent of the statute, the case should have been submitted to the jury as an action for common-law negligence. The statute provides (section 1692): "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine, recoverable by indictment, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury." Section 1685 provides that "the bell shall be rung or the whistle sounded by the engineer or fireman at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed said highway or street or traveled place," etc. The intention of the statute is to be first ascertained from its language. The statute in terms covers every injury to persons or property by collision with the engine or cars of a railroad company at a crossing. There must be an actual collision (*Kinard v. Railroad Co.*, 39 S. C. 517, 18 S. E. 119), and such collision must be on the crossing, not merely near to the crossing (*Neely v. Railroad Co.*, 33 S. C. 139, 11 S. E. 636), and the crossing must be a "traveled place" (*Hale v. Railroad Co.*, 34 S. C. 299, 13 S. E. 537). The statute makes no distinction between persons who contemplate crossing completely and those who, for reasons satisfactory to themselves, contemplate a partial crossing; and we fail to see a reason why one intending to use an inch of the crossing, or all but an inch of the crossing, should not come within the statute as well as one intending to use the whole length of the crossing, provided he is injured on the crossing by a collision with the railroad's en-

gine or cars. To illustrate, suppose a traveler on a highway should accidentally drop a package between the rails of the railroad track on a crossing, and, after passing over, should, on looking back, discover the package between the rails, and should then return to pick up the package, with no intention whatever of crossing the track completely; and suppose, while regaining the package, he is injured by a collision with engine or cars of the railroad company, without signal or warning,—would not such a case be within the statute? Or suppose that one is traveling a highway with the intention, when he reaches the railroad crossing, to pass up or down the railroad track without crossing over, and is struck by the engine or cars while on the crossing, without signal or warning, would not the statute cover such a case? If not, why not? If an intention to cross has anything to do with the question, why is not an intention to cross in part as effective to bring within the statute as an intention to cross in whole, provided the collision takes place on the crossing? We do not regard the case of *Neely v. Railroad Co.*, 33 S. C. 139, 11 S. E. 636, as conflicting with this view. In that case the point decided was that the words of the statute "at a crossing," did not mean "near a crossing," but "on a crossing," and therefore the killing of a cow by a collision 10 or 20 steps from the crossing was not within the statute. The following language by the court in that case has doubtless given rise to the view of the circuit court: "Now, there can be no doubt but that the object of these sections was to prevent collisions which might occur between persons attempting to cross the track of the railroad and the locomotive and cars approaching the crossing at the same moment, and the provisions of the act did not include, nor was the act intended to include, injuries inflicted upon bystanders not intending to cross, or upon cattle that happened to be killed or injured pasturing near by, but not upon, the crossing, or using it to pass from one side to the other." The case then being considered was, as stated, the case of cattle killed by collision with the railroad cars some 10 or 20 steps from the crossing. The language used plainly imports that the killing of cattle by collision upon a crossing would be within the statute, although the cattle were not using the crossing to cross over the track. Further, when the court said "the act was not intended to include bystanders not intending to cross" the court meant persons standing near by the crossing, and did not have in mind the case of a person on the crossing with intention to use only a part of the crossing. Undoubtedly, the object of the statute was to prevent injury to person or property by collision at a crossing between persons or things using the highway and the engine or cars of the railroad com-

pany on the track, and this purpose can best be effectuated by holding that such injury inflicted by collision on the crossing is within the statute, without regard to the extent to which the person injured intended to use the highway crossing.

The case of *Hale v. Railroad Co.*, 34 S. C. 299, 13 S. E. 537, while it approved the language in *Neely's Case*, supra, was concerning an injury in the private yard of the railroad company, and not upon any traveled place, and hence is no authority against the construction here given. Other subsequent cases have approved the construction of the statute as made in *Neely's Case*, but, as shown, there is no conflict with the view that the case now presented comes within the statute. But, if we are in error in this view, still the nonsuit was improper, because the action is sustainable as for negligence at common law. The allegations of the complaint in reference to the negligence complained of is that defendant "carelessly, negligently, and in reckless disregard of the safety of travelers along said highway, failing to give the signal required by law on approaching a crossing, without sounding the whistle or ringing the bell, and as a consequence of said careless, negligent, and reckless operation and management of said train in failing to give proper signals as aforesaid, and in general an utter failure to observe any proper caution and care for the safety of the deceased and others passing along said highway, collided," etc. The common law requires the giving of such signals at a highway crossing as are reasonable in view of the situation and surroundings, to put individuals using the highway on their guard. *Murray v. Railroad Co.*, 10 Rich. Law, 232, 70 Am. Dec. 219; *Kaminitzky v. Railroad Co.*, 25 S. C. 61; *Kinard v. Railroad Co.*, 39 S. C. 516, 18 S. E. 119. It appeared from the testimony that the deceased was upon the crossing when killed by collision with defendant's train; that no whistle was blown, no bell was rung, nor any signal given of the train's approach to the crossing; that said crossing was upon one of the main thoroughfares of Bamberg county; that the time of the collision was night; and there was nothing in the testimony to show that the deceased would have been killed notwithstanding the failure to give warning of the train's approach. Independent, therefore, of the statute, the testimony was sufficient to carry the case to the jury, whose province it is to determine whether the failure to give any signal or warning was want of ordinary care under the circumstances, and whether such negligence, if found to exist, was a proximate cause of the injury. The judgment of the circuit court is reversed, and the case remanded for a new trial.

McIVER, C. J., concurs in the result on the second ground.

(61 S. C. 490)

HAGEN v. ANDERSON COUNTY.
(Supreme Court of South Carolina. Sept. 7, 1901.)

REFUSAL OF NEW TRIAL—ERROR OF LAW.

It is not error to refuse a new trial, where there is evidence tending to establish all material issues in favor of the prevailing party.

Appeal from common pleas circuit court of Anderson county; Aldrich, Judge.

Action by John Hagen, by his guardian ad litem, against Anderson county. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

J. E. Breazeale, for appellant. Bonham & Watkins, for appellee.

JONES, J. This action was brought under section 1166 of the Revised Statutes to recover damages for personal injury alleged to have been sustained by plaintiff through a defect in a bridge over a ditch on a public highway in Anderson county, occasioned by the neglect or mismanagement of said county. The jury having rendered a verdict for \$98 in favor of the plaintiff, the defendant moved for a new trial on the ground that the verdict was not supported by the evidence, which motion was refused. The defendant now appeals from the judgment rendered solely on the ground that there was error in refusing the motion for a new trial. The refusal of a motion for a new trial is final as to all issues of fact involved. It is only when the verdict is wholly without any evidence to support it that it is error of law to refuse a motion for new trial based upon the evidence. *Martin v. Jennings*, 52 S. C. 382, 29 S. E. 807. There was no error of law in this case, for an examination of the testimony shows that there was some testimony tending to establish all the material issues in favor of the plaintiff. The judgment of the circuit court is affirmed.

(61 S. C. 459)

ULMER v. PHOENIX FIRE INS. CO. OF BROOKLYN et al.

(Supreme Court of South Carolina. Sept. 6, 1901.)

OPEN INSURANCE POLICIES—INSURABLE INTEREST.

1. 22 St. at Large, p. 113, providing that no insurance company in the state shall issue policies for more than the stated value, and in case of total loss insured may recover the full amount, not prescribing any rule of evidence in regard thereto, nor any penalty against writing an open policy, does not prohibit the issuance of such a policy.

2. A person who has contracted to build a house and furnish the materials for a fixed sum, has an insurable interest to the value thereof, though he has received nearly payment of the price in full.

Appeal from common pleas circuit court of Orangeburg county; Watts, Judge.

Action on insurance policy by B. D. Ulmer against the Phoenix Fire Insurance Company

of Brooklyn, N. Y., A. F. Horger, Alice E. Inabinet, and W. S. Kemmerlin. From judgment for plaintiff, he appeals. Reversed.

Thos. F. Brantley and Wm. C. Wolfe, for appellant. Izlar Bros., for appellees.

JONES, J. The plaintiff appeals from a judgment for \$82.92 in his favor in this action on a fire insurance policy issued by the defendant for \$450. The questions raised by the exceptions are as to the proper construction of the policy and the extent of the insurable interest of the insured plaintiff. It appears from the evidence submitted in behalf of the plaintiff that on December 4, 1898, the plaintiff, Ulmer, entered into a written contract with one A. F. Horger, by which plaintiff, as contractor, agreed to build for Horger a dwelling house according to specifications, for which Horger agreed to pay \$300 in weekly installments, \$50 to be held back until the completion of the house. A. E. Inabinet became surety for Horger on this contract, and as the work progressed paid or advanced to Ulmer, upon the request or order of Horger, sums aggregating \$287.22. On the 4th day of March, 1899, while the building was being constructed, Ulmer procured the policy in question, by which the defendant, in consideration of the \$1.35 premium, agreed to "insure B. D. Ulmer, contractor, for the term of thirty days from the 4th day of March, 1899, at noon, to the 4th day of April, 1899, at noon, against all direct loss or damages by fire, except as hereinafter provided, to an amount not exceeding \$450, to the following described property, while located and described herein, and not elsewhere, to wit: \$450 on one-story, shingle-roof building, now in course of construction, and all building material to be used for same, lying adjacent to said building, situate in the town of Jamison, Orangeburg county, S. C." This was made subject to the three-fourth value clause attached to the policy. There was no slip attached, such as is usual since the act of February 28, 1896, fixing the value of the building and the amount of insurance. The policy contained the provisions usual in the "standard" policy, among which is the following: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be pay-

able sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company at their office in Atlanta, Ga., in accordance with the terms of this policy." The building was totally destroyed by fire on the night of the 3d of April, 1896. At that time the building was not quite completed, and had not been turned over to Horger. There was some testimony tending to show that certain extra work had been done on the building by agreement between Ulmer and Horger, reasonably worth \$65. The verdict included this \$65 for extra work, \$12.73 balance due Ulmer on the original contract, and \$5.19 interest, as the extent of the loss under the policy.

Construing the policy, the circuit court instructed the jury as follows: "Now, I will tell you what that contract of insurance is. The insurance company entered into a contract with the plaintiff for what? To indemnify and secure him against loss he might sustain by reason of the building which he had contracted to build, in case that building, or any of the material on the premises, which was to be used in the erection of that building, should be destroyed, to a sum not exceeding the sum of \$450. Now, was the building destroyed by fire? And, if so, the plaintiff then would be entitled to recover such damages as he has sustained by reason of the destruction of such property by fire, not to exceed the amount of \$450. That policy does not mean that, as soon as the house was destroyed by fire, the plaintiff was entitled to recover \$450 from the insurance company, but meant that he was to recover that amount if that was the damage done him by the fire. In other words, he was to recover just such injury as he had sustained by reason of the fire, whatever the injury amounted to, provided it didn't exceed the sum of \$450. The insurance company guaranteed him against any loss to the extent of \$450 which he might sustain by reason of the property being destroyed by fire; that is, the house in the course of erection, and the lumber on the ground adjacent thereto, which was to be used in the construction of the house." It is excepted that this construction is erroneous, because contrary to the provisions of the act of 1896 (22 St. at Large, p. 113), and the argument is that the policy is what is known as a "valued" policy, and is not an "open" policy, and that upon a total loss the defendant company was liable for the whole \$450. The statute provides: "That hereafter no fire insurance company, or individual writing fire insurance policies, doing business in this state, shall issue policies for more than the value to be stated in the policy, amount of the value of the property to be insured, the amount of insurance to be fixed by insurer and inserted at or before time of issuing said policies; and in case of total loss by fire the insured shall be en-

titled to recover the full amount of insurance and a proportionate amount in case of partial loss," etc. We have quoted as printed, and presume the meaning is that no fire insurance company shall issue policies for more than the value of the property to be insured, to be stated in the policy, the amount of insurance to be fixed by the insurer and insured, etc. The attempt of the statute no doubt was to secure "valued" instead of "open" policies of fire insurance on property other than chattel or personal property. The statute prescribes no penalty, and contains no provision requiring that the amount named in the policy shall be construed to be the value of the property insured, or conclusive evidence of such value. The circuit court was, therefore, compelled to construe the contract according to its terms, and we do not think he erred in construing the policy to mean that the defendant was liable for the loss or damage by fire sustained by the insured, not to exceed \$450. This is manifest from the express language of the policy and the provisions showing how the amount of the loss is to be ascertained or estimated. The policy contains no words showing that the property was "worth" or "valued at" the amount stated as limiting the loss, and, on the contrary, shows that the intent of the parties was that proof should be offered as to the value of the property in case of loss. This shows that the policy is an "open," and not a "valued," policy, as defined in 13 Am. & Eng. Enc. Law, 102, 103. This not being a policy in which the value of the property to be insured and the amount of the insurance are fixed by the terms of the policy or by statutory construction, the provision of the statute that, "in case of total loss by fire, the insured shall be entitled to recover the full amount of insurance," cannot apply.

In the matter of the plaintiff's insurable interest and loss the court instructed the jury: "Now, if you conclude that the plaintiff in this case contracted with Horger to build his house for \$300, and he went ahead doing his work, and partially completed it, and had lumber there, and that he was paid \$287.27 on that, and he was only to get \$300 for it, then he would be interested in the house to the extent of what was still due on the contract,—whatever amount he had been paid on his contract. If he was to receive \$300 on his contract, and he had received that, the insurance company would not be liable for what he had been paid, but would be liable for any amount of money that was due him for labor performed and material on the ground, or material to be used in the erection of the building, or material actually furnished." Appellant excepts to this instruction, because it "limited the plaintiff's recovery to the difference between the contract price, \$365, and the amount advanced by the surety defendant, Inabinet, \$287.27; whereas,

as matter of law, the plaintiff was entitled, even before the act of 1896, to recover the amount of the policy, so that he would be able to either (a) repay the defendant Inabinet the amount advanced by her to him, or (b) to perform and discharge his contract fully by rebuilding the house for defendant Horger; in other words, the right and insurable interest of plaintiff extended at least to a sufficient amount to protect his payment of the amount advanced by the defendant Inabinet, as well as the difference between the amount thus advanced and the contract price, \$365, or to rebuild the house according to his contract. But this instruction precluded this, and took these matters from the consideration of the jury." In May, Ins. p. 144, it is stated: "Whoever may be fairly said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interest of another, has an insurable interest, * * * or who will receive benefit from the continued existence of the property, whether they have or have not any title to, estate in, lien upon, or possession of, it, have an insurable interest." In this state there are statutory provisions by which persons furnishing labor or material for the erection of a building may secure a lien on such building to secure payment of the amount due. Section 2465, Rev. St. Independent of any statutory lien, it would seem that contractors, builders, and the like have insurable interests in the buildings in the construction of which they furnish labor or material, whether the payments are to be in installments or upon the completion of the work. 13 Am. & Eng. Enc. Law, 164, and cases cited. It is not disputed in this appeal that plaintiff, as contractor, had an insurable interest in the building insured, at least to the extent provided for in the verdict. If the extent of his insurable interest is limited by the amount of his lien on the building, or the amount he could have recovered of Horger upon the completion of the building, then unquestionably the charge and verdict must stand. But, as it seems to us, plaintiff had a greater interest than that in the continued existence of the building. By his contract with Horger he was bound to build and complete the dwelling house for \$365, including the extras, and he has not been prevented from discharging this agreement by any fault of Horger, or by act of God or the public enemy, if even the two last-named contingencies would, under all circumstances, excuse performance. Assuming honesty of purpose on the part of Ulmer, it is very probable that the contingency which prevented and prevents full performance is the very casualty by fire against which he sought protection by procuring the policy in question. Being bound by his contract to give Horger a completed building, which he has never done because of the destruction of

the nearly completed house by fire, Ulmer's interest in the continued existence of the building was not merely as a security for the amount to be due him on completion, but as a means by which he could discharge his own obligation to Horger. His insurable interest in the building would, therefore, be the value of the building at the time of the fire, and his "loss or damage" by the fire would necessarily be the same. The plaintiff's case is not altogether like the case of a mortgagee or mere lienholder, who insures the property upon which he holds the lien, as to whom it may be said that his insurable interest is limited by the amount due upon the lien debt. Plaintiff's case is more analogous to the case of a bailee or warehouseman charged with the custody and delivery of goods, who not only has a lien for his charges, but is also responsible for the delivery of the goods; or still more analogous to the case of a shipbuilder, who contracts to build and deliver a ship. It can hardly be doubted that a bailee charged with the custody of property, or a shipbuilder contracting to build and deliver a ship, has an insurable interest to the extent of the value of the property, and not merely to the extent of the lien for charges, or the balance due upon the contract price. In the case of *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 266, 15 S. E. 581, the court, speaking by Chief Justice McIver, said: "It is well settled that a warehouseman has an insurable interest in property stored in his warehouse to indemnify himself against any liability which he may incur to his patrons by reason of his relation to them as warehouseman." So, if the warehouseman's liability was to the extent of the value of the goods in his hands, his insurable interest therein would go to that extent. We see no sufficient reason why this principle should not extend to a builder or contractor while the building is being constructed for the purpose of being turned over after completion to the employer.

The case of *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 60 Am. Rep. 162, is much in point, the facts being very similar to those in the case at bar. In that case the court decided that, when a builder contracts to furnish materials and build a house for another person at a stipulated price, payable in installments as the work progresses, and takes out a policy of insurance on the house during its construction, and it is destroyed by fire before completion, the loss is his, although he may have received partial payments by installments, because of his liability to rebuild the house. The case of *Foley v. Insurance Co.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664, decides that an owner has an insurable interest to the extent of his value in a building in process of construction at the time of the fire, under a contract requiring the delivery of the completed building within a specified time not yet expired, although the loss, in the absence of insur-

ance, would fall on the contractor, and not on the owner. In this case the owner has an insurable interest to the extent of the value of the building, for which he had not paid, because, the building being annexed to the soil, title thereto passed to the owner. The case, however, recognizes the principle that the loss of a building destroyed by fire while being constructed, under contract requiring delivery of the completed building, falls upon the contractor. Under such circumstances, while the contractor in strict law would not be the owner of the building, still he has potentially the rights of the owner to indemnify himself against loss by reason of its destruction. See note to the case cited above, 43 L. R. A. 664. The conclusion we have reached is further strengthened or made manifest by the stipulations of the policy, which provide that the loss or damage shall be ascertained or estimated according to the actual cash value of the property insured, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. These stipulations show that the parties contemplated that the loss was to be measured with reference to the value of the building, and not with reference to the sum that might be due the insured upon the building contract. This conclusion renders it unnecessary to consider the remaining exceptions. The judgment of the circuit court is reversed, and the case remanded for a new trial.

(61 S. C. 468)

BODIE v. CHARLESTON & W. C. RY. CO.
(Supreme Court of South Carolina. Sept. 6, 1901.)

PLEADING—AMENDMENT—ACTION FOR PERSONAL INJURIES—EVIDENCE—NONSUIT—INSTRUCTIONS—NEGLIGENCE—DUE CARE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. Where defendant moved to amend his answer, and his motion was granted, he cannot object that the remarks made by the court on granting it were incorrect.

2. Where a complaint for personal injuries alleges damages to internal organs, evidence as to impairment of eyesight is admissible, when shown to be the result of internal injuries.

3. Where there is evidence tending to show defendant's negligence as alleged, refusal of a nonsuit was proper.

4. An instruction that negligence is a relative term when applied to different sets of circumstances, and that the caution required in one case may be greater than that required in another, but in any case the law enjoined the duty of observing the care due under such circumstances, which was the amount of care which would be exercised by a man of ordinary intelligence and prudence, is not erroneous as charging that in some cases a higher degree of care than due care is necessary.

5. It is for the jury to determine whether an employé, by remaining in service after knowledge of defective appliances, notice to the master thereof, and promise by him to remedy the same, assumed the risk.

6. Const. art. 9, § 15, provides that a railroad company in an action for personal injuries cannot set up assumption of risk by employé.

Held to apply to an action by a section master for personal injuries by failure of company to furnish a sufficient number of persons to perform the work.

7. An instruction that, if the injury to an employé could have been avoided, in spite of his negligence, by the exercise of due care on the part of defendant, then defendant would be liable, because that would show that plaintiff's negligence did not contribute to the injury, because it was not a direct cause thereof, was not erroneous, as instructing that plaintiff could recover, though guilty of contributory negligence, if defendant could have avoided the injury.

8. An instruction as to contributory negligence, that, before the jury could find for defendant, they must be sure that such negligence had been proven, is not erroneous as calling for a higher degree of proof than the law requires.

9. An instruction that if plaintiff employé did the work assigned to him in the usual and customary manner he could not be charged with doing it negligently, so as to contribute to the injury received, was erroneous.

Appeal from common pleas circuit court of Greenwood county; Benet, Judge.

Action by Josiah W. Bodie against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

S. J. Simpson and Sheppard & Grier, for appellant. Caldwell & Park and Graydon & Giles, for appellee.

JONES, J. This appeal comes from a verdict and judgment in favor of plaintiff in an action for damages for personal injuries alleged to have been sustained through defendant's negligence in failing to furnish an adequate force of laborers to do the work required of plaintiff, as section track foreman, in the hauling and piling of steel rails, after application for additional help by the plaintiff, and promise by defendant to supply the same. The sixth paragraph of the complaint alleged: "(6) That on the 15th day of February, 1900, while the plaintiff, in compliance with the orders of the defendant, was trying, with the assistance of his three hands, to carry one of the said steel rails up an embankment for the purpose of loading it on his car, and hauling and piling it, as aforesaid, one of his said hands was entirely overcome and exhausted by the great weight of the said steel rail, on account of the failure of the defendant to furnish a sufficient force to carry the same, and fell to the ground, thereby causing the whole weight of one end of the said steel rail to be thrown on the plaintiff, by which his right leg was knocked out of place, his back injured, and a great strain put upon his whole body, causing a lesion of his kidneys and other internal organs." Besides the general denial, the defendant interposed as special defenses contributory negligence and assumption of risk after knowledge. The numerous exceptions of appellant will be considered under the subject heads following:

1. Amendment to Answer. On motion of the defendant (appellant), over the objection

of plaintiff (respondent), the circuit court permitted defendant to amend the answer by inserting the following: "(8) That the said plaintiff went about the work in which he was engaged when he alleges to have been injured with full knowledge of the manner in which said work was to be done, and of all the facts and circumstances connected therewith; that he directed the said work, and assumed all risks incident thereto." Plaintiff's counsel objected to this amendment under section 15, art. 9, Const., which provides: "Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances of any machinery, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." The circuit court, in allowing the amendment, said that the first portion would be objectionable, but the additional clause, "and the plaintiff assumed all the risks," etc., is sufficient to permit its allowance. Upon this appellant predicates the third exception, which assigns error (1) in holding that such amendment was permitted for the purpose of alleging assumption of risk only, and not for the purpose of setting up the defense that the defendant had knowledge of the alleged shortness of hands, and that such knowledge was a bar to his recovery; and (2) in holding that the allegations of negligence here come within the word "appliances," as used in section 15, art. 9, Const. This exception cannot be sustained for several reasons. Appellant, having been granted what was asked for, cannot complain, whether the remarks accompanying were correct or not. Since the defense of assumption of risk must necessarily be based upon the employe's knowledge, either actual or constructive, we are unable to see wherein appellant has been prejudiced, whatever may be the correct view as to the meaning of the term "appliances," as used in the section of the constitution referred to. But, as we will show hereafter, the term "appliances," in section 15, art. 9, of the constitution, includes a force of hands sufficient to operate the machinery, etc., and, if there was error in the ruling of the circuit court, it was in allowing the amendment at all.

2. The Admissibility of Certain Testimony. The first and second exceptions assign error in allowing the plaintiff, Bodie, to testify as to damages to his eyesight, when there was no allegation in the complaint asking damage for such injury. The complaint alleged that plaintiff's "right leg was knocked out of place, his back injured, and a great strain put upon his whole body, causing a lesion of his kidneys and other internal organs." The circuit court admitted the testimony as to impairment of eyesight in so far as it tended to show a result or effect of the internal injuries alleged. This was not error, as

shown by the recent case of *Youngblood v. Railroad Co.*, 60 S. C. 14, 88 S. E. 232.

3. Refusal of Nonsuit. The fourth, fifth, and sixth exceptions allege error (1) in that there was no evidence that the failure to furnish a sufficient force of hands was the proximate cause of the injury; (2) in that the evidence showed that the proximate cause of the injury was the accidental fall of a fellow servant; (3) in that the evidence showed that plaintiff, with knowledge, assumed the risk of the injury alleged. These grounds were all satisfactorily disposed of by the circuit court in refusing the motion, in accordance with the well-settled rule in this state that nonsuit should not be granted when there is any evidence tending to establish the allegations of the complaint.

4. Negligence. The eighth exception complains of the charge to the jury in reference to the matter of negligence. The jury was charged: "Negligence simply means want of due care. That is a very short definition. If you weigh each word, you will find that that contains the whole doctrine,—want of due care; not simply want of care, but want of due care. From its very nature, negligence may consist in the doing something which should not have been done. Negligence may also consist in leaving undone that which ought to have been done. It may, therefore, be a fault of omission as well as a fault of commission. [It is impossible for the court to furnish a jury with a hard and fast measure of care, the presence of which, or the exercise of which, would drive away the idea of negligence, the absence of which would mean the presence of negligence. There is no such hard and fast rule which can be applied by a jury like a foot rule or a bushel measure; but there is a general principle which underlies the doctrine of negligence, and shows sufficiently clearly the measure of care proper in each particular case, and it is this: The greater the probability of danger in the particular circumstances, the greater is the required degree of care, because the measure of care naturally varies in the different circumstances. For example, a man cutting wood with an ax must exercise a proper amount of precaution to guard against other people that may be near him; but a man who is blasting rock with dynamite, since there is much greater danger in handling that explosive than in holding an ax, is required to exercise a much greater degree of care. Due care in handling an ax in cutting wood would not be a sufficient measure of care in handling dynamite and blasting rock. But this shows you that the jury in each particular case has to establish from the testimony in the case exactly the measure of care which should have been exercised under the circumstances, and it is just that amount of care which would or should have been exercised by a man of ordinary intelligence and prudence. Your common sense and intelligence

will guide you, in deciding by the testimony] in the case what amount of care should have been exercised by the railway company in the circumstances detailed in the testimony, and also will show you what amount of care should have been exercised by Bodie, the plaintiff, under the circumstances detailed, when you are considering the subject of contributory negligence; and I repeat it is just that degree of care which a man of ordinary intelligence, common sense, and prudence should have exercised under the same or similar circumstances; not absolute care, not the utmost care to guard against a possible danger, but only reasonable care, due care, that amount of precaution proper to guard against the probable danger." The exception is to that portion of the charge above which is within the brackets, and the specific errors assigned are: (1) That the jury were instructed that in some cases a higher degree of care than due care is necessary to exempt from liability; and (2) the charge left to the jury the legal question, what degree of care was necessary in this case? We do not think the charge is amenable to either objection. The learned circuit judge, by his language and illustration, merely meant to show the jury that "negligence" is a relative term when applied to different cases or sets of circumstances, and that the care or caution required in one case may be greater or less than the care or caution required in another; but the jury were plainly instructed that in any particular case or set of circumstances the law enjoined the duty of observing the care due under such circumstances, and the court did not instruct the jury that in any case the law required a higher degree of care than due care. The jury were further instructed that the measure of the care due in any particular case was "that amount of care which would or should have been exercised by a man of ordinary intelligence and prudence," or "that degree of care which a man of ordinary intelligence, common sense, and prudence should have exercised under the same or similar circumstances." The charge was, therefore, nothing more than what has been often approved in this state, viz.: "Negligence is the want of ordinary care under the circumstances." A more comprehensive and scientific definition of negligence is that contained in 16 Am. & Eng. Enc. Law, 389, as follows: "Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a non-contractual duty implied by law, which failure is the proximate cause of the injury to a person to whom the duty is due." Negligence involves (1) a duty to exercise ordinary care under the circumstances; (2) a breach of such duty; (3) the breach being inadvertently, not wantonly nor intentionally, made; (4) injury or damage resulting to the party complaining; (5) and that such injury be

proximately caused by, or be the natural and probable result of, such breach. The charge, viewed as a whole, fairly instructed the jury as to what matters constitute actionable negligence.

5. Assumption of Risks. The eighteenth and twentieth exceptions complain of error in the charge to the jury on this subject. The defendant's sixteenth request to charge was as follows: "When an employé, after having had an opportunity to become acquainted with the risks of his situation, voluntarily accepts them, and continues in the performance of them, he cannot recover for his subsequent injury by such exposure." In response to this request the court said: "That is rather a bald statement of the doctrine. It is good law, to a certain extent, but it is left for the jury to decide, under the circumstances, whether his continuance to perform the work should, under the circumstances, be held to be a voluntary assumption of the risks, or whether by, for instance, the promise of the master, he was entitled to continue a reasonable time still exposed to the danger, and yet not relieve the master from his liability for the increased risk. I have already fully charged on that doctrine." It is complained in the eighteenth exception that the request contained a second proposition of law, and should have been charged without modification, and that "the modification gave the jury an incorrect idea of the difference between assumption of risks and waiver, of defects and waiver." The twentieth exception is as follows: "Twentieth. Because it was error in his honor to charge the jury as follows: 'But if the testimony shows, under all the circumstances, that, while he did continue to work exposed to this increased risk or danger, he did complain of this increased risk or danger to the master, had asked for means to lessen or remove the increased risk or danger, and had been promised by his master that such would be done, if he continues to work after that promise, it is then a question for the jury, judging by the length of time, under all the circumstances, that he continues to work, whether or not by thus continuing he has assumed the risk, or is still entitled to ask and hold the master liable. That is a question for the jury to determine, under the circumstances shown by the testimony, whether the master, by promising to remove the danger, has assumed the risk and liability following, or whether the servant, by continuing too long without the danger being removed, continues the work, has thereby assumed the increased risk of danger,'—the error being, it is submitted: (a) In wholly failing to distinguish and instruct the jury as to the radical difference between the defense of contributory negligence and assumption of risk; (b) in entirely withdrawing from the jury and eliminating from the case the defense of assumption of risk; (c) in charging incorrectly the law applicable to assumption of risk." The

sentence immediately preceding the portion of the charge above excepted to was as follows: "I repeat that a railway servant, while he assumes the ordinary risks incident to the kind of work that he is engaged to do, does not assume the risks or dangers to which he may be exposed by unsafe or unsuitable or insufficient means and appliances for doing the work required of him; but, while that be so, still he may, without complaining of such added risk and danger, continue to work after he has discovered the increased risk or danger. He may do this voluntarily, and he may be injured as the direct result of this increased risk or danger; and, if so, he would be held to have waived his right to hold his master liable. He would be held to have assumed the increased risk of danger, and the master could not be held liable." The charge to the jury was to that effect,—that if a railway employé, after knowledge of an extraordinary risk, remains in the employer's service without complaint on his part and promise of amendment by the employer, he is held, as matter of law, to have assumed the risk, and cannot recover for an injury directly resulting therefrom; but, if complaint be made, and there is promise of removal, and the employé, while remaining thereafter a reasonable time in the employer's service, is injured, then it is for the jury to determine whether the employé, by remaining in the employer's service, assumed such risk. If it be conceded that this case is one in which it was proper to submit to the jury the question of assumption of risk by an employé, the charge was more favorable for the appellant than the law justifies. In *Mew v. Railway Co.*, 55 S. C. 101, 32 S. E. 832, the court said: "The remaining in the master's service by an employé, after knowledge of an alleged defect in the instrumentalities to be furnished by the master, is not, as a matter of law, an assumption of the risk by the employé. Whether the employé assumed the risk is a question for the jury, to be determined from all the circumstances of the case. If the undisputed evidence is such as to be capable of but one inference, viz. voluntary assumption of the risk by the employé, then the jury could be rightfully instructed that the employé could not recover. *Bussey v. Railway Co.*, 52 S. C. 438, 30 S. E. 477." In the case of *Powers v. Oil Co.*, 53 S. C. 303, 31 S. E. 278, the court says: "A promise by the master to remedy a defect tends to rebut the inference of waiver of the defect by the servant's remaining in the master's service after knowledge. If the servant continued in discharge of his duties, relying on the master's promise to remove a defect, he could not be said to have waived such defect. The jury was the proper tribunal to determine this question in this case." It is manifest that the court did not withdraw from the jury the question as to assumption of risk, but, on the contrary, explicitly instructed them on that subject, and substan-

tially charged all the requests of the appellant in relation thereto. The doctrine of assumption of risk by the employé is distinct from the doctrine of contributory negligence, although there may arise a certain condition of facts capable of supporting either inference. This has given rise to a great deal of confusion of statement when dealing with these defenses. "Assumption of risk" rests in the law of contract, and involves an implied agreement by the employé to assume the risks ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for a breach of duty in this regard. *Hooper v. Railroad Co.*, 21 S. C. 547. The law as to waiver applies because the relation between the employer and employé is contractual, and waiver is the voluntary relinquishment of a known right. By the contract the employer and employé each assume certain risks, but, as in all contracts, either party may waive his right to insist upon strict performance of the other's contractual duty. When, therefore, a case arises in which it is shown (upon proper pleading) that the employé has assumed the risk from which the injury arose, or, what is the same thing in effect, has waived his right to hold the employer responsible for the risk, the employé's action is defeated because of his agreement, and not because of negligence. "Contributory negligence," on the other hand, rests in the law of torts, as applied to negligence, and, when such defense is established, the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury. This distinction, while not emphasized in the charge, was plainly manifest therein, for the jury were instructed as to both defenses in language from which the distinction was inferable. Moreover, if appellant desired instructions specifically pointing out the distinction between the two defenses, appellant should have presented specific requests embodying such distinction, which was not done.

But we will now attempt to show that the doctrine of "assumption of risk" has no application to this case, and by having it submitted to the jury appellant received favor, instead of prejudice. We think that section 15, art. 9, of the constitution, sweeps away the defense of "assumption of risk" in all cases falling within its provisions. We quote the section in full, as follows: "Section 15. Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow-servant engaged

in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. *Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them.* When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. *Any contract or agreement expressed or implied made by any employee to waive the benefit of this section, shall be null and void;* and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The general assembly may extend the remedies herein provided for to any other class of employees." The circuit court charged the jury—we think, correctly—that "the word 'appliances' includes not only inanimate machinery and tools and apparatus, but also the living men or persons needed to operate the machinery." This view is supported in 3 Wood, Ry. Law, p. 1478, and *Johnson v. Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243. In the case of *Donahue v. Railroad Co.*, 32 S. O. 299, 11 S. E. 95, 17 Am. St. Rep. 854, the court considered that the negligent furnishing of a vicious horse by a master to a street car driver, by which the driver was killed, was a breach of the master's duty to furnish the servant with safe and suitable appliances to do the work for which he was engaged. We do not think it is straining the meaning of the language, "defective or unsafe character or condition of any machinery, ways, or appliances," as used in the section quoted, to hold that it includes the human instrumentalities physically applied to properly operate the machinery and ways of the railroad company, and so has in contemplation the inadequacy of a force of hands to safely perform the work required. If this be so, then it is expressly provided in the section of the constitution quoted and italicized by us that the employé's knowledge of the unsafe condition of such appliances shall be no defense to an action for injury caused thereby. The plaintiff, being a section master, does not fall within the exception as to conductors and engineers. There can be no assumption of risk by an employé without knowledge of the risk, either actual or constructive, since, as already shown, the doctrine of assumption of risk depends upon agreement or waiver, which depends upon such knowledge; and the section further provides that any agreement, express or implied, made by an employé to waive the benefit of

the section, shall be void. We hold, therefore, that the matter of assumption of risk has no application to this case.

6. Contributory Negligence. The twelfth, thirteenth, fourteenth, fifteenth, and sixteenth exceptions assign error in the charge as to contributory negligence. The twelfth exception complains of the following portion of the charge: "A man may be careless and negligent of his receiving injury, and yet his negligence may not be contributory negligence. It may not be a direct cause, or proximate; and, if the injury was inflicted by the defendant without any direct help from the negligence of the plaintiff, then the defendant would still be liable. If the injury could have been avoided, in spite of the plaintiff's negligence, by the exercise of due care on the part of the defendant, then the defendant would be liable, because that would mean that the plaintiff's negligence did not contribute to the injury, because it was not a proximate or direct cause." The error assigned is that the court thereby instructed the jury that the plaintiff could recover, though guilty of contributory negligence, if the defendant, by the exercise of due care, could have avoided the injury. The thirteenth exception complains of the same language as in effect instructing the jury that, if the defendant could have avoided the injury by the exercise of due care, any negligence of the plaintiff in reference to the injury would not be a proximate or direct cause thereof, so as to prevent his recovery. If the charge really bore the meaning attributed to it by the exceptions, it would unquestionably be reversible error, for the law is too well settled to need caution in support of it that contributory negligence will always defeat plaintiff's recovery. But an examination of the charge shows that it does not mean what appellant claims. The court had previously instructed the jury by defining contributory negligence in the language of 7 Enc. Law (2d Ed.) 371, approved in *Cooper v. Railway Co.*, 56 S. C. 95, 34 S. E. 17, as follows: "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." Then, in his own language, the court proceeded to explain the meaning of this definition, and, immediately preceding the language above complained of, said: "You understand, therefore, that when contributory negligence has been proved satisfactorily to any extent, more or less, that is the end of the investigation of the jury, and they will find for the defendant; but they must be sure of this contributory negligence,—that is to say, working with the defendant's negligence as a direct, proximate, and immediate cause. It will mean that both were to blame directly; and, when both are to blame, the

one cannot be heard in law to blame the other. The law will not allow either to put the blame on the other, nor to recover damages from the other; nor may a jury award damages against a defendant, even if the testimony shows that the defendant is more to blame than the plaintiff, if the plaintiff is also directly to blame as being guilty of contributory negligence. You heard me read from the Cooper Case, where our supreme court says that contributory negligence to any extent on the part of the plaintiff will always defeat a recovery, and I repeat it that contributory negligence of the plaintiff to any extent, whether much or little, will always deprive a plaintiff of the right to recover damages; but, as I said before, it must be contributory negligence acting with the defendant's negligence, aiding the defendant's negligence, concurring with the defendant's negligence as a proximate, direct cause, because not every kind of negligence * * * on the part of the plaintiff will defeat his claim for damages and prevent recovery." Then, immediately after the language excepted to above, the court said: "For example, a man may be careless in standing in a dangerous place. He may, for instance, be standing in the middle of a thoroughfare on a busy day, and, if he was injured by some man who was recklessly and furiously driving a vehicle, the injured man's carelessness in standing in the middle of the road could not be held to be a direct proximate cause of the injury, because, if it be manifest that the man would not have been injured if the driver had exercised ordinary care, the driver cannot claim that the man's own carelessness contributed to the injury. There is a case in the books where a man was standing on a dock at a waterway, carelessly standing in a dangerous place. A steamer came in, driven recklessly and carelessly, and struck the place where he was standing so violently that he was injured; and the courts properly held that the fact that he was standing there carelessly and in a dangerous place could not be regarded as contributing to his injury, when the injury would not have been inflicted if the steamer had been carefully handled. It simply means that the carelessness did not directly aid the negligence of the defendant, and, while it was carelessness, it was too remote, it was not proximate, did not contribute to the injury as an effective cause." It is thus manifest that the court was instructing the jury that carelessness of plaintiff, which was not a direct and proximate cause of his injury, could not constitute contributory negligence, which involves plaintiff's negligence as a direct and proximate cause of his injury. The jury were repeatedly told that contributory negligence to any extent would defeat plaintiff's recovery. This case is very different from Cooper's Case, 56 S. C. 95, 34 S. E. 16, where the jury were erroneously instructed to the effect that, although plaintiff's imme-

diately act of negligence caused his injury, if the injury could have been prevented by the ordinary care of the defendant, and the defendant did not observe that care, defendant was liable for the injury. Such a charge eliminated contributory negligence as a defense, since that defense is always based on the concession that defendant's own failure to observe ordinary care was a proximate cause of the injury. In considering the matter of contributory negligence, confusion of thought is likely to arise, unless there is kept in mind the difference between contributory negligence and negligence which contributes remotely to the injury or merely furnishes a condition for its infliction. The former necessarily involves negligence as a direct proximate cause, and always defeats a recovery, unless the injury is wantonly or willfully inflicted; the latter involves negligence of the injured party, which is not a proximate cause of the injury, and does not defeat a recovery, because in the bewildering complexity of causes the law regards the proximate not the remote cause. "Causa proxima, non remota, spectatur." The term "contributory negligence" is sometimes, but inaccurately, used to characterize negligence of the injured party, which is a remote cause or mere condition of the injury, as in the cases of *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, and *Railway Co. v. Ives*, 144 U. S. 409, 12 Sup. Ct. 687, 36 L. Ed. 485. In this case, however, the circuit court was cautious to impress the proper distinction and to emphasize the necessity that the jury must find that plaintiff's negligence proximately caused his injury, in order to defeat his action; and that, when such contributory negligence exists to any extent, it defeats recovery. When the court said, "If the injury could have been avoided, in spite of plaintiff's negligence, by the exercise of due care on the part of defendant, then the defendant would be liable, because that would mean that the plaintiff's negligence did not contribute to the injury, because it was not a proximate or direct cause," the court evidently did not mean to state anything inconsistent with the repeated instructions that contributory negligence (as defined above) would always defeat a recovery, but merely meant to state that the injured party might be negligent, and yet his negligence may be remote, and not proximate, in which case he could recover, because his negligence would not be "contributory negligence." The two illustrations given by the court, which appellant excepts to in the fifteenth and sixteenth exceptions, were intended to further impress the instruction given. The first illustration given, involving that the driver saw or ought to have seen the exposed condition of the man standing carelessly in the crowded thoroughfare, and therefore, if, under such circumstances, he failed to observe due care to avoid injury to the man, this negligence, which arose aft-

er discovery of the injured party's exposure, would be the sole proximate cause of the injury, and the careless exposure of the injured person would be a mere condition, and not a proximate cause. The case would be different if the injured person was aware of the negligence of the driver, and, notwithstanding, failed to observe ordinary care to avoid the consequences of the driver's negligence. In reference to this illustration, viz. an injury inflicted by reckless and furious driving in a crowded thoroughfare, it may be said that such injury was wantonly inflicted, in which case it is of no consequence whether plaintiff's negligence was proximate or remote, since it is well settled that contributory negligence is no defense when the injury is wantonly or willfully inflicted. The illustration of a man injured, while standing on a wharf, by the negligent management of a steamboat, was probably based upon Tolson's Case, *supra*. In that case the supreme court of the United States said: "But upon the question of the plaintiff's position and attitude the evidence was conflicting, and it was indisputable that the steamboat was approaching the wharf at his [plaintiff's] call, and for the purpose of receiving freight from his hands, and that the pilot and officers saw him as he waited on the wharf. The jury might well be of the opinion that, while there was some negligence on his part in standing where and as he did, yet the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct, and efficient cause of the injury." (Italics ours.) In 7 Enc. Law (2d Ed.) pp. 383-385, the rule is stated—and, we think, correctly, after investigation—as follows: "A want of ordinary care may be said to contribute proximately to an injury when it is an active and efficient cause of the injury in any degree, however slight, and not the mere condition or occasion of it. But it is not a proximate cause of the injury when the negligence of the person inflicting it is a more immediate, efficient cause. And so when the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effect and prevent injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case the want of ordinary care on the part of the injured person is held not a judicial cause [i. e. a proximate cause] of his injury, but only a condition of its occurrence. Conversely, when the carelessness of the person inflicting the injury is antecedent to the negli-

gence of the person injured, and the latter might, by ordinary care, have discovered the failure of the former to use such care in time to avoid the injury, there can be no recovery, because the intervening negligence of the injured person is the direct and proximate cause of the injury." This statement of the rule is not an exception to, or modification or qualification of, the doctrine of contributory negligence, but is only an illustration of that doctrine, which requires that, in order to constitute contributory negligence, the injured person's negligence must directly and proximately cause the injury, combining and concurring with the negligence of the injuring party. *Farley v. Veneer Co.*, 51 S. C. 236, 28 S. E. 193, 401; *Disher v. Railroad Co.*, 55 S. C. 192, 33 S. E. 172.

The seventh exception alleges error in charging the jury, as to contributory negligence, that, before they could find for the defendant, they must be sure that contributory negligence had been proven; thereby, in effect, calling for a higher degree of proof than the law requires. We do not think the exception is well taken. The burden was upon defendant to establish the defense of contributory negligence to the satisfaction of the jury, and that is all that the charge can be fairly construed to mean, especially in view of other portions of the charge, wherein the jury were plainly instructed that in determining the issues they were to be guided by the greater weight or preponderance of the evidence.

We notice finally the tenth and seventeenth exceptions. The court instructed the jury: "But if the evidence satisfies you that he [plaintiff] was using the force to do the work required of him in the usual, customary way, then I charge you that he was not required, as section foreman and railway servant, to find out if there was another safer way, because he is simply required to use ordinary care; and the man who does ordinary work in the ordinary way—in the usual manner, the customary manner—can hardly be held guilty of negligence." Defendant's ninth request to charge and the court's response thereto are as follows: "(9) If the jury believe that the force of hands furnished to the plaintiff was sufficient and safe for doing the work in hand in a different way from that which he adopted, then the plaintiff cannot recover, if the evidence shows that his injury resulted from his use of the force for the work in a more dangerous way, unless the evidence also shows that he was directed or required by his employer to adopt such more hazardous way." In response to this request the court said: "I charge you that, with the modification that, if he was doing the work in the usual, ordinary way,—the customary way,—he was not required to look out for another way." It is expected that the foregoing charge was erroneous (1) in charging on the facts, in violation of the constitution; (2) in instructing the jury, in effect, that negli-

ligence is negated if ordinary work is done in the usual, customary manner. We think the charge was erroneous, as alleged. Ordinary care, as already approved, is that care which a person of ordinary intelligence and prudence should exercise under the circumstances. The charge made the usual, customary way of doing things a conclusive test whether due care is exercised therein, whereas that is merely evidence which should go to the jury along with the other evidence, leaving the jury to determine from all the evidence whether due care was observed. The usual, customary way may not be a negligent way, but in this the court left the jury no discretion but to find that plaintiff was not negligent if he was doing the work in the usual, customary way. In the case of *Bridger v. Railroad Co.*, 25 S. C. 24, the circuit court declined to charge that "the degree of care required of defendant is only such as is exercised by well-regulated railroads over their turntables, and that, if defendant exercised such care in this case, there was no negligence," saying that other railroads' negligence could not excuse negligence by this defendant, and that it was for the jury to say whether there was negligence here. The supreme court held that there was no error in this. In the recent case of *Lowrimore v. Manufacturing Co.*, 60 S. C. 168, 38 S. E. 433, the circuit court was requested to charge the jury: "If the jury believe that the Palmer Manufacturing Company exercised such care as other well-regulated companies doing the like business ought to exercise, and as proper prudence demanded under the circumstances, nothing more can be required, and they are not responsible," to which the court replied: "I refuse that. We are not to discuss other well-regulated companies, but this company." This court, speaking by Chief Justice McIver, in overruling the exception to the refusal to charge, said: "The question, as the circuit judge very properly said, was whether the defendant used proper care in furnishing machinery and other appliances for the performance of the work required of its employes, and not what other well-regulated companies did or ought to have done. What such companies did may possibly have had some bearing upon the question of fact as to whether defendant exercised proper care." The principle announced in these cases is as applicable to the question of negligence by plaintiff as to negligence by defendant. The following statement in *Beach, Contrib. Neg.* p. 442, is applicable: "Where an employe, in discharging the duty required of him, has the choice of two ways of performing it,—one entirely safe, and the other obviously and greatly dangerous,—adopts the dangerous way, and is injured, he is guilty of negligence, which will bar a recovery by him in an action against the employer, based on the

latter's negligence; and he cannot relieve himself of the consequences of such contributory negligence by showing that it was customary to perform the duty in the dangerous way." The error in the charge was harmful. There was evidence tending to show that the rails could have been safely carried up the embankment or fill, which was three or four feet high, by the four men constituting the usual force for that season of the year, by carrying up one end of the rail at a time, instead of the method adopted of carrying the rail, two men at each end. The plaintiff, as section master, directed the method of handling the rails, and according to the complaint he was aware of the inadequacy of the force, having made protest concerning this. When, therefore, the defendant sought to show contributory negligence on the part of plaintiff in doing the work in a dangerous way when a safe way was at his choice, it was prejudicial to have the jury instructed that there was no negligence on the part of plaintiff if the way he adopted was customary. It was for the jury to say whether such usual or customary method was such as a careful and prudent person should adopt under the circumstances. For this reason a new trial must be granted. The judgment of the circuit court is reversed, and the case remanded for a new trial.

(129 N. C. 21)

MIDGETT v. MIDGETT.

(Supreme Court of North Carolina. Sept. 10, 1901.)

QUIETING TITLE—STATUTE—JURY—INSTRUCTIONS—EVIDENCE—STATE GRANT—ADMISSIBILITY.

1. A dispute of title to land cannot be tried by processioning proceedings, under Laws 1893, c. 22, providing that proceedings may be brought before the clerks of the superior courts to determine the boundary lines between lands.

2. Where an action is brought to determine the title to land, and plaintiff's only evidence as to his ownership is a grant from the state, which ownership, as well as possession, defendant denies, refusal to submit an issue as to title or possession, or to charge the jury as to the same, is error.

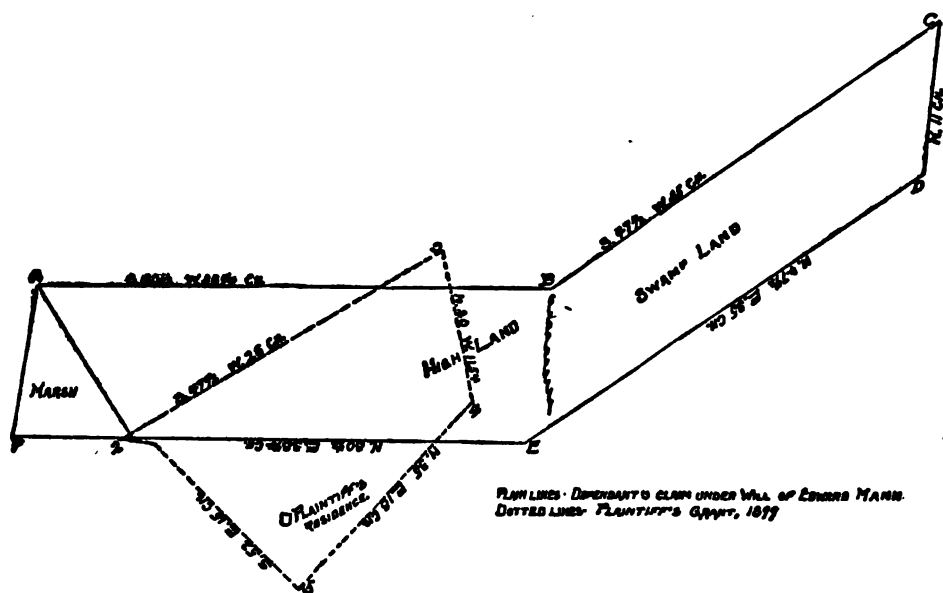
3. In an action brought to determine the title to land, a grant from the state is admissible in evidence to show such title.

4. Where at the time the state issued a grant to land the title thereto was held by others, such grant conveys no title, and hence, it having been put in evidence in an action to determine the title to the land described therein, the court should so instruct the jury.

Appeal from superior court, Dare county; McNeill, Judge.

Action by W. W. Midgett against J. D. Midgett. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The following is the map referred to in the opinion:



E. F. Aydlott and F. H. Busbee, for appellant. W. M. Bond and B. G. Crisp, for appellee.

FURCHES, C. J. This is a proceeding commenced before the clerk of Dare superior court under chapter 22, Laws 1893. This act seems to have been intended as a substitute for the old processioning act, and it has been so many times held by this court that it settles nothing as to title that we are somewhat surprised to see that it should have been used in this proceeding instead of a civil action. *Vandyke v. Farris*, 126 N. C. 744, 36 S. E. 171; *Williams v. Hughes*, 124 N. C. 3, 32 S. E. 325; *Wilson v. Alleghany Co.*, 124 N. C. 7, 32 S. E. 326. But, besides this, it appears to us from the case on appeal, the map exhibited, and the argument of the case that chapter 22, Laws 1893, has nothing to do with it. If the plaintiff has any right under his grant of 1899, it is in ejectment. There is no evidence tending to show that the plaintiff was the owner of the land he claimed, or that he was in possession, except the grant of 1899. It was flatly denied by defendant that the plaintiff was the owner, or that he was in possession, and yet the court refused to submit an issue as to title or possession, or to charge the jury as to the same; but charged the jury "that it was purely a question of fact for them to say where the lines were, and after weighing all the evidence both for the plaintiff and defendant, and giving due weight to the same, it was for them to say how it was, and to answer the issues accordingly." This was error. But this appears to us to be a remarkable case. In 1858 Edward Mann made a will, in which he devised this land to his four sons, as tenants in common, to be equally divided among them, "share and share alike," designating the order in which they should

take, commencing at Caroon's line. This will was probated in 1861, and the plaintiff is the purchaser from one of the four devisees. The defendant claims under a deed from Thomas R. Mann for his interest under the will of Edward Mann, dated in April, 1884. The plaintiff claims the interest of W. K. Mann under a deed from T. M. Gard, dated April, 1892, stating that it conveys W. K. Mann's interest under the will of Edward Mann, and calls for the line of the defendant as one of its boundaries. After the plaintiff obtained his deed from Gard for W. K. Mann's interest in the Edward Mann lands, he commenced a proceeding in the superior court of Dare county before the clerk, alleging that he was a tenant in common with the other devisees of Edward Mann, and demanded a partition of the same; the defendant, John D. Midgett, being one of the defendants in that proceeding. 117 N. C. 8, 23 S. E. 37, and 120 N. C. 4, 26 S. E. 626. In that proceeding the defendants admitted that the plaintiff was the owner of W. K. Mann's interest in the Edward Mann lands, devised to W. K. Mann, but denied that they were tenants in common with him; and upon the final hearing it was held that the plaintiff was sole seised, and that the defendants were not tenants in common with him. Id. The plaintiff then brought an action of trespass, but afterwards withdrew that action. He then obtains his grant of 1899, and commences this proceeding, under chapter 22, Laws 1893.

We do not see how this proceeding can be sustained. The contention of the plaintiff, as shown by the map, fails to show a disputed dividing line between the plaintiff and defendant, but only a dispute of title, if it shows anything. This cannot be tried under the act of 1893.

There was no error in allowing the plain-

tiff to offer his grant in evidence, but if the title to the land it covered was out of the state at the time it was issued, as it seems to have been, it conveyed no title, and it was the duty of the court to so have instructed the jury. We do not see how the plaintiff can proceed: certainly, he cannot as the case is now presented to us. Error.

(129 N. C. 60)

BARDEN et al. v. PUGH.

(Supreme Court of North Carolina. Oct. 1, 1901.)

APPEAL—JUDGMENT—NOTICE OF APPEAL—PERSONS BENEFICIALLY INTERESTED.

A suit on a note was brought in the name of the payee to the use of S., the transferee, against the administrator of the deceased maker. The administrator demurred, answered the allegations of ownership, and set up a counterclaim as against the payee, which counterclaim was denied. On an issue submitted to the jury it was found that S. was the owner of the note, and that the same was due and unpaid. A judgment was rendered for S. in her own name, and thereafter defendant took an appeal, but served notice thereof only on the payee. *Held*, that such appeal was ineffectual as against S. for want of a notice served on her, and as against the payee for the reason that no rights of his were affected by the judgment appealed from.

Appeal from superior court, Sampson county; Moore, Judge.

Action by W. E. Barden and others against W. J. Pugh, as administrator of the estate of J. E. Barden, etc. From a judgment in favor of plaintiffs, defendant appeals. Appeal dismissed.

J. L. Stewart and J. D. Kerr, for appellant. T. B. Womack and E. C. Smith, for appellees.

MONTGOMERY, J. The summons was issued in the style of W. E. Barden, to the use of Nannie Smith and her husband, R. B. Smith, against W. J. Pugh, administrator of J. E. Barden, deceased; and there was inserted a notice that, if the defendant failed to answer the complaint within the time required by law, the plaintiff Mrs. Nannie O. Smith would apply to the court for the relief demanded in the complaint. The complaint was entitled, as to the parties, in conformity to the summons; but in the complaint the cause of action was alleged to be entirely in favor of Mrs. Smith, and judgment for the amount of the note declared on in the complaint was demanded in her name and for her benefit. The defendant, not demurring to the complaint for the irregularity in the manner in which the suit was brought, answered the allegations which alleged the ownership of the note (the subject of the action) in Mrs. Smith, and also set up a counterclaim against W. E. Barden. The counterclaim was denied by replication. An issue was submitted to the jury, without exception by the defendant, as to whether the note was the property of Mrs. Smith, and the same was answered

in the affirmative. The jury also found that the whole amount was due on the note, less the two indorsed credits; that it was not barred by the statute of limitations, and not executed in fraud. A judgment was rendered upon the verdict of the jury in favor of Mrs. Smith in her own name, and for the amount due on the note and costs. The verdict was delivered and the judgment rendered on the night of October 19 (Friday), 1900, the last day of the term of court. No appeal was taken from the judgment, and no notice of appeal was given at the term at which the action was tried. After the term of the court had expired the defendant caused to be entered the following words on the judgment docket: "From this judgment the defendant takes an appeal to the supreme court, and causes said appeal to be docketed here this October 25, 1900, and also files with the clerk of this court a statement of the case on appeal." On the 26th of the same month the defendant caused a notice of appeal, addressed to the plaintiffs, to be served on W. E. Barden, and on the same day a statement of the case on appeal was served on Barden. No notice of appeal, nor any statement of a case on appeal, was ever served upon Mrs. Smith. Upon these facts being found by his honor who tried the case, the matter of the appeal being afterwards heard by his honor, counsel for both parties being present, he made an order as follows: "The court, being of the opinion that the defendant has appealed from the judgment only in so far as the same affects the rights of W. E. Barden, but is entitled to have a case on appeal settled as to the plaintiff W. E. Barden, overrules the objections of counsel for the plaintiffs to the settlement of case on appeal as to the plaintiff W. E. Barden, and sustains said objection as to the plaintiffs Nannie O. Smith and R. B. Smith, her husband."

From the summons and the pleadings and the evidence in the case, it is perfectly clear that the defendant was not misled as to who was the true party plaintiff. The subject of the action was a note executed by the intestate of the defendant to W. E. Barden, and which note had been assigned and transferred to Mrs. Smith. Why the action should have been commenced in the name of Barden, to the use of Mrs. Smith, in the face of section 177 of the Code, we do not understand; but it was not demurred to by the defendant, and he made his defense against the collection of the note as if Mrs. Smith was the sole and absolute owner of the same. As we have said, the verdict was in favor of Mrs. Smith on an issue as to whether she was the owner of the note, and the judgment was in her name; the name of W. E. Barden not appearing in it. To make the notice of appeal effectual as to Mrs. Smith, of course, the notice should have been served on her; and, that not having been done, there was no error in the ruling of his honor on that point. But we think his honor was in error

in holding that the notices which were served on W. E. Barden constituted an appeal. Nothing was embraced in the judgment which gave any benefit or advantage to W. E. Barden. In fact, as we have said, his name did not appear in the judgment. Nor was any right of the defendant affected so far as W. E. Barden was concerned. Nothing appears in the record as to what became of the counterclaim set up by the defendant against W. E. Barden. No instructions were given by the court, nor were any asked by the defendant, on that part of the case, and there is no evidence concerning the same in the statement of the case on appeal. There was nothing in the judgment from which the defendant ever had any right of appeal, so far as W. E. Barden was concerned, and he did not serve any notice of appeal on Mrs. Smith, who made the recovery on the note against him, so that it is unnecessary to consider the questions raised in the case which his honor made up. Appeal dismissed.

(129 N. C. 46)

WAINWRIGHT v. MASSENBURG.

(Supreme Court of North Carolina. Sept. 24. 1901.)

REAL ACTIONS—INTERVENTION—TITLE OF INTERVENER—AGENCY—POWER COUPLED WITH INTEREST.

1. Testator devised land to his wife, providing that she should have a life estate, restricted to the coming of age of any of her children, and with the limitation that, if she should marry, she should cease to have any interest. Subsequently she married, and she and the husband occupied the land for several years, when it was sold under execution. In an action to recover the land by the purchaser at execution sale certain parties intervened, and introduced a deed from a son of testator for his interest in the land willed by his grandfather to his father. *Held*, that the intervener, not showing that the one who married testator's widow claimed to hold the land under the will of his father or grandfather, had no standing in the suit.

2. Where testator devised land to his wife for life, with the limitation on the coming of age of any of his sons or on her remarriage, and some of the children or their grantees acquiesced in the occupation of the land for more than 50 years after their coming of age, their rights were barred by laches.

3. Where, in a suit to recover real property, an intervener relies on a deed from I. to J., and a power of attorney from a Mrs. J., who alleges that she is the heir at law of J., but it is not stated in the interplea how she is related to J., the interplea is insufficient.

4. One claiming under a power of attorney to recover land whereby he is to have one-half of what he recovers has not an interest coupled with the power which prevents death from terminating the agency.

On petition for rehearing. Denied.

FURCHES, C. J. This is a petition to rehear as to the interpleader, B. B. Massenburg, attorney. 127 N. C. 274, 37 S. E. 336. It was decided at September term, 1900, that the plaintiff was the owner and entitled to the possession of the land in controversy. This decision is not affected by the petition

to rehear, as the rehearing was only granted as to Massenburg, therein called "defendant." We do not propose to discuss the plaintiff's rights in this opinion further than is necessary to present the facts that are necessary to discuss the rights of the petitioner, Massenburg. It appears from the record that Jeremiah Ingram, on the 26th of March, 1826, made a will, which was probated in March, 1827, in which he willed and devised the lands in controversy to his widow, Nancy, and to his four children, Samuel, Joseph, Joshua, and Presley. But the wife, Nancy, at the longest time, was to have only a life estate therein, which was further restricted to the coming of age of any one of his children, with the further restriction and limitation that, if his widow, Nancy, should marry, she was then to cease to have any interest whatever in said land. She afterwards did intermarry with Willis P. Ingram, but the date of this marriage is not stated. But it does appear from the record that W. P. Ingram and his wife, Nancy, were living upon this land as far back as any of the witnesses could remember,—certainly for the last 60 years,—and that Willis was using it and claiming it as his own until 1870, when it was sold under execution by the sheriff of Franklin county, when the plaintiff became the purchaser, took a deed from the sheriff, and went into possession. There are several reasons why the petition to rehear should not be granted. The learned counsel for the petitioner contended that, as this was an action of ejectment, the plaintiff must recover upon the strength of his own title, and not on the weakness of defendant's title. This is a correct proposition of law, which was observed on the trial of this case, and the plaintiff recovered; and the opinion of this court affirming that judgment is allowed to stand as a correct ruling and judgment as to all the defendants except the interveners, and must stand as to them unless they show that it is erroneous. This, we think, they have failed to show. The interveners have failed to show any title to the land, or to connect themselves with the estate of Willis Ingram or the plaintiff. The interpleaders have introduced a deed from Joseph Ingram to T. J. Judkins, dated the 9th of December, 1844, for his interest in the land willed by his grandfather to his father, Jeremiah Ingram. But they do not show that W. P. Ingram held or claimed to hold said land under the will of Benjamin Ingram or Jeremiah Ingram. It was not willed to him by either of them. And, while Willis Ingram married the widow of Jeremiah Ingram, the will itself shows that she had no interest in the land after her marriage. The petition to rehear says that Willis and Nancy, the widow of Jeremiah Ingram, intermarried a few years before his death, which was about 1880. But the intervener offers no evidence to sustain this allegation, and it would be most remarkable if it were true, as she was

old enough in 1827 to be the mother of four children, Samuel, Joseph, Joshua, and Presley, named in his will. But it cannot be true, as it is shown that the Bobblits are the grandchildren of Willis and Nancy, and the plaintiff is the daughter of Willis and Nancy, and that she was a married woman in 1870, when she bought the land in controversy. These children and grandchildren, the result of the marriage of Willis and Nancy, show that the marriage must have taken place more than "a few years before the death of Willis Ingram." We have seen that Nancy had no interest in this land after her marriage with Willis, which was long enough ago to have a married daughter (the plaintiff) in 1870, and grown grandchildren (the defendants Bobblits) before this action was commenced. And Joseph Ingram, the grantor of Judkins, must have been of age in 1844, when he made his deed to Judkins, which was more than 50 years before the commencement of this action; and if he or Judkins ever had any right to the land in controversy, they have lost it by sleeping on their rights for more than 50 years, when there was nothing to prevent them from suing for it.

But there are other reasons why this petition to rehear should not be granted. The deed offered in evidence is from Joseph Ingram to T. J. Judkins, and the power of attorney is from Mrs. Rachael Judkins, who alleges that she is the heir at law of T. J. Judkins. But it is not stated in the interplea how she is related to T. J. Judkins, and the court cannot know whether she is or not, and there is no evidence offered to show her relation to him. It was stated during the argument that she was his widow, and, if so, she would not be the heir at law of T. J. Judkins, unless she is made so by statute; and no such statute was called to our attention. But she is dead, and was so before the commencement of this action, and the interplea is made in behalf of her heirs. Who are they? The court has no means of knowing, and would be at a loss to render a judgment if they were entitled to one. But Mr. Massenburg claims that under the power of attorney from Mrs. Judkins to him he is personally interested; that he is to have "one-half of what he recovers." But Mrs. Judkins is dead, and was so several years before this action was commenced, and upon her death all the power Mr. Massenburg had from her died. This is the general rule, and the exception to this rule is where the power is coupled with an interest. But an interest in the recovery is not an interest coupled with the power that prevents death from terminating the agency. 1 Am. & Eng. Enc. Law, 1217, 1218, 1222. The petition says that in the opinion of the court it is said that plaintiff and defendants are tenants in common. This expression may not have been well guarded. But the defendants claimed to be tenants in common with the plaintiff, and the court was commenting upon the case,

upon defendants' contention. But let that be as it may, it in no way affects the rights of the interpleader in this petition to rehear. They have failed to connect themselves with this estate, or to show any title to the same. For the reasons stated, the petition must be dismissed.

CLARK, J., did not sit on the hearing of this case.

(129 N. C. 67)

SATTERTHWAITE et al. v. ELLIS.
(Supreme Court of North Carolina. Oct. 1, 1901.)

CHATTEL MORTGAGE—ASSIGNEE—RIGHT TO POSSESSION—RECOVERY OF CHATTELS—
—MATURITY OF DEBT.

1. The assignee of a note secured by a mortgage on chattels is entitled to the possession thereof.

2. In an action by an assignee of a mortgage of chattels to recover possession of the same before maturity of the note secured by the mortgage, it was proper to render judgment for the absolute possession of the property.

3. Where the assignee of a mortgage of chattels before maturity of a debt seized the property in claim and delivery, it was proper not to allow the defendant the value of the use of the property from the time of seizure to the time of the judgment in favor of plaintiff.

4. Where the assignee of a mortgage of chattels seized the same in claim and delivery, it was not necessary that he should show a demand for the chattels before instituting a proceeding, it appearing that such demand would not have been complied with.

Appeal from superior court, Craven county; Coble, Judge.

Action by L. M. Satterthwaite & Bro. against W. S. Ellis. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

W. D. McIver, for appellant.

MONTGOMERY, J. The plaintiff, who is the assignee of a note and mortgage made by the defendant, brought this action to recover possession of the personal property conveyed in the mortgage before the maturity of the debt, and at the time of the issuing of the summons seized the property under a proceeding in claim and delivery. The defendant in his answer resisted the plaintiff's claim, averring that there was a verbal agreement between the mortgagee and himself at the time of the execution of the mortgage that he should be allowed to remain in possession of the property until the note should fall due, and also set up a counterclaim, and prayed for judgment for a return of the property and for damages for the wrongful taking and detaining the same. Among the issues submitted was one (the fifth in number) as to whether demand was made under the mortgage and note on the defendant for possession of the property before the action was commenced, and another (ninth) as to the value of the use and possession of the property seized from the date of its seizure to the trial,

—both issues submitted under the plaintiff's objection. The jury responded "No" to the fifth issue, and "\$110" to the ninth. His honor, notwithstanding the finding of the jury on the two issues, gave judgment that the plaintiff recover the property absolutely; the jury having found in response to the first issue that the plaintiff was entitled to the property. His honor instructed the jury, among other matters, that if the jury should find that the plaintiff purchased the note and mortgage from Mitchell (the mortgagee) for value and before it was due, unless they should find that the plaintiff had had notice of the agreement between Mitchell and Ellis (the defendant) that Ellis should retain possession of the property (if they should find there was such an agreement), the plaintiff would not be bound by the agreement, and that the jury should find that the plaintiff was the owner and entitled to the possession of the property, and answer "Yes" to the first issue, and that the fact that the defendant was then in possession of the property was not notice of such an agreement. The defendant excepted to the charge, and the contention of his counsel here was that the plaintiff, as assignee of the mortgagee, had no authority or right to have possession of the property, that being the privilege of the mortgagee only, and that that right belonged to the mortgagee, because, and only because, of the legal title being in the mortgagee; the legal title drawing the right of possession. But it seems to us that the better view is that the assignee was entitled to possession of the property. Under numerous decisions of this court it is held that the assignee of a note secured by a mortgage is entitled to all the rights and privileges which the mortgagee had, except to sell the property under the mortgage; and in *Jones, Chat. Mortg.* § 501, it is said: "The legal effect of the assignment is to transfer the entire interest of the mortgagee in the property to the assignee, who thereupon, in place of the mortgagee, becomes the general owner. If the mortgagee was entitled to the possession of the property, the legal effect of his assignment is the same as if he had been in the possession of the property, and had sold and delivered it to the assignee. His assignee may recover possession in the same manner that the mortgagee himself might have recovered it." And so, also, it is said in *Id.* § 506: "An assignment by a mortgagee not in possession has the same legal effect as an assignment by a mortgagee in possession. It passes his entire interest in the property, and the assignee becomes entitled to all the rights of the mortgagee. If the latter is entitled to possession, his assignee in like manner is entitled to possession."

The defendant also excepted to the judgment—First, because it was for the absolute possession of the property; second, because the defendant was not allowed the amount found by the jury under the ninth issue, and

also because the jury found that no demand had been made by the plaintiff on the defendant for the property before the action was commenced.

We think the judgment is correct. The action was not for the debt and foreclosure of the mortgage, but simply for the possession of the property. The debt was not due. If the action had been for foreclosure, and there had been a verdict of the jury ascertaining the debt, and it had appeared that the property was largely in excess of the debt, the court might have rendered a judgment for the recovery of the property, with a proviso that the same should have been relieved of the lien and liability to seizure and sale by the payment of the sum actually due, with interest and costs. *Taylor v. Hodges*, 105 N. C. 344, 11 S. E. 156. But, as we have said, the action was for the possession of the property itself, and the plaintiff had the right to that, notwithstanding the debt was not due. *Hinson v. Smith*, 118 N. C. 503, 24 S. E. 541; *Jackson v. Hall*, 84 N. C. 480.

As to the second exception of the defendant to the judgment, it may be said that, if the demand for such damages as are embraced in the ninth issue could be considered as a counterclaim (the same not having been set out in the answer, but only in the demands for judgment), it ought not to have been allowed in the judgment. It did not exist at the time of the commencement of the action, nor did it arise out of the same cause of action. It grew out of an alleged wrongful procedure in the present action, the seizure of the property by claim and delivery, and not out of the cause of the action. *Kramer v. Light Co.*, 95 N. C. 277; *Snow v. Commissioners*, 112 N. C. 335, 17 S. E. 176; *Phipps v. Wilson*, 125 N. C. 106, 34 S. E. 227.

In respect to the third exception to the judgment it is sufficient to say that no demand was necessary for the possession of the property before the action was commenced. The answer shows, as we have pointed out, that the demand would have been useless. The defendant intended to resist the claim of the plaintiff. *Buffkins v. Eason*, 112 N. C. 162, 16 S. E. 916; *Moore v. Hurtt*, 124 N. C. 27, 32 S. E. 317. In the last-mentioned case it is said: "The sole purpose in requiring a demand before action is that the defendant shall not be taxed with costs when the plaintiff could have obtained the object of his action by simply making demand. When, therefore, the defendant set up a defense to the action, it appearing that a demand would have been futile, the courts do not hold that the omission to make demand is fatal." Affirmed.

DOUGLAS, J. While concurring generally in the opinion, I cannot agree with that part of it which holds that the so-called damages embraced in the ninth issue did not arise out of the same cause of action, but out of an alleged wrongful procedure in the action.

Whatever terms may have been used by the parties, the sum found due is in fact not damages arising out of a wrongful act, but the net value of the use of the property in the plaintiff's possession. It is well settled that while a mortgagee may, in the absence of any stipulation to the contrary, take possession of mortgaged property, he cannot sell such property before default. If he sees fit to take the property before the debt is due, he must account to the mortgagor for the value of any reasonable use to which the property is or could have been put. The reason of the rule is thus given in *Jackson v. Hall*, 84 N. C. 489: "While the defendant invaded no right of the mortgagor in taking and keeping possession until the day of default, whether the property was or was not in danger of being lost or injured, yet he was meanwhile acting as trustee bound to exercise that diligence and care expected of one in the preservation and management of his own property, and to account not only for profits actually received, but for the value of any reasonable and prudent use to which it could have been put without detriment to the property itself, since he has, as the verdict finds, needlessly deprived the plaintiff of its use." Such a claim is rather in the nature of recoupment, and, being "connected with the subject of the action," clearly comes under the first class of counterclaims mentioned in section 244 of the Code. *Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288. If this were a suit for the foreclosure of the mortgage, which it appears to have been considered through every stage of its proceeding up to the judgment, I do not see why the defendant could not maintain his counterclaim for the reasonable hire of the property taken before default.

(129 N. C. 64)

LANE v. RANEY.

(Supreme Court of North Carolina. Oct. 1, 1901.)

INSURANCE—COMPENSATION OF AGENT—EVIDENCE.

1. Plaintiff was employed by the defendant, who was a general insurance agent, as a local agent, under a contract requiring him to abide by the rules of the company, one of which provided that, where a policy was procured by the joint services of two agents, a written agreement for the division of the commission should be filed with the application. Plaintiff and another agent procured a policy, but no agreement for the division of the commission was filed, and the same was paid to the other agent. *Heid*, that plaintiff was not entitled to recover.

2. Where, in an action by a local insurance agent against the general agent for commissions on a policy, it appeared that the plaintiff had been appointed by another local agent, who had authority "to discontinue and to create agencies," evidence of a statement by such agent that plaintiff was entitled to commissions on the policy in question was inadmissible; the agent not having power to bind defendant for a pecuniary obligation not connected with the creation or discontinuance of an agency.

Appeal from superior court, Craven county; McNeill, Judge.

Action by S. H. Lane against R. B. Raney. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Battle & Mordecai, for appellant. W. D. McIver, for appellee.

MONTGOMERY, J. The defendant is now, and was at the time of the matters set out in the pleadings, the general agent of North Carolina of the Penn Mutual Life Insurance Company of Philadelphia, and the plaintiff was at that time one of the local agents of the defendant at Newberne. It appears from all the testimony on that point in the case that the policy (the commission on the first premium of which being the subject-matter in dispute) was procured by the joint services of the plaintiff and another agent (H. O. Martin) of the defendant. In the contract concerning the agency between the plaintiff and the defendant, the plaintiff agreed to abide by and follow the rules of the defendant's office; one of the rules being on the subject of the division of commissions on first premiums on policies procured by the joint services of two or more of the special or local agents of the defendant. The defendant in his testimony said that the rule required that the agreement should be in writing, and filed with the application for insurance when the application was sent into his office. The plaintiff testified that he knew there was a rule on the subject, and had complied with it, as he understood it, in every instance except the present one, and that his understanding of the rule was that the agreement in writing was to be sent in "when the payment was collected upon the delivery of the policy." Under either view of the agreement and rule, the required notice was not given to the defendant by the plaintiff. The plaintiff knew on the 6th of June that all the preliminaries had been arranged, and that the application for the insurance was to be sent on to the defendant by Martin. It was sent off on the last-mentioned date to the defendant's office, and was unaccompanied by the agreement for division of commissions, as the rule required. No notice was afterwards given to the defendant until long after the premium had been paid and the commissions accounted for to the other agent, Martin. If it had been in contemplation that a note was to be given by the insured for the premium, instead of money, as the plaintiff testified was the understanding, the effect would be the same under the rule. The notice should have been given to Raney concerning the alleged claim of the defendant to his part of the commissions when the application was sent in. Raney would have been entitled to the notice, in order that he might reserve for the plaintiff out of the collection of the note, whenever paid,—whether before, at, or after its

maturity,—his part of the commissions. But the plaintiff contends that he was relieved of the duty to send forward the written agreement at the time of the receipt of the application of insurance at the office of the defendant, on the ground that Martin, who was authorized by the defendant to discontinue and to create the agency, was instructed by the defendant to discontinue the agency of the plaintiff, and in so doing said to the plaintiff: "You are entitled to your commissions on that [the premium on the policy] anyway. So, if that is all, you can give the papers over to me now." That conversation was on the 6th of June; the application for insurance being then in the possession of Martin, to be forwarded to the defendant, and that fact known to the plaintiff. That contention might be successful if Martin had been authorized by Raney to have made the statement, but the defendant had given him no such power. Martin was only authorized "to discontinue and to create agencies," and he could not bind Raney by his promise or agreement for a pecuniary obligation disconnected with the discontinuance or creation of an agency. His honor admitted the testimony of the plaintiff as to that conversation with Martin over the objection and exception of the defendant, and we think in so doing he committed error.

(129 N. C. 93)

MIZELL v. MCGOWAN et al.

(Supreme Court of North Carolina. Oct. 1, 1901.)

WATERS AND WATER COURSES—SURFACE WATERS—DIVERSION—DAMAGES—STATUTE.

1. Though a party may not divert the waters of a stream to the damage of another, he may accelerate and increase such waters, though by so doing another is damaged.

2. Code, c. 30, providing that persons owning swamp lands which cannot be conveniently drained or embanked except by cutting a canal or ditch or erecting a dam through or upon the lands of other persons may apply to the superior court, and further providing the mode of procedure, damages, etc., is not controlling as to damages for flooding lands of another where a party turns increased and accelerated but undiverted waters into a natural water course on her own lands by means of her own ditches, since such chapter deals with artificial water courses only.

Appeal from superior court, Pitt county; Hoke, Judge.

Action by W. G. Mizell against G. A. McGowan and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

A. M. Moore, for appellant. Skinner & Whedbee and Jarvis & Blow, for appellees.

DOUGLAS, J. This is an action for damages to the plaintiff's land from flooding alleged to have been caused by the improper and unlawful construction of ditches by the defendant. This is the third time that it has been before this court, being reported

in 120 N. C. 134, 26 S. E. 783, and 125 N. C. 439, 34 S. E. 538. The following are the issues and answers thereto: "(1) Is the plaintiff the owner and in possession of the lands described in the complaint? Ans. Yes. (2) Did Mrs. Laura A. McGowan wrongfully and unlawfully divert any water from its natural channel and discharge it upon the lands of the plaintiff, causing damage to same? Ans. No. (3) What damage, if any, has plaintiff sustained by reason of the wrongful diversion of said water? Ans. Nothing." We think these were the proper issues, and covered every contention left open to the plaintiff, in view of the opinions already rendered by this court in the case. We see no reason to depart from the rule we have laid down, and which may now be considered settled, that "neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert." *Hocutt v. Railroad Co.*, 124 N. C. 214, 32 S. E. 681; *Mizzell v. McGowan*, 125 N. C. 439, 34 S. E. 538; *Lassiter v. Railroad Co.*, 126 N. C. 509, 36 S. E. 48. The question of diversion was all that was left to the plaintiff, and that was submitted to the jury under instructions that appear to us without error. We are aware that great hardship may sometimes occur from the unlimited right of increase and acceleration, and that there are some authorities limiting it to the capacity of the natural outlet; but we must adhere to the rule as the result of our deliberate judgment. However short it may fall as a theoretical definition of ideal right, we can frame none better that is capable of practical application. Its limits are clearly defined by the natural landmark of the watershed, which, seen of all men, renders it easy of application and capable of definite proof. Any other rule would prevent the drainage of large bodies of swamp lands of great natural fertility and capable of the highest degree of improvement, but now worse than useless. They will eventually be needed to support an ever-increasing population, and to shut them up indefinitely as the mere homes of disease is repugnant to the highest principles of public policy and of private right. Suppose the natural capacity of the water course was made the test of the rule; it would be so extremely difficult of application as practically to destroy its value. What is the natural capacity of a stream? Is it measured at low water or at high water? Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water, and at the same time filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains. Again, suppose that the upper tenant were compelled to

regard the natural capacity of the stream; how far down would this limitation extend? Naturally many others would drain into the same stream, so that the landowner near its mouth would get the accumulated waters of all those above him. In case of injury, how would he apportion his damages, and where would the liability of each tortfeasor begin and end? These questions, it seems to us, would severely tax the utmost ingenuity of the courts, and leave the jury in such a state of perplexity as to seriously endanger their intelligent determination of the issues.

It is contended by the defendant that chapter 30 of the Code should be taken as determining this case. We do not think so. Those sections by their very terms apply to artificial outlets, such as ditches and canals, and not to natural water courses. A man can dig ditches wherever he pleases upon his own land, provided he runs them into a natural water course before leaving his own land, subject only to the limitation against diversion. But, if he cannot reach a natural water course without going on the lands of another, he must proceed under chapter 30 of the Code. The scope of this chapter is indicated in section 1297, which is in part as follows: "Any person owning pocoson, swamp or flat lands, or owning low lands subject to inundation, which cannot be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons may by petition apply to the superior court of the county," etc. In the case at bar the defendant has not cut any ditch upon the lands of the plaintiff, nor does she wish to do so. She has simply, by means of her own ditches, turned into a natural water course upon her own land increased and accelerated, but undiverted, waters. The rules governing natural and artificial water courses as outlets through the lands of another are essentially different,—this opinion dealing exclusively with the former. The judgment is affirmed.

(129 N. C. 78)

EDWARDS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct 1, 1901.)

RAILROADS — ACCIDENT AT CROSSING — FAILURE TO RING BELL — EVIDENCE — SUFFICIENCY — CONSTRUCTION OF CROSSING — ORDINANCE LIMITING SPEED — VIOLATION OF ORDINANCE — PROXIMATE CAUSE — INSTRUCTIONS.

1. In an action against a railroad company for the death of plaintiff's intestate, caused by his having been run over at a crossing, the testimony of a witness that he did not hear either a whistle or bell, though in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury.

2. In an action against a railroad company

for the death of plaintiff's intestate at a railroad crossing, evidence whether, if the highway had remained as it was before the construction of the railroad, a person driving along the highway could not have observed the approach of the train more readily than one traveling along the highway since the construction of the road, was properly excluded, since the fact that a crossing is dangerous does not necessarily impute negligence to the railroad company.

3. Where instructions on a material point are conflicting, a new trial will be awarded on an appeal.

4. A town ordinance limited the speed of railroad trains within the corporate limits, and in an action for the death of plaintiff's intestate at a railroad crossing the court charged that if the train at the time it reached the crossing was running at a greater rate of speed than that prescribed by the ordinance, and if the train had not been running at such speed the injury would not have occurred, defendant was negligent. *Held*, that the charge was erroneous, in that it restricted the consideration of the excessive speed to the actual point of the injury, while if the train had been running within the limits at an unlawful rate, and could not be stopped in time to prevent the injury at the crossing, its actual speed at the crossing was immaterial.

5. It was error to instruct the jury that if defendant's train approached the crossing without sounding the whistle or ringing a bell, and struck and killed plaintiff's intestate, the defendant was guilty of negligence, since the negligence of the defendant, no matter how great, would not of itself have rendered it liable unless such negligence contributed to the death.

6. It was error to charge that the rate at which the train was running would not be negligence, "or evidence of negligence," unless if the train had been running within the prescribed rate of speed the injury would not have occurred, inasmuch as, if the excessive speed was not even evidence of negligence, it would make no difference if such speed did cause the death.

Appeal from superior court, Wilson county; Coble, Judge.

Action by J. W. Edwards against the Atlantic Coast Line Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Woodard & Mewborn, for appellant. H. G. Connor, Geo. B. Elliott, and F. A. Daniels, for appellee.

DOUGLAS, J. This is an action brought by the administrator to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendant. It is admitted that the intestate was killed by the defendant's engine about 2 o'clock in the daytime at a street crossing within the corporate limits of the city of Wilson, and that there was an ordinance of said city reading as follows: "That any engineer of a railroad company who shall run any train in the city at a speed exceeding ten miles an hour, or who shall fail to ring the bell while in the city, shall be subject to a fine," etc. There was conflicting evidence as to the speed at which the train was running, and as to whether the whistle was sounded or the bell rung. We think that the testimony of a witness that he did not hear

either the whistle or the bell, although in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury. It tends to prove that neither the whistle nor the bell was sounded, but whether it does prove it is for them alone to decide. The plaintiff asked the witness this question: "If the public highway had remained as it was before the construction of the railroad, if a person driving along the highway could not have observed the approach of the train more readily than a person traveling along the same highway since the construction of the crossing made by the defendant railroad." This question, upon objection, was properly ruled out by the court. We are not clear what was meant by the question, but, in any view of it, we fail to see its relevancy. If the plaintiff had wished to show that the crossing was negligently constructed, he had the right to do so. By "negligent construction" we mean such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. *Raper v. Railroad Co.*, 126 N. C. 568, 36 S. E. 115. But the mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. All railroad crossings are more or less dangerous, and the mere presence of a railroad near a public highway is necessarily a disturbing element; but the company is not responsible for such inherent danger unless it unnecessarily causes or increases it by some unlawful act, or willful or negligent omission of duty. It is true that a railroad company might, by a proper construction of its road, render a public highway so dangerous as to demand more than ordinary care in the running of its trains, and it may be that to show this was the plaintiff's object; but even in that view the question was too general.

The plaintiff's second exception presents a graver question, and we think must be sustained. It is well settled that where there are conflicting instructions upon a material point a new trial must be granted, as "the jury are not supposed to be capable of determining when the judge states the law correctly and when incorrectly." *Tillett v. Railroad Co.*, 115 N. C. 662, 20 S. E. 480; *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; *Williams v. Hald*, 118 N. C. 481, 24 S. E. 417; *Bragaw v. Supreme Lodge*, 124 N. C. 154, 32 S. E. 544. This rule applies where there is actual repugnancy, and where, consequently, one part of the charge is necessarily erroneous, but not to cases where parts of the charge are explained and amplified by other parts thereof, or where an error therein is afterwards corrected in so clear and unmistakable a manner as to leave no possibility of misconstruction by the jury. *Everett v. Spencer*, 122 N.

C. 1010, 30 S. E. 334. His honor charged in part as follows: "If the jury find that the train at the time it reached the crossing in question was running at a greater speed than that prescribed by the town ordinance, and find that, if the said train had not been running at the time it reached the said crossing at a greater rate of speed than that prescribed by the town ordinance, that the injury would not have occurred,—that is, find that but for such rate of speed the injury would not have happened,—then the jury are instructed that this was negligence, and they will answer the first issue, 'Yes.'" This charge is correct in so far as it correctly assumes the two requisites for an affirmative finding of the first issue, namely, that the defendant must be guilty of negligence, and that such negligence must have contributed to the injury. In another view it is not correct, because it restricts the consideration of the excessive speed to the actual point of the injury. The negligence consists in running at an unlawful rate of speed within the corporate limits. If a train were running within such limits at an unlawful rate of speed, and in consequence of such excessive speed could not be stopped in time to prevent injury at the crossing after coming within sight thereof, the company could not free itself from liability simply by showing that the train was running less than 10 miles an hour when it reached the crossing. The object in limiting the speed where accidents are liable to occur is to keep the train within the control of the engineer, so as to enable him to stop in time to prevent such accidents after he discovers the danger. His honor had previously charged as follows: "If the jury find that defendant's train approached the crossing in question without sounding the whistle and without ringing the bell, and struck and killed the plaintiff's intestate, then the jury are instructed that defendant was guilty of negligence, and you will answer the first issue, 'Yes.'" This instruction was erroneous because, the killing being admitted, it made the answer to the first issue depend entirely upon the failure to sound the whistle or ring the bell. If the issue had been simply as to the negligence of the defendant, this instruction would have been correct, but such was not the issue. It was as follows: "Was the plaintiff's intestate killed by the negligence of defendant?" This issue involved two propositions: First, the existence of such negligence; and, secondly, its relation to the injury. The negligence of the defendant, no matter how great, would not of itself have rendered it liable in damages unless it had contributed to the death of the plaintiff's intestate; while, on the other hand, the mere killing would not have been actionable unless caused by some unlawful act or the negligent or willful omission of some legal duty on the part of the defendant. This instruction, being favorable to the appellant, is not ex-

cepted to, but we deem it proper to discuss it in view of our comments on the general effect of the entire charge. Again, his honor charges that "the rate of speed at which the train was running would not be negligence, or evidence of negligence, unless the jury find that if the train had been running within the limits prescribed by the town ordinance, to wit, not more than ten miles an hour, the injury would not have occurred." This instruction is in conflict with those quoted above, and is clearly erroneous, as well as prejudicial to the plaintiff. If the excessive speed was not even evidence of negligence, it would make no difference if it did cause the death of the intestate. A train may, without negligence, kill a man simply because, owing to its high speed, the engineer was unable to stop in time after discovering the danger; and yet the company would not be liable unless such speed were negligent or unlawful. A rate of speed greater than that allowed by law is always at least evidence of negligence, and under certain circumstances may become negligence per se. *Norton v. Railroad Co.*, 122 N. C. 910, 927, 29 S. E. 886. In *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, the court says on page 418, 144 U. S., page 683, 12 Sup. Ct., and page 489, 36 L. Ed.: "Indeed it has been held in many cases that the running of railroad trains, within the limits of a city, at a rate of speed greater than is allowed by an ordinance of such city, is negligence per se. [Citing authorities.] But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred, in determining whether the company was or was not guilty of negligence." In the same case the court says on page 417, 144 U. S., page 683, 12 Sup. Ct., and page 489, 36 L. Ed.: "What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence." The defendant urges in support of this instruction that it was copied from one given by the court below in *Norton v. Railroad Co.*, supra. This appears to be true, but it does not appear that it was approved by this court. As it was favorable to the then appellant, it was not under exception, and was therefore not material. In that case this court says on page 933, 122 N. C., and page 893, 29 S. E.: "They [the defendant's prayers] were given to a large extent in the charge,—fully as much so as the defendant could rightfully ask. In fact, it is questionable whether some parts that were given could stand the test of exception, but that is not now before us." The relative rights, duties, and responsibilities of a railroad company and a traveler crossing its track on the highway are fully discussed in *Norton v. Railroad Co.*, supra, and *Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403.

There were some other exceptions as to the court's singling out a certain witness, but it is unnecessary to discuss them, as it may not occur upon a new trial, and is not material now. For error in the charge, there must be a new trial.

(129 N. C. 73)

WEEKS v. McPHAIL et al.

(Supreme Court of North Carolina. Oct. 1, 1901.)

JUDGMENT—NONSUIT—FORM—ESTOPPEL—
RES ADJUDICATA—PLEADING.

1. Where a decree in partition recites that it is on the merits, it will not be construed to be a judgment of nonsuit because it orders that the petition be dismissed, instead of ordering that the petitioner take nothing by his petition.

2. Plaintiff in a suit to recover real estate relied on a former decree adjudging a will to create a life estate in a mother, remainder over to her children, and he introduced the will merely to show that it was considered on the former trial. Held not to estop plaintiff from denying that the will created a tenancy in common, which would prevent his relying on the conclusiveness of the former decree, even though the will showed on its face that such was the estate created by it.

3. A decree in a suit to partition lands, which was relied on in a subsequent suit to recover the lands as res judicata by a party claiming under a defendant, acts as an estoppel as to all parties to such partition suit, without regard to their being plaintiffs or defendants.

4. Where all the parties interested in certain land appeared in an action to recover possession thereof, and a prior decree, determining the title thereto, which was created by a certain will, is introduced in evidence, and relied on as an estoppel, the fact that it was not so pleaded is not a ground for the reversal of a judgment in favor of the party relying thereon.

On petition for rehearing. Petition overruled.

For former opinion, see 38 S. E. 472.

J. L. Stewart, Allen & Dortch, J. D. Kerr, and Battle & Mordecai, for appellants. F. R. Cooper and Geo. E. Butler, for appellee.

FURCHES, O. J. This is a petition to rehear this case decided at the last term of the court, and reported in 128 N. C. 130, 38 S. E. 292. There are five grounds assigned in the petition in which error is alleged in the opinion of the court when this case was here before; and, while the argument before us was principally upon the first assignment, none of them were abandoned, and it will be necessary that we shall examine and pass upon all of them.

The first assignment is as follows: "That the decree of 1854, dismissing the petition, was in substance a nonsuit," and cites *Strauss v. Beardsley*, 79 N. C. 50. This case, in our opinion, does not sustain the contention of the petitioners, and is not authority for holding that the "decree" in the courts of Sampson, in 1854, was "in effect a nonsuit." That case shows that the judgment in that case, which the court says was "in substance a nonsuit, was a judgment dis-

missing the action for the reason that the court had no jurisdiction to try the case; and, this being so, it shows that it was not disposed of upon its merits,—could not have been; and, this being so, if the court had proceeded to try the case, and to enter up a formal judgment, it would have been a nullity, and would have been no estoppel; while it was not disputed, and cannot be disputed, that the court of pleas and quarter sessions of Sampson county had jurisdiction of this proceeding for partition, and the superior court upon appeal. Originally, courts of law and equity had concurrent jurisdiction of matters of partition. But in 1787 the legislature gave jurisdiction in matters of partition “to the justices of the county courts of pleas and quarter sessions,” as well as to the superior courts, and prescribed the mode and manner in which it should be done,—that it should be done by filing a petition, as was done in this case. 1 Rev. St. c. 86, § 1. The legislature did not only give the county courts jurisdiction in cases of partition, but it prescribed the manner of procedure, which was substantially the equity practice in such cases. There were the best of reasons for prescribing the equity practice, because matters of partition involved equitable jurisdiction. The judgments of the law courts were in *solido*, yea, yea, or nay, nay; while the decrees in courts of equity could be shaped and modified to meet the facts and requirements of the case. They could not only grant the order for partition, but direct the assignment in owelty, and require the same to be reported back to the court, subject to exceptions, to be passed upon by the court before a final decree was rendered. This is the reason the final order in matters of partition was called the “decree” of the court. So this case is distinguished from *Strauss v. Beardsley*, in that the county courts of Sampson had jurisdiction, and the superior court had on appeal, while in *Strauss v. Beardsley* it did not. And it is not denied but what Hester Weeks and all her children were parties to the proceeding for partition. It is distinguished from *Strauss’ Case* by the fact that judgment of dismissal in that case was for the want of jurisdiction,—the merits were not passed upon; while in the case of *Rayner v. Weeks* the merits of the case are discussed, and expressly passed upon. And it would seem strange if we should say, 40 years afterwards, that the court did not consider and pass upon the merits of that case, although it expressly said it did, because it was said—inadvertently, as we must think—that the “petition be dismissed,” instead of saying that the petitioner will take nothing by his petition. The petitioner also cites *Campbell v. Potts*, 119 N. C. 530, 28 S. E. 50, but that case is also put upon the want of jurisdiction, and the further fact that it appeared that it was not made upon a consideration of the merits of the case. The petitioner also cites the case of *Bond v. Mc-*

Nider, 25 N. C. 440, but this is also put upon the ground that the court had no jurisdiction. The petitioner also cites *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970, but the opinion in that case seems to hinge upon the ground that the court was called to pass upon an agreed state of facts, in which it was agreed that, if the opinion of the court was adverse to the plaintiff, a judgment of nonsuit should be entered. This, we think, is no more than we see in almost everyday practice,—where the court intimates an opinion adverse to the plaintiff, he takes a nonsuit. There was no such thing as this in the case of *Raynor v. Weeks* in the courts of Sampson. In *Raynor v. Weeks* it appears that the defendant answered, and the case was heard upon the petition and answer, and the decree entered thereon, from which there was no appeal. We cannot sustain the petitioner on the first assignment.

The second assignment of error is “that the court overlooked, or did not give to the fact the attention it deserved, the fact that the plaintiff on the trial introduced in evidence the will of Richard Warren, which showed that Hester and her children were tenants in common under said will, and that this set the matter of estoppel at large.” We do not think so. The will of Warren is not pleaded by the plaintiff, so as to make it a part of the record, and we do not think the plaintiff was estopped by introducing this will in evidence. It seems to us that the will was introduced for the purpose of showing what was before the court in 1864, when the judgment was rendered, and for the purpose of showing that the same matter was passed upon then that is involved in this action. For that purpose (and that is the only purpose we see that it was offered for) we think it was proper, and did not estop the plaintiff.

The third assignment of error is disposed of by what we have said as to the second assignment.

The fourth assignment of error is that the court overlooked the fact that only one of the children of Hester Weeks was a plaintiff, and that estoppels only operate as between adverse parties. It is seen that a proceeding to partition land is equitable in its nature, and in equity all parties, whether plaintiffs or defendants, are bound—estopped—by the judgment or decree. This, it seems to us, is a sufficient answer to the assignment. And, while the judgment of 1864 was adverse to the interests of all the children (all the defendants except Hester), they had the right to be heard, and were heard, and the right to appeal; and, as they did not do so, they are bound by the judgment of the court. We cannot hold that defendants in partition proceedings are not bound by the judgment of the court. To do so would destroy the title to thousands of tracts of land in this state, and to sustain this assignment of the petitioner would be to do so.

The fifth assignment cannot be sustained. If we understand it, it has been disposed of by what we have already said.

The sixth assignment is "that the court overlooked the fact that no estoppel is pleaded," and cites *Wilkins v. Suttle*, 114 N. C. 556, 19 S. E. 606, as authority for the assignment. We do not think this case sustains the assignment. It seems to be authority for holding that in actions of ejectment and for possession of land it need not be pleaded. Neither do we think *Baugert v. Blades*, 117 N. C. 221, 23 S. E. 179, cited by petitioner, sustains his contention. It holds that, if a party has had the right to be heard, and to assert his rights, he is bound by the judgment. And it appears that all the parties interested in this land under the will of Richard Warren were properly before the court, had the opportunity to be heard, and were heard.

After giving a careful examination of all the errors assigned in the petition, we do not think it should be allowed. Petition dismissed.

(129 N. C. 90)

STATE HOSPITAL v. FOUNTAIN.

(Supreme Court of North Carolina. Oct. 1, 1901.)

INSANE PERSONS—INDIGENT—STATE HOSPITAL—COMPENSATION—RES JUDICATA—LIMITATIONS OF ACTIONS.

1. Under Code 1883, § 2278, providing that other than indigent insane persons may be admitted to the state hospital on payment of proper compensation, a recovery could be had by the state hospital of compensation for the maintenance of a wealthy patient, though the superintendent of the hospital informed the patient's guardian that no charge would be made.

2. Where an issue has been passed on by the supreme court on a former appeal, the same question will not be considered on a subsequent appeal.

3. Under Code 1900, § 136, providing that on the trial of any action or special proceeding to which an insane person has been made a party such insane person shall have the benefit of any defense that might have been made for him by his guardian or attorney under sections 136-176, whether pleaded or not, and section 159, prescribing that the limitation of actions shall apply to civil actions brought in the name of the state in the same manner as to actions of private parties, it was error to allow a recovery of compensation by the state hospital for the maintenance of an insane person for more than three years preceding the bringing of the action.

Appeal from superior court, Edgecombe county; McNeill, Judge.

Action by the State Hospital against G. M. T. Fountain, guardian of Nancy L. Hargrove, an insane patient. From a judgment in favor of plaintiff, defendant appeals. Reversed.

G. M. T. Fountain, in pro per. Shepherd & Shepherd, for appellee.

COOK, J. This action was before us at spring term, 1901, as appears in 128 N. C. 23,

38 S. E. 34, wherein the court only passed upon the question of liability of defendant's ward, as it was agreed that the reasonable expenses of maintaining and treating her were \$200 per year, leaving the computation of time for which she was liable to be adjusted in the court below; and when it was again heard in the superior court of Edgecombe county his honor, upon motion of plaintiff, rendered judgment against defendant for the sum of \$2,191.50, being the full amount claimed against defendant's ward from the time she first became a patient in plaintiff hospital to the time of the hearing, excepting two intervals during which she was discharged,—to which judgment defendant excepted and appealed. The case on appeal shows that defendant's ward, Mrs. Nancy L. Hargrove, was an inmate of the hospital from November 21, 1887, till the institution of this action, and still is (excepting from September 15, 1892, to January 31, 1895, and from February 8 till June 8, 1895); that at the time of her admission she was the wife of Gray L. Hargrove, a citizen worth at least \$35,000, who died in 1894; that up to the time of her husband's death said Nancy had no estate of her own, but from his estate received as distributee \$2,255.60 of personalty, and was endowed of 202 acres of land, from which she received a rental of 7,200 pounds of lint cotton per annum for five years, and which thereafter did not amount to more than 5,200 pounds of lint cotton per annum; and that afterwards (November 14, 1890) defendant collected, after long litigation and much expense, for his said ward, as one of the heirs of J. J. Drew, deceased, in the state of Alabama, the gross sum of \$3,240. Defendant contends: First, that his ward's estate is not liable for any sum whatsoever, for the reason that, upon his qualification as guardian, March 29, 1895, he applied to the superintendent of the plaintiff to know if any charge was made for patients who were able to pay, and was informed that no charge was made for any person, and thereupon his ward was allowed to remain in the plaintiff institution; second, that, if her estate is liable at all, plaintiff can only recover for such liability as accrued within three years prior to the beginning of this action.

The first contention cannot be sustained, as it is too well settled that its agents or officers cannot bind the state by any contract they may make, when not so authorized to do; especially in violation of the express statute (Code 1883, § 2278) which allows the admission into the institution of others than indigent insane persons upon payment of proper compensation, and for the further reason that that question was adjudicated in the former decision (128 N. C. 23, 38 S. E. 34), and cannot now be reviewed in this appeal.

We think the second contention is well founded, and must be sustained. In no event

could her estate have been liable during the lifetime of her husband, for it appears that he was possessed of sufficient means to provide for himself and family, and no liability could have attached to her estate till after his death. But, as he died more than three years prior to the institution of this action, and the statute of limitations is interposed by law, that fact is not material in this decision. It is provided by section 136 of the Code of 1900 that "on the trial of any action or special proceeding, to which an insane person has been made a party, such insane person shall be deemed to have pleaded specially any defence, and shall have on the trial the benefit of any defence, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of title three of the Code of Civil Procedure, section one hundred and thirty six to section one hundred and seventy six of the Code of North Carolina, both inclusive." By which statute the plea of the statute of limitations is specially interposed and pleaded in behalf of the defendant, against which the state cannot avail itself on account of its sovereignty, since by section 150 of the Code it has prescribed that "the limitations prescribed in this chapter shall apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by and for the benefit of private parties." His honor erred in rendering judgment for a sum in excess of the liability incurred within three years next preceding the institution of this action. As the exact amount for which her estate is liable is not ascertained, this action is remanded to the superior court for the same to be inquired into and determined according to the practice of the court and the due course of law. There is error.

(120 N. C. 84)

STRICKLAND et al. v. STRICKLAND et al.
(FINCH, Intervener).

(Supreme Court of North Carolina. Oct. 1,
1901.)

EXECUTOR—PROCEEDINGS TO SELL REAL ESTATE—INTERVENTION BY CREDITOR—CONSENT JUDGMENT—VACATING.

1. A creditor of an estate cannot intervene as party plaintiff in proceedings by the executor to sell testator's real estate to pay debts.

2. A creditor of an estate was erroneously allowed to intervene in proceedings by an executor to sell real estate, and a sale differing from that desired by the executor was made at the instance of such creditor, who purchased the land for an adequate consideration. *Held*, that a judgment confirming such sale, which was rendered with the consent of all the parties, did not validate the proceedings.

3. The executor may have such judgment and proceedings set aside within a reasonable time on motion, and is not limited to an independent action therefor.

Appeal from superior court, Nash county; Doble, Judge.

Suit by Mary J. Strickland, executrix, etc., against A. A. Strickland and others, for the

sale of real estate to pay debts. N. B. Finch, a creditor, was allowed to intervene, and testator's real estate was ordered sold, and was purchased by the intervener, and the sale was confirmed by a consent decree. Joint motion by plaintiff and defendants to vacate such proceedings was sustained as to plaintiff and denied as to defendants, and plaintiff, defendants, and the intervener appeal. Affirmed on intervener's appeal, and reversed on appeal of plaintiff and defendants.

T. T. Hicks and W. M. Person, for petitioners. Jacob Battle and F. S. Spruill, for intervener.

MONTGOMERY, J. On the 29th of August, 1892, the clerk of the superior court of Nash county, in a special proceeding begun by Mary J. Strickland, executrix of Allison Strickland, and also in her own right, against the devisees and heirs at law of the testator (he dying partially intestate), for the purpose of selling certain real estate of the testator to make assets for the payment of his debts, made a decree for a sale of a part of the land, to wit, a tract of 84 acres; the same to be sold by the petitioner, a commissioner appointed by the court. In February, 1895, an order was made, on the motion of a creditor, N. B. Finch, that the plaintiff and defendants appear before the court (the clerk) on the 2d of March following, and "show cause why some other commissioner shall not be appointed and ordered to make sale of all the real estate aforesaid for the purpose of paying said indebtedness and costs." On the last-mentioned day, notice of the order having been served, the clerk, on motion of N. B. Finch, "relieved the former commissioner, Mary J. Strickland, of the duty heretofore imposed on her as commissioner," and appointed B. H. Sorsby commissioner in her place to sell the land; and Sorsby was ordered to sell not only the 84-acre tract, but to sell the whole of the real estate of the testator, in case the proceeds from the sale of the 84-acre tract should not be sufficient to pay the debts. On the same day, on motion of N. B. Finch, additional parties (infant children who were interested) were ordered to be made, and Finch was allowed to intervene in the action and required to file a formal petition in the cause; all the parties—infants and adults, plaintiffs and defendants—being allowed until the 4th of May to file an answer to the petition. The petition was filed by Finch. In it he alleged the death of the testator; the probate of the will; the former order appointing Mary J. Strickland commissioner to sell the land, and her failure to do so; the debt due to him from the estate,—and prayed for an order of sale of all the real estate of the testator "in order that said indebtedness may be paid and the estate closed." The infants, through their guardian ad litem, filed an answer, in

which it was said that the guardian had "looked into the matters alleged in said petition, and could see no defense to the same on behalf of the said wards, and he therefore admits each allegation of said petition, and asked the court to protect the interest of his said wards." The other parties did not answer. Sorsby was ordered to sell, the sale took place and was confirmed, and Finch became the purchaser of the 84-acre tract at \$75, and of the other real estate (352 acres) at \$377.64. The decree of confirmation was a consent one; that is, it was signed by all the parties to the proceeding, and was declared to be a final decree. The following is a part of the decree: "It is now, on motion of the petitioner, and with the consent of the other parties interested, ordered, adjudged, and decreed that the said widow, Mary J. Strickland, shall hold during her lifetime, in lieu of dower, the Susan A. C. Sutton tract or lot, No. 5, containing 50 acres, more or less, together with a portion of the 84-acre tract adjacent to lot No. 5, to be cut off by an east and west line, so as to make an area of 15 acres to be added to the 50-acre lot." The commissioner was ordered to make a fee-simple deed to the purchaser to the lands bought by him, other than the 65 acres, and as to that he should convey the reversion in fee to the purchaser. On December 19, 1900, a motion was heard by the clerk in the said special proceeding to set aside all judgments which had been rendered therein. The motion was at the instance of the parties to the special proceeding, and directed to N. B. Finch, notice of which had been properly served on him. On the 28th of January following the clerk found the facts, and rendered judgment thereon in law. The parties who made the motion filed numerous exceptions both to the clerk's findings of fact and of law, and appealed to the superior court in term. Upon the hearing of the matter by his honor, and judgment being rendered, the plaintiff and defendants in the special proceeding, and also N. B. Finch, filed exceptions and appealed to this court.

Appeal by Mary J. Strickland and Others. From our view of the case, it is necessary to consider only one of the exceptions of the movers. That exception was to the ruling of his honor that the orders and decrees made in the special proceeding after and including the one allowing N. B. Finch, the creditor, to intervene, were valid and binding on the movers other than Mary J. Strickland. That ruling of his honor was erroneous, unless the signing of the judgment of confirmation of the sale, of date July 22, 1895, made the proceedings and decree legal and proper. In *Dickey v. Dickey*, 118 N. C. 956, 24 S. E. 715, the facts were like those in the case before us, except that the decree was not a final one, and the decree was signed by the parties. In that case the court said: "These proceedings, from the

time of their commencement at the issuing of the notice by Johnson [creditor] before the clerk to the last order of the court, cannot be sustained. They are altogether irregular. Creditors cannot be permitted to become parties plaintiff with the personal representative in proceedings of this kind. [Petitions by personal representatives to make real-estate assets.] All sorts of confusion and delay might and would be the result thereof. The representative might be embarrassed in every step he took to close up his administration." That decision we still think a correct declaration of the law. Probably it might need some modification in a case where the purchaser of the land might be a stranger. Does the fact, then, that the judgment was a correct one affect the ruling in *Dickey v. Dickey*, supra? We think it does not. This court would not and could not affirm a judgment by consent in a case where the superior court had no jurisdiction of the subject-matter in dispute. Neither will it do so where, although the court below might have jurisdiction, the evils that might be reasonably apprehended are patent, and where the proceedings are violative of a sound legal policy and of all rules of practice. In the case before us one creditor of a decedent's estate intervenes in a proceeding such as the law furnishes to the personal representative alone, completely sets aside the personal representative, is the author of every motion and the beneficiary of every decree made in the cause, and finally concludes the matter by a decree which makes him the owner of more than 400 acres of land for the price of less than \$500. It is true that his honor found as a fact that, "from the affidavits before the court," the land brought a fair price. It is also true that in 1891, 1892, 1893, and in 1894 the land was listed at \$4.50 per acre, and at the time of the decree for its sale at \$5 per acre. Administration of the estates of decedents must be made through the personal representative. A creditor or creditors cannot be allowed to displace the personal representative and take charge of the administration. It is not a question of whether a wrong has been or may be done in a particular case, but it is a question as to whether the personal representative shall administer, or a creditor. It is unnecessary to discuss the ruling of his honor as to the effect of the decree on Mary J. Strickland, for, from what we have said, the decree as to all will be set aside, and for the reasons given. We have not failed to notice the other question which was the subject of the appeal on the part of these appellants,—the alleged appearance of counsel in the original proceeding,—but a consideration of the same is rendered unnecessary by our conclusion on the matter discussed in the appeal. Error.

Appeal of N. B. Finch. The counsel of N. B. Finch insisted on his argument here that his honor should have held that the consent

decree of July 22, 1895, could not be set aside as to Mary J. Strickland in the present proceeding,—a motion in the original cause,—and that her remedy, if any, was by another and an independent action. We think his honor was not in error on that point. An irregular judgment can be set aside, within a reasonable time, by a motion in the cause. *Harrison v. Hargrove*, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781; *Banking Co. v. Duke*, 121 N. C. 110, 28 S. E. 191; *Everett v. Reynolds*, 114 N. C. 366, 19 S. E. 233. It is not necessary to consider the other exceptions of N. B. Finch, for in the other appeal we have said that the decrees in the special proceeding should be set aside as to all the parties, and that decision carries with it the exceptions of Finch, except the one just above discussed, and as to that we have said there was no error. No error.

(61 S. C. 523)

Ex parte FELDER.

FELDER v. VOSE.

(Supreme Court of North Carolina. Sept. 17, 1901.)

CONTRACT—CONSTRUCTION.

In order to determine a contest on foreclosure of mortgage, where a portion of the mortgaged property was claimed by the heirs of the mortgagor as remainder-men, the parties entered into an agreement for judgment of foreclosure and an order of sale, and that the difference between the valuation and the mortgage debt should be paid into the general fund, and a pro rata part of the balance of the judgment should be turned over to the remainder-men, the heirs at law to get the pro rata portion which the mortgagee would have received on the balance of the judgment in excess of the valuation fixed by the settlement; and that, if the property sold for more or less than the valuation, the heirs at law were to have the benefit of the pro rata dividend which the estate paid to the unsecured creditors on the difference between the valuation and the full mortgage debt, just as if the property sold for the valuation. *Held* to be an agreement by the mortgagee to prorate with heirs of mortgagor the amount of foreclosure sale over the sum certain on the scale of dividends paid to the mortgagor's unsecured creditors and under an assignment of the balance on foreclosure judgment.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Orangeburg county; Buchanan, Judge.

Agreed case without action by J. S. Felder and others in the case of Caroline Felder and others against Elizabeth M. Vose and others for construction of a written agreement. From the decree the Bank of Charleston, National Banking Association, appeals. Modified.

The following is the circuit decree:

"In the settlement of the indebtedness and estate of Paul S. Felder a dispute has arisen as to the application of a certain tract of land to the payment of the claims of his indebtedness. It was claimed, and seemingly with good reason, that the Salley tract was the property of the heirs of Paul S. Felder by

his first wife; that his first wife had a life estate only, and that after her death the property rightly and properly belonged to her children. The words 'heirs of Paul S. Felder' were used to indicate the children by his first wife, being the only children of Paul S. Felder, and the only children of the first wife; for, while he was married twice, there are no children by the second marriage. The land referred to, it is claimed, came from the mother of the children who now claim it, and, it was contended, was in no sense responsible for the debts of Paul S. Felder. The creditors were desirous of obtaining payment from everything rightly belonging to the estate of Paul S. Felder, and, inasmuch as Paul S. Felder had mortgaged the land, or had given a deed purporting to convey by way of mortgage the said Salley or Martin place to the Bank of Charleston, National Banking Association, as security for certain indebtedness, the association desired the application of the proceeds to the payment of its claims, or to the extent of the amount that would come from its sale. The said Paul S. Felder, by his last will and testament, devised the tract of land to his four children, who are parties hereto. The executors filed a creditors' bill to marshal the assets of his estate, the same being insolvent. The said association, being a creditor and a party to the action, proved its debts for a considerable sum, and the heirs at law of Ann M. Felder, deceased, filed their answer, claiming that the said Salley or Martin place was not a part of the real estate of Paul S. Felder, deceased, but was conveyed to their mother, Ann M. Felder, the first wife of the said Paul S. Felder, for life, and after her death to her children, and that the mortgage executed to the said banking association by the said Paul S. Felder in his lifetime was to secure a past-due indebtedness of the said Paul S. Felder, deceased, and that their rights in said premises were not affected thereby. Several references had been held on this issue, and after an appeal had been taken by the association to the supreme court as to the right of trial by jury of this issue, and while said appeal was pending in the supreme court, an overture was made by said association to the children of Ann M. Felder heretofore mentioned (Jacob Felder, Elizabeth Vose, Annie A. Izlar, and Alma Felder) looking to the settlement of the issue between the association and such heirs (of Ann M. Felder),—an agreement was perfected under the construction of that agreement, which is the object of the 'controversy without action.' In the beginning it shall be remembered that the association claimed as against the heirs (of Ann M. Felder) the land or its proceeds; whereas the heirs claimed the land, and all of it, under their mother, who, it was contended, had only a life estate, and that the remainder belonged to them, and that, inasmuch as the life tenant was dead, they were entitled to the immediate

possession of their land; that they did not claim through their father, who, while he mortgaged (or attempted to convey by mortgage) the said land, yet he disposed of it by will, as he doubtless thought the land would or should go, it having come from or by his first wife. It was urged that it was the purpose of Paul S. Felder to mortgage only what he must have known he possessed, and in disposing of the place to the heirs of the first wife he but carried out what he believed the law would carry out in any case; i. e. give the land over to the children of Ann M. Felder. The heirs of Ann M. Felder, as incidental to the ownership of the lands, claimed the fruits of such ownership, the right of its production, etc. The association insisted on its rights under the mortgage, and, being met with this claim of the heirs that bid fair, if established, to defeat its security entirely, was willing to agree to some arrangement. The heirs, doubtless with a view of helping along the payment of the indebtedness of their father, and to the amount of \$8,000, agreed to the proposition,—the heirs concede in the light of their claim, the association contends in the light of its mortgage. The heirs of Ann M. Felder, claiming the whole land in fee, agree with knowledge of its entire claim; the association, knowing the amount of indebtedness claimed by it, desires payment out of the proceeds of the land.

"Some concession was desired on the part of each, which each was willing to give. The contract was signed. What are the rights of the heirs of Ann M. Felder under it? This involves an inquiry into what was designed by each party when the agreement was signed. What were the contentions, and, in the light of the positions of each party, what was meant in the use of the terms employed? In construing a contract, the leading course of construction is to ascertain the intention of the contracting parties, and, whatever that intention was, to carry it out. The intention, if possible, shall be gathered from the contract itself. *Anderson v. Holmes*, 14 S. C. 165; *Lesesne v. Young*, 33 S. C. 550, 12 S. E. 414. If, however, the terms of the contract were not clear, but the language used is susceptible of more than one construction, thus rendering the contract ambiguous in its terms, then the court may resort to extrinsic evidence to aid it in arriving at the true intention of the parties, and as to the circumstances which led up to the making of the contract, the conditions which existed between them at the time of exacting it, the object to be attained, etc. *Maxwell v. Thompson*, 15 S. C. 612. It was expressly agreed here 'that either party may refer to the record in the main case as often as may be necessary in arguing this controversy.' The light drawn from such 'main case' was given the court by argument of learned counsel, who argued the matter on each side respectively. The history of the

case has materially aided the court in finding the intention of the contracting parties, and what was meant by the language employed in the writing. It may be stated that each party gave up by agreement only so much of his claim or contention as was specifically given up, or was incidental or necessary to the specific concession contemplated. I think the heirs of Ann M. Felder intended a yielding up or concession of the land which would amount to the sum of \$8,000. This seems to have been the limit, and the amount above that sum the Felder heirs were to receive. The valuation was fixed at \$8,000 by the bank itself, with which the bank was doubtless satisfied. It desired to realize that much out of the sale of the place. It was not satisfied that the land would bring that much, but both parties did know that the amount secured by the mortgage exceeded \$8,000, and that if the heirs withdrew their fight as to the title to the land then the bank would be entitled to judgment for a much larger sum. If the heirs were to give up all claim to the excess over \$8,000, what would be the need of any agreement? A new disclaimer or a withdrawal of the answer would permit the bank to get what it wanted. This would be no compromise, so far as the heirs were concerned. It would be a surrender of their claim and rights as the owners of the fee in the Salley place. So a different agreement was made, not an abject surrender of the land claimed to be derived from their mother, but a compromise,—a mutual waiver of a part of each contention. It was agreed that the answer was to be withdrawn, and judgment and foreclosure was to be had. The value of the land was to be fixed so that the bank would realize the sum of \$8,000 which it wanted out of the judgment. The referee reported the indebtedness to the bank to be \$10,561.93, with interest from September 20, 1898. By this arrangement the bank would get out of a very doubtful lawsuit, and would realize about eighty per cent. on its claim. This was the realization promised itself by the bank. So the heirs agreed to withdraw their answer, and allow judgment of foreclosure and sale, and the bank agreed to give them in consideration the benefit of all the judgment so to be obtained in excess of the \$8,000. True, the contract speaks of sharing in the pro rata dividends which the other creditors would get out of the other assets of Paul S. Felder's estate, but that part of the contract, I think, was intended to meet the contingency of the Martin or Salley place selling for less than \$8,000, in which case the bank was to get the dividend on such part of the judgment as might be between what the place sold for and \$8,000, and the Felder heirs on the amount over \$8,000. Suppose the judgment entered up had been \$10,500, and the land had sold for \$7,000. There would have remained unpaid on the judgment \$3,500, and the bank would have been entitled to the fruits of \$1,000 of this, rep-

resenting the amount between the bid and the amount fixed in the agreement, and the Felder heirs would have been entitled to the fruits of \$2,500, being the amount over the sum in the agreement. It, however, turned out that the land sold for \$9,000, that is, \$1,000 over and above the sum fixed in the agreement as the amount of the judgment reserved to the bank, and I think that under the agreement this \$1,000 belongs to the Felder heirs, and not to the bank. I think that the agreement, though not in terms as apt as might be, operated as a transfer or assignment of all of the interest of the bank in the judgment it obtained on the mortgage on the Martin place over and above \$8,000 to the Felder heirs, and that the fruits of the parts transferred, whether derived from dividends from the other assets of the estate of Paul S. Felder or from a sale of the land securing the judgment, matters not. The controversy here concerns immediately only the bank and the heirs of Ann M. Felder. The intention of the parties was, I think, that the bank should have the benefit of \$8,000 of the judgment obtained on the foreclosure of the mortgage, and the Felder heirs to have the benefit of all the judgment over and above this amount. But there is another view of the matter that might work a recognition or may be construed as making an admission of the \$1,000 as due to the Felder heirs, growing out of the payment of the dividend on the basis herein indicated. Nine thousand dollars, it seems, was deducted from the judgment, and dividend only paid on the balance, if I have correctly understood the facts and argument. The agreement is not apt in its terms, and in argument a good deal of light was drawn by learned counsel from the main case and from the general history of the litigation; and in the light of this information as explaining the language used in the agreement I think the Felder heirs entitled to the overplus of \$1,000. The Felder heirs were to practically abandon their claim, and withdraw their contest over this particular piece or tract of land, and the bank was to give them the benefit of all the judgment recovered in the foreclosure of the mortgage over and above \$8,000, and when the land brought \$9,000 the \$1,000 should go to the Felder heirs. The language of the agreement, construed with reference to the purposes and interests, position and history, developed on the argument, I think meant the plan here found. No one could foretell the property would bring more than \$8,000. It might bring more. It did bring \$9,000. That it did is the misfortune of the bank. It received its \$8,000 with the \$1,000 above it. It was the good fortune of the Felder heirs that it did bring \$1,000 over and above \$8,000. They withdrew their answer, and I think they are fairly entitled to the \$1,000. And now, pursuant to the terms of the agreement, judgment is hereby rendered against

the said Bank of Charleston, National Banking Association, for the sum of \$1,000, with interest from the 6th day of November, 1899, being the whole amount claimed by the heirs of Ann M. Felder, deceased, in favor of said heirs, Jacob S. Felder, Elizabeth M. Vose, Annie A. Izlar, and Alma Felder, in settlement of the controversy without action, argument upon which was had before me."

From this decree the Bank of Charleston, National Banking Association, appeals.

S. G. Mayfield, for appellant. Laurie T. Izlar, for respondent Felder heirs.

JONES, J. (after stating the facts). This is a "controversy without action" based upon an agreed statement of facts, and involved merely the construction of a written agreement between the Bank of Charleston, National Banking Association, and the respondents, heirs at law of Paul S. Felder, deceased, with reference to the sale of certain lands mortgaged by Paul S. Felder to the Bank of Charleston, National Banking Association, and the disposition of the proceeds of the sale and the balance of the mortgage debt. In a suit by the bank to foreclose the mortgage, the heirs of Felder made contest that the mortgaged premises did not belong to the estate of Paul S. Felder, but to them as remainder-men after the falling in of the life estate of their mother, Ann M. Felder. This controversy was compromised by the agreement in question, which is as follows: "Proposition of Bank of Charleston, National Banking Association. The Bank of Charleston, National Banking Association, makes the following proposition to the heirs at law of Ann M. Felder for the settlement of the above-entitled case: (1) Let bank withdraw its appeal, and take judgment in foreclosure at this term of court and order of sale for sales day in November. (2) That heirs at law consent for judgment of foreclosure in favor of the Bank of Charleston, National Banking Association, and the order of sale. (3) That, after the sale of the Martin or Salley place at foreclosure sale, then the difference between \$8,000 and the mortgage debt is to be turned into the general fund, and the pro rata part of the balance of the judgment in foreclosure is to be turned over to the said heirs at law of Ann M. Felder; that the heirs at law are to get the pro rata portion which the Bank of Charleston, National Banking Association, would have received on the balance of the judgment in foreclosure in excess of the valuation fixed therein (\$8,000); that, if the Martin or Salley place sells for more or less than the sum of \$8,000, the intent of this proposition is that the heirs at law of Mrs. Ann M. Felder are to have the benefit of the pro rata dividend which the estate of Col. Paul S. Felder pays on the dollar to the unsecured creditors on the difference between \$8,000 and the full mortgage debt due

this bank, just as if said place sold for \$8,000. (4) That the heirs at law shall have the rent and profits of the Martin or Salley place up to and including the year of 1899. (5) That no part of the judgment of the Bank of Charleston, National Banking Association, obtained in this and other cases on notes other than that secured by the mortgage of the Martin or Salley place, is to be turned over to the heirs at law of Ann M. Felder." This proposition was accepted, and the agreement signed by the parties. The land was sold in November, 1899, and the bank became the purchaser for \$9,000, which was paid over to the bank or its attorney on its mortgage debt, leaving a balance on said debt at the time of the distribution among the creditors of said estate amounting to \$2,618.54. Thereafter, on the 21st December, 1899, the Felder heirs received from the bank, "on account under the agreement," \$344.33, being $13\frac{1}{16}$ per cent. on \$2,618.54, the pro rata of dividends paid to the unsecured creditors of Paul S. Felder. The contest is in reference to the \$1,000 received by the bank out of the proceeds of sale in excess of \$8,000. This \$1,000 is claimed by the Felder heirs under the agreement, which is resisted by the bank. The circuit court decreed for the Felder heirs for the whole sum claimed, with interest from the day of sale, holding that the agreement operated as a transfer or assignment of all the interest of the bank in the judgment after credit with \$8,000. The question before us is substantially covered and presented by the first exception, as follows: "(1) Because his honor erred in finding as a fact that it was the intention of both parties that the heirs at law of Ann M. Felder should take all of the judgment debt over \$8,000, instead of finding that they were to take and did receive their pro rata dividends on the judgment in excess of \$8,000 in the general distribution of the assets among the unsecured creditors." The difficulty lies in the proper construction of the third paragraph of the agreement. It is the court's province not to make a new contract for the parties, but to declare the meaning of the contract which the parties have made. In doing so, the court should endeavor, if possible, to harmonize all parts of the agreement, and give effect to the whole, rather than to utterly ignore some parts of the agreement. The contract was drawn by, or under the supervision of, the attorneys of the parties. If they found difficulty in clearly and briefly stating their meaning, it was no doubt because the scheme of settlement was unusual, and involved some complexity of plan. It will scarcely admit of doubt that, if the parties merely intended to provide for an assignment of the judgment to the Felder heirs after crediting it with \$8,000 of the proceeds of sale, they would have said so in so many words, in which event the right of the Felder heirs to the surplus of the sale over \$8,000,

and the right to receive a pro rata from the Felder estate, would all follow as legal incidents, which the parties by their attorneys knew as well as anybody. The parties seem careful to avoid expressing so simple a thing as an assignment of the judgment, after applying thereto \$8,000 of the proceeds of sale. It is manifest from the language used that all that was intended to be "turned over" to the Felder heirs was a pro rata part of some general fund. The first clause of the third paragraph is: "That, after the sale of the Martin or Salley place at foreclosure sale, then the difference between \$8,000 and the mortgage debt is to be turned into the general fund, and the pro rata of the balance of the judgment in foreclosure is to be turned over to the said heirs at law of Ann M. Felder." In this clause the parties clearly intended that after the sale something should be turned into, or, as between the parties, treated as turned into, the general fund of the estate of Paul S. Felder. What was to be turned into such fund? The difference between \$8,000 and the mortgage debt. What does that mean? Does it mean that \$3,618.54, the difference between \$8,000 and the mortgage debt of \$11,618.54, or does it mean the sum realized on the mortgage debt from the sale in excess of \$8,000, which, as appears, was \$1,000? We construe it as meaning that the excess over \$8,000, realized at the sale, should be treated by the parties as a part of the general fund as to which the Felder heirs were to have the right to prorate, since it is manifest that the parties intended that the bank should receive \$8,000 from the proceeds of sale, if that much was realized, upon the mortgage debt as a lien. It could not mean that the balance of the judgment debt remaining after the sale should be turned into the general fund, since the parties must have contemplated the turning of an asset into the general fund, and not a mere claim against such fund. Nor is it reasonable to construe the language as merely meaning that the claim for the balance due after the sale should have the right to receive pro rata distribution from the general fund, as that would be a wholly useless provision, such right being inevitable under the law and well known to the parties. We think, therefore, that the excess over \$8,000 received from the sale was not to go to the bank under its mortgage lien, as that by the agreement was limited to \$8,000; nor was it to go to the Felder heirs as a whole, for in every clause of the third paragraph of the agreement the Felder heirs were only to receive a pro rata of the general fund; but we think the excess was intended to be treated as if a part of such general fund for prorating. It will be noted here that we are considering only the rights of the bank and the Felder heirs, and are not dealing with the rights of other creditors, who are not concerned in this controversy.

It appears that the bank, outside of the mortgage debt, was an unsecured creditor of the Felder estate to the amount of \$23,745. This will serve to explain why the parties fell upon their scheme of prorating, why the bank was so particular in the fifth paragraph of the agreement to reserve all its rights as general creditors to participate in the general fund, and why the bank should prefer to take charge of the \$1,000 in question, leaving it to the Felder heirs to assert their legal rights under the agreement. If the after-conduct of the parties is to aid in showing what they meant by the contract, the receipt of the \$1,000 by the bank is more consistent with an agreement to prorate it with the Felder heirs than the permission by the Felder heirs for the bank to receive it is consistent with the view that it belonged to the Felder heirs by assignment. If the Felder heirs were assignees of the \$1,000, why did not they, or their vigilant attorney, take steps to receive it from the disbursing officer?

Having thus determined what was to be prorated, the amount that should go to the Felder heirs of the \$1,000 is easily ascertained from the agreement, which provides, in the second clause of the third paragraph, "that the heirs at law are to get the pro rata portion which the Bank of Charleston, N. B. A., would have received on the balance of the judgment in foreclosure in excess of the valuation fixed herein, \$8,000, whether the property sold for \$8,000, or whether it sold for more than \$8,000, and the excess is turned into or treated as a part of the general fund, or whether it sold for less than \$8,000," in which last case the bank would be prorated as to the difference between the price less and the \$8,000. This is made clear by the third clause, which provides "that, if the Martin or Salley place sells for more or less than the sum of \$8,000, the intent of this proposition is that the heirs at law of Mrs. Ann M. Felder are to have the benefit of the pro rata dividends which the estate of Col. Paul S. Felder pays on the dollar to the unsecured creditors on the difference between \$8,000 and the full mortgage debt due this bank, just as if said place sold for \$8,000." It appears that the pro rata of dividends which the estate paid to unsecured creditors was $13\frac{1}{16}$ per cent. As the Felder heirs were entitled to receive from the bank an amount equal to $13\frac{1}{16}$ per cent. of \$3,816.54, and have only received that per cent. on \$2,816.54, they are still entitled to receive that per cent. of the \$1,000 in the hands of the bank, which for this purpose should be treated as funds subject to be prorated under the agreement. Thus the amount due the Felder heirs, respondents, is \$130.66, with interest from, say, the 21st day of December, 1899, when the other dividends were paid. This conclusion renders it unnecessary to consider the remaining exceptions. The judgment of the circuit court is modified, so

that the judgment shall stand for only the sum of \$130.66, with interest from December 21, 1899.

GARY, A. J. (dissenting). As I do not concur in the opinion of Mr. Justice JONES, I will state briefly the reasons for my dissent. The reasons set forth by his honor, Judge Buchanan, in his decree, which will be incorporated in the report of the case, sustain his conclusion. Although the agreement between the bank and the Felder heirs, which is set out in the leading opinion, is inartificially drawn, and its provisions are inconsistent, it nevertheless plainly appears it was the intention of the parties that the bank should only receive \$8,000 of the proceeds arising from the sale of the mortgaged property. It must be remembered that the other creditors were not entitled by law to any portion of the amount for which the property was sold in excess of the \$8,000, as it did not bring enough to satisfy the amount adjudged to be due on the mortgage. The controversy is solely between the bank and the heirs. It is true there are expressions in the agreement tending to show that the fund in excess of the \$8,000 was to be turned into the general fund, and distributed among the creditors, and that the heirs were to receive the pro rata share which the bank would have received on the balance due upon its judgment in foreclosure, but they are inconsistent with other expressions in the agreement. If such was the intention of the parties, then why did not the bank turn the excess into the general fund? The failure to do so shows that the bank did not place such construction on the agreement, for, if it did, it was guilty of a violation of duty.

In the case of *Williamson v. Association*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822, the court says: "It is a well-settled principle that, when the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the contract by the parties themselves is entitled to great weight;" citing *City of Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Steinbach v. Stewart*, 11 Wall. 566, 20 L. Ed. 56; *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768. Furthermore, if such construction is to be placed on the agreement, it would not show that the bank is entitled to more than the \$8,000. But we do not think either of the parties to the agreement intended to create a trust fund for the payment of the unsecured creditors. Such a provision might have destroyed entirely the rights of the heirs, without any benefit to the bank; for, suppose the mortgaged property had been sold for the exact amount adjudged to be due the bank, there would not have remained a balance upon which the heirs could have received a single cent as their pro rata share in the distribution of the excess of \$8,000. Or suppose the mortgaged property had been

sold for enough, not only to satisfy the amount adjudged to be due under the mortgage, but to pay the unsecured creditors in full, they still would not have received a distributive share. The heirs certainly did not intend to enter into an agreement by which the larger the sum for which the property should be sold the more effectually their rights might be destroyed,—an agreement by which their distributive share might be diminished in proportion to the increase in the price of the property. It seems to me that the heirs have the equity on their side, and that the construction placed upon the agreement by the majority of the court enables the bank to retain possession of a larger sum than was contemplated.

There is another reason why I cannot concur in the opinion of Mr. Justice JONES. If the heirs are to get the pro rata portion which the bank would have received on the balance of the judgment in foreclosure in excess of the valuation fixed therein, to wit, \$8,000, the dividend would be declared, not on the difference between \$8,000 and the amount adjudged to be due, but on the balance remaining after crediting the judgment in foreclosure with the amount for which the property was sold. *Wheat v. Dingle*, 32 S. C. 473, 11 S. E. 394, 8 L. R. A. 375; *Ragsdale v. Bank*, 45 S. C. 575, 23 S. E. 947.

For the foregoing reasons, I dissent.

(61 S. C. 501)

WAY v. UNION CENT. LIFE INS. CO. et al.
(Supreme Court of South Carolina. Sept. 10, 1901.)

HUSBAND AND WIFE—VALIDITY OF TRANSACTIONS—EVIDENCE—RESCISSION—SEAL.

1. Where a husband entered into a contract with his wife by which he or his estate obtained an advantage over her, the burden of proof is on the husband, or the representatives of the husband, to show that the wife was fully informed as to the effects of the transaction, and also the utmost fairness therein.

2. A husband took out a policy of life insurance, payable to his second wife. A short time before his death she signed a paper, without reading it, presented to her by the husband's brother, assigning, without any consideration, all her interest in the life insurance policy to her husband's estate. The will of the husband, executed about seven days before the assignment of the policy, disposed of the insurance policy as if belonging to the estate. The wife had no other means except a small tract of land worth about \$50. Under the husband's will the wife got nothing but a dwelling house and 10 acres of land as long as she remained unmarried, in lieu of her dower in 275 acres of land. *Held*, that the assignment would be canceled at the suit of the wife.

3. It is no defense to a bill in equity to cancel a written instrument for want of consideration that it is sealed.

Appeal from common pleas circuit court of Dorchester county; Buchanan, Judge.

Action by Jane O. Way against the Union Central Life Insurance Company and others to set aside an assignment of an insurance policy. Judgment dismissing the complaint, and plaintiff appeals. Reversed.

Wolfe & Connor, for appellant. C. G. Dantzler and J. A. Hiers, for respondents.

McIVER, C. J. The undisputed facts of this case are as follows: On the 28th of December, 1899, Joseph A. Way, who had been twice married, departed this life, leaving a will, of which the defendant George H. Way is the duly qualified executor. After the death of his first wife the testator took out a policy of insurance on his own life for the sum of \$1,000, which by the terms of the policy was made payable to Jane O. Way, his second wife, who is the plaintiff herein, though by the "application" for such policy it appears that the persons in whose favor the insurance was desired were his wife, "Jane Olivia Way, and children." At the time of his death the said Joseph A. Way left surviving him the plaintiff herein, his second wife, and her four children, all of whom are minors, the eldest being 5 years of age, and also five children of his first marriage, three of whom are minors above the age of 14 years. All of the surviving children of the first marriage, together with George H. Way, as executor of the will of the said Joseph A. Way, are made parties defendant to this action. The testator by the second clause of his will gave to his wife, the plaintiff herein, "in lieu of her dower, the dwelling house and ten acres of land upon which I now reside, in Dorchester county, S. C., as long as she remains unmarried, and that at the marriage of my said wife all the property here devised to her as aforesaid I give to her four children in equal shares, and to their heirs and assigns, forever." By the third clause of his will he gives to his said wife \$300 out of the insurance on his life. By the fourth clause he directs "that all my personal effects, consisting of a mule and buggy, hogs, household goods, and all other property not particularly named, be sold and equally divided among my wife and children, except my daughter Dora Way," who was one of the children of the first marriage. By the fifth clause he gives to four of his daughters (naming them, but not including Dora) by his first marriage \$600 out of the insurance on his life. By the sixth clause he gives to Dora Way, one of his daughters by his first marriage, \$20 out of the insurance on his life. By the seventh clause he devises to the same four daughters a tract of land containing 265 acres, to be equally divided among them. This will bears date the 10th day of October, A. D. 1899, and, in the absence of any evidence to the contrary (and there is no such evidence), it must be assumed to have been executed on that day. In accordance with the agreement of the parties, the original policy of insurance, bearing date the 27th day of May, A. D. 1896, was placed before the court at the hearing, together with a copy of the application; and to the policy is attached a formal assignment of the same "to the estate of the said Joseph

A. Way," which bears date the 17th day of October, A. D. 1899, and is signed under seal by the said Joseph A. Way and Jane O. Way, in the presence of two subscribing witnesses, W. B. Way and G. H. Way. The object of this action is to have the said assignment set aside and canceled, and to obtain judgment against the said insurance company for the amount due on the said policy. The insurance company has made no defense and has filed no answer. The other adult defendants have answered, contesting the claim of the plaintiff, and demanding that the executor of the will of the said J. A. Way have judgment against the insurance company for the amount due on the policy, and that plaintiff's claim be dismissed. The minor defendants have filed the usual formal answer. An order was granted referring the case to a referee to take the testimony and report his conclusions of law and fact. The testimony as so taken is set out in the "case," with the referee's report, in which he finds as conclusions of fact that the assignment was valid; that it was supported by a sufficient consideration; that there was no undue influence, fraud, or misrepresentation; and that there was no agreement, express or implied, by the plaintiff's husband to pay her the amount of the face value of the policy, or any other amount; and as conclusions of law he found that the complaint should be dismissed, and that the executor have judgment against the insurance company for the amount due on the policy. To this report the plaintiff filed numerous exceptions, and the case was heard by his honor Judge Buchanan on the report and exceptions, who, in a short order, without giving any reasons, rendered judgment confirming the report of the referee. From this judgment the plaintiff appeals upon the several grounds set out in the record, which need not be stated here, as the grounds upon which we rest our conclusion will sufficiently appear in this opinion.

It seems to us that the fundamental error into which both the referee and the circuit judge have fallen is in overlooking the fact that this is a case in which the court of equity is asked to set aside a transaction between persons sustaining towards each other the close, confidential relations of husband and wife, and in failing to apply the rules applicable in such cases. As is said in 1 Story, Eq. Jur. § 218: "But by far the most comprehensive class of cases of undue concealment arises from some peculiar relation or fiduciary character between the parties. Among this class of cases are to be found those which arise from the relation of * * * husband and wife. * * * In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith (*uberrima fides*) in all transactions between the parties. If there is any misrepresentation, or any con-

cealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose, and pronounce the transaction void, and, as far as possible, restore the parties to their original rights." Again, in section 307, the same distinguished author, in speaking of constructive frauds, arising from some peculiar confidential or fiduciary relation between the parties, says: "In this class of cases there is often found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle upon which courts of equity act in regard thereto stands, independent of any such ingredients, upon a motive of general public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment." So we find in 2 Pom. Eq. Jur. §§ 955, 956, that the distinguished text writer emphasizes the distinction between cases in which there has been undue influence actually exerted and cases in which reliance is placed solely upon the existence of confidential or fiduciary relations between the parties, and calls attention to the importance of observing this distinction; and in section 956 he uses this language: "The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet, because every fiduciary relation implied a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption." And in the same section the author quotes with approval the following language used by "a most able judge" in one of the cases cited in the notes: "The broad principle on which the court acts in cases of this description is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the courts will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him." And again, in another note, the author quotes the following language used by Turner, J., in another case, where, after laying down some most important corollaries of the general principle, and distinguishing it from the doctrine concerning undue influence exerted upon persons weak-minded, etc., he says: "I take it to be a well-established principle of this court that persons standing

in confidential relations towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." That this doctrine applies to persons occupying the relation towards each other of husband and wife is shown not only by the passage above quoted from Story, Eq. Jur., but also by section 963, at page 496, of 2 Pom. Eq. Jur. The rule that in a case where a transaction between husband and wife, whereby the husband acquires an advantage either for himself or his estate, comes under review in a court of equity, the burden of proof is upon the husband, or those who represent his estate, to show the utmost fairness in the transaction, and that the wife was fully advised as to what she was doing, and the effect of it, has been fully recognized in this state, in the case of *Butler v. Haskell*, 4 Desaus., at page 684, where the learned chancellor speaks of the rule as "quite clear"; and among the authorities which he cites is the case of *Gibson v. Jeyes*, 6 Ves. 266, where, at page 278, Lord Eldon characterizes it as "that great rule of the court," which he states as follows: "That he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else." See, also, the case of *McCants v. Bee*, 1 McCord, Eq. 383, 16 Am. Dec. 610, where the case of *Butler v. Haskell* is distinctly recognized. In 14 Am. & Eng. Enc. Law (2d Ed.) at page 194, it is said: "It is well settled that where it appears that a fiduciary or confidential relation existed between the parties at the time the transaction alleged to be fraudulent, such as trustee and cestui que trust, * * * husband and wife, * * * or that one of the parties for any reason possessed a power or influence over the other, * * * the existence of such relation or such power or influence * * * raises a presumption of fraud, and the burden of proof is upon the party seeking to sustain the transaction. The presumption arises in such cases not because the court can see that there was fraud, but because there may have been fraud."

In the light of these well-settled principles of law, we proceed to the examination of the testimony. Only two witnesses appear to have been examined at the reference,—the plaintiff and R. S. Weeks, the general agent of the insurance company, who seems to have been examined for the purpose of showing that the assignment of the policy had been made known to the insurance company and approved by it. This, no doubt, was for the purpose of meeting the point made below that the assignment was not in the proper form; but, as that point is not made by this appeal, we need not refer to the testi-

mony of Weeks further than to say that he testified that from an experience of 12 or 13 years in the insurance business, and from his knowledge of the tables of mortality used by the leading insurance companies, the policy now in controversy was, at the time of the assignment, under the circumstances then existing, "worth nearly or the entire face value of the policy to the beneficiary or the owner of the policy." So that practically the entire oral testimony in the case comes from the plaintiff; and although objections were interposed at the reference to portions of her testimony, as to which the referee reserved his decision, yet the referee in his report says: "I have since decided to admit such testimony, and have marked the objections thereto overruled;" and, as there is no exception to such ruling, all of the testimony of the plaintiff must be regarded as competent, at least for the purposes of this case. This testimony shows that the assignment in question was brought to her house by Dr. W. B. Way, a brother of her husband, who was his attending physician, but when he came to bring the assignment he did not come on a professional visit. When shown the paper, she says: "She recognizes her signature thereto. I signed the paper at my husband's home. Dr. Way was there, and I think George Way was there, but I am not sure that George Way was there. [But as the name of George H. Way appears as one of the subscribing witnesses, it is but reasonable to suppose that he was there.] I did not read the paper [assignment] before I signed it. Dr. Way nor any one else did not read this paper for me before I signed it, or after I signed it. I never saw the paper again before to-day [the day of the reference]. Dr. Way nor any one else explained to me what the paper contained or what it meant. I did not know what the paper was. No one paid me any money or any consideration when I signed this paper, nor have I received anything since, nor did I receive anything before I signed it, as a consideration for signing it. It was some time after that I discovered that this paper transferred my interest in the life insurance policy. I would not have signed the paper if I had known at the time what it meant. For several months before my husband's death I was very much worried in mind and body on account of the serious illness of my husband. During that time I felt sure that he would die, and I did not know how soon. Also the fact that I would have my several infant children dependent on me when my husband died also increased my troubles. * * * My husband was present when the assignment was signed by me. It was signed in the parlor where my husband was sitting up." This witness further testified as follows: "My husband died with consumption. He was sick with consumption for about two years and a half. He was confined to his bed about a month before his death. He

would be sick by spells, and sometimes would be very sick, and then improve and get up. He was quite a sick man for several months preceding his death. During that time I nursed him. * * * Mr. B. W. Muckenfuss drew up the will for my husband. Dr. William Way came with Mr. Muckenfuss when the will was made. * * * I knew that my husband had his life insured in the Union Central Life Insurance Company." This testimony stands wholly uncontradicted, as neither Dr. William Way nor George H. Way, the trusted brothers of the testator, who were present and participated in the transaction under consideration, were examined as witnesses, and no reason appears or has even been suggested why they were not examined. There is another circumstance, not without significance, which may be mentioned, and that is that, although the will purports to dispose of the proceeds of the insurance policy, yet it appears to have been executed seven days before the assignment was executed, and therefore before the testator had acquired any right to do so. This indicates that the will, containing these provisions, was executed in pursuance of a predetermined purpose to obtain from the plaintiff the assignment in question, whereby the testator would be enabled, practically, to defeat his original intention when he took out the policy, for then he manifestly intended that the policy should inure to the benefit of the plaintiff and her children, for he so declared in writing when he made the "application" for the policy, as we have seen above, though when the policy was actually taken out it for some unexplained reason was made in favor of "Jane O. Way, his wife," without mentioning her children. No reason has been given or even suggested for this change of plans upon the part of the testator, which does not appear to have been communicated to the wife, who was most deeply interested, and, on the contrary, the most natural inference is, was kept concealed from her, though it is but reasonable to suppose that it was communicated to his brothers, who seem to have been his trusted advisers, and yet neither of them were examined as witnesses. In view of all these circumstances, which are patent upon the face of the papers, and of the uncontradicted testimony, it is impossible to conceive that the plaintiff, suffering from the distress and anxiety incident to the occasion, could have, with a full knowledge of her rights, voluntarily stripped herself of practically all means for the support of herself and her little children in the event of the death, then impending, of her husband and the protection of herself and little children, without any consideration whatsoever. The testimony shows that she had no other means except a small tract of land, yielding no rent, and worth only the paltry sum of \$50. It is true that the referee finds (and the circuit judge confirms such finding) that

the assignment being under seal, which imports a consideration, therefore it cannot be attacked for lack of consideration. This may be so at law, but not so in equity, at least in a case of this kind; and this is a case on the equity side of the court, for the cancellation of a written instrument. As is said in 6 Am. & Eng. Enc. Law (2d Ed.) at page 683: "The presence of a seal does not, in equity, import a consideration, but proof of it must be given." See, also, the fourteenth volume of the same valuable work, at page 166, where it is said: "In most jurisdictions fraud cannot be pleaded as a defense in an action at law on a contract under seal, when it does not affect the execution of the contract, but relates merely to the consideration, though relief may be obtained in equity." (Italics ours.) Again, at page 199 of the same volume, it is said: "As was shown in a previous section (which has just been quoted), in most jurisdictions fraud cannot be pleaded as a defense in an action at law on a contract under seal, when it relates merely to the consideration, but relief may be obtained in equity; and at law, as well as in equity, fraud may be shown where it relates to the execution of the contract. When fraud can be shown, according to these rules, it may be shown by parol evidence, notwithstanding the contract is both in writing and under seal." (Italics ours.) Certainly the finding by the referee and affirmance by the circuit judge that the fact that the assignment "was made in favor of her husband's estate, and presumably at her husband's request," constitutes sufficient consideration to support the assignment, even if the papers had not been under seal, cannot be supported, especially in view of the very meager provision made for the wife in the husband's will; for by the will she gets nothing but the dwelling house and 10 acres of land "as long as she remains unmarried," and that, too, in lieu of her dower in 275 acres of land, and an equal share of the paltry amount of the personal property, for the \$300 out of the insurance money, to the whole of which she was already entitled, certainly cannot be regarded as anything more than the pretense of a benefaction to the wife. It is clear, therefore, that the exceptions raising these points must be sustained.

The referee also finds (and the circuit judge sustains him in so finding) that there is no testimony to sustain the allegations of undue influence, fraud, and misrepresentations, and therefore that the complaint should be dismissed. This finding, as we have indicated above, is based upon an entire misconception of the rule applicable to a case like this, which places the burden of proof upon the husband, or those who represent his estate, to show the utmost good faith (*uberrima fides*) in the transaction which this court has been called upon to review,—a transaction by which the husband

acquired for his estate all the advantage, and the wife suffered all the disadvantage,—in which case, as we have seen, the presumption is that there was fraud, undue influence, and concealment; and it is incumbent upon those who seek to avail themselves of such advantage to show to the satisfaction of the court that such presumption is not well founded. This the defendants have not only failed to do, but have failed to make any attempt to do, as they offered no testimony whatever as to that matter, although they had the means of explaining fully the whole transaction, of which they have not availed themselves, by examining as witnesses the two brothers of the testator, who were present at, and, to some extent at least, participated in, the transaction which is here assailed. The exceptions raising the point last considered must therefore be sustained.

We are of the opinion that the plaintiff has shown herself entitled to a decree for the cancellation of the assignment hereinabove referred to, and to judgment against the insurance company, who has made no defense, for the full amount due on the policy of insurance. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court, with instructions to carry out the views herein announced.

POPE, J. (concurring in the result). I think the plaintiff's minor children may have rights in the policy, as they were named as beneficiaries along with the plaintiff in the application for insurance.

(129 N. C. 149)

COOK v. AMERICAN EXCH. BANK et al.
(Supreme Court of North Carolina. Oct. 22, 1901.)

APPEARANCE—STIPULATION—PROCESS—DEFECTIVE SERVICE—WAIVER—TRESPASS—LIABILITY—PLEADING—DEFECTS—WAIVER.

1. Where defendants, having failed to appear during term time, entered into a stipulation with plaintiff whereby their time to take any action they might have taken before the term's close was extended, on their failure to plead thereafter judgment will be entered for plaintiff, though service on them may have been so defective as not to bring them within the court's jurisdiction.

2. Where the right of possession, and also the actual possession of land and timber thereon are vested in a trustee for the benefit of creditors, who permit others to go on such land and remove timber, such creditors, as well as the parties trespassing, are liable in damages for the value of the timber cut and removed.

3. In the absence of a demurrer to defects in a complaint, defendant will be deemed to have waived the same.

Appeal from superior court, Dare county; McNeill, Judge.

Action by P. F. Cook, trustee of Andrew Brown, a bankrupt, against the American Exchange Bank and others. From an order refusing a motion for judgment, plaintiff appeals. Reversed.

On the 23d day of February, 1900, the plaintiff sued out a summons in the superior court of Dare county against the defendants, and delivered it to the sheriff of that county, who returned it not served, because the defendants could not be found in his county. Plaintiff also applied for and obtained an order of attachment against defendants' property. Upon the return of the summons not served, plaintiff undertook to have the service made by publication, and did cause a publication to be made, citing defendants to appear at the spring term (May 7th) of the court, and during the first three days of the term filed his complaint, duly verified. But no appearance was made by defendants during the term, which continued only one week, and then expired by limitation of law. Afterwards, to wit, on the 21st day of May, the defendants through their counsel, requested and obtained from plaintiff's counsel a stipulation as follows: "It is hereby stipulated that the defendants' time is extended to and including May 31, 1900, to take any action that they, or either of them, might have taken in the above-entitled action on or prior to May 5, 1900." And subsequently, on the 29th of May, they filed a petition and bond for removal of the action to the United States circuit court, which was, however, remanded for reasons not material to be here stated. At the fall term of court, plaintiff moved for judgment by default and inquiry for want of an answer, which was resisted by defendants upon the ground that they had never been served with process, and had never voluntarily appeared. Motion for judgment denied by his honor, and plaintiff appealed.

E. F. Ayldett and F. H. Busbee, for appellant. Busbee & Busbee, for appellees.

COOK, J. The above statement of the case recites all the facts material to aid us in determining the contention between the parties as presented by the record upon appeal. And in this court defendants further insisted that, if the court should hold that they were properly in court, by service or otherwise, the plaintiff could not recover judgment against them, for that the complaint did not state facts sufficient to constitute a cause of action; and moved to dismiss the action. As to the question raised in the record upon appeal, plaintiff contends that he is entitled to a judgment by default and inquiry for want of an answer, while defendants contend that they are not within the jurisdiction of the court for want of service of process, and have not waived such service by voluntarily appearing. The term of the court to which the summons was returnable began on May 7th, and continued only one week. After the filing of his complaint, it became incumbent upon defendants, if they had been legally served with process, to answer or demur to the complaint during that term, or to file their petition for removal to the United States circuit court before the time of answering or demur-

ring expired, which was during that term. But no action or appearance whatsoever was taken or entered by defendants, and the term expired, whereby they were deprived of all rights thereafter to plead to the action or remove the cause; and, if defendants had not been legally served, no harm could befall them by paying no attention to the proceedings. But defendants chose a different course, and desired to remove the action to the United States circuit court, which they had no legal right to do. The term had expired, and the door was closed against them. So they sought and obtained the consent of the plaintiff, set out in the stipulation, and were, by agreement, relegated to their original rights, and also obtained the further indulgence of time, which was extended by consent to and including May 31st. By thus recognizing the action and treating with plaintiff's attorneys concerning the remedies and rights existing under it, and obtaining a standing in court (which they once could have exercised, but had lost) which would again enable them to assert or exercise their rights, and thereafter exercising such, the action of defendants became ipso facto a voluntary appearance, and waived any irregularity or lack of service which may have theretofore existed. Had they not been made parties by service before, they could not at that time come in and obtain the privileges sought, except by consent, and it is clear that they could not stay out and exercise rights and privileges which belonged only to parties to the action. In *Bazzo v. Wallace*, 16 Neb. 290, 20 N. W. 315, defendant's attorney had filed a special appearance for the purpose of making a motion to dismiss, and on the next day entered into a stipulation as to the continuance of the main action, viz.: "It is hereby stipulated and agreed by and between the parties in the above-entitled cause that said cause be continued until February 20, 1884;" and the court there held that his agreeing to the continuance of the action was a general appearance. In this case, by the stipulation, defendants not only obtained a postponement of the time in which they were required by statute to file their petition, but actually acquired the right to do so; and, further, they obtained the right to defend the action, which they had lost, and, still further, to take any action they may have taken on or before the first day of the May term. So, having been let into court for all purposes, it is clear to us that one of their capacities must necessarily have been that of a party to the action for concluding the contentions involved. Finding the parties before the court with nothing except the verified complaint, upon which motion was made for judgment by default and inquiry, we think his honor erred in not granting judgment accordingly, unless the motion to dismiss, made in this court by defendants, can be sustained. The complaint shows that

the title to the land was held by a trustee to secure certain securities held by defendants, for which the assignor of plaintiff (Brown) was liable; and that Brown, under an agreement, had the right to sell the pine timber upon the land, alleged to be worth \$200,000, and apply the proceeds of sale in payment upon his said liability. It alleges "that defendants herein have allowed the Alligator Lumber Co. * * * and other parties to go upon said premises, and cut a large quantity of the valuable pine timber upon said lands, which is worth \$25,000, or some other large sum, all of which should be applied to the payment of said indebtedness of Anderson Brown, referred to in the mortgage of Warren, trustee, to Chard, trustee"; and in his prayer for judgment (among other reliefs) prays judgment "for the value of the timber which was permitted to be cut by defendants upon said lands, amounting to upwards of \$25,000, and for costs." We find some difficulty in determining whether it is a defective statement of a cause of action, which should have been taken advantage of by demurrer, or a statement of a defective cause of action, for which a motion to dismiss will be sustained in this court. Clark's Code, § 242, and cases there cited. But we are of opinion that it is the former, rather than the latter. Under their said agreement Brown had the right to sell the pine timber, and apply the proceeds in extinguishing his indebtedness. It does not appear that the trustee or defendants had any right to control or dispose of the pine timber. They had the right of possession of the land, and it inferentially appears that they had the actual possession, but the disposition of the pine timber belonged to Brown. It is not alleged that Brown was hindered in the exercise of his rights over the timber, but, as the right of possession and also the actual possession of the land were vested in the trustee for the benefit of defendants, and it appearing that they allowed and permitted parties to cut a large quantity of said timber of great value, by which permission they became and were parties to the conversion, it follows that they, too, are liable in damages, and should account for the value of such quantity as was thus cut, and of which Brown was deprived. They having possession of the land, the parties had no right to enter thereon for any purpose, except by their permission; and, having so entered and trespassed upon Brown's property, the defendants became equally liable with the trespassers for the damage done. It is true that the trespass is not charged in the complaint, but no advantage is taken of the defects in the statement of the cause by demurrer, so defendants are deemed to have waived such right of defense. The plaintiff is entitled to judgment by default and inquiry, and his honor erred in not granting the same.

Error.

(129 N. C. 97)

ROWE et al. v. CAPE FEAR LUMBER CO.

(Supreme Court of North Carolina. Oct. 15, 1901.)

TRESPASS—TITLE OF PLAINTIFF.

Where a deed took title to a swamp out of the state, though it did not put title in defendant, plaintiff cannot recover in an action of trespass against defendant under a subsequent grant from the state.

On rehearing. Modified.

For former opinion, see 38 S. E. 896.

Stevens, Beasley & Weeks, for appellant.
Rountree & Carr, for appellees.

FURCHES, C. J. This case was before us at the last term of the court (reported in 128 N. C. 801, 38 S. E. 896), and is here again on a petition to rehear. Upon the argument the defendant abandoned its claims to a rehearing as to the two tracts on the south-east side of Catskin swamp, and the only question now before us is as to whether the defendant is entitled to a rehearing as to the tract lying on the north side of Catskin; and we think it is. It was not contended in the petition nor in the argument that there were errors in the principles or statements of law contained in the former opinion. But it was contended that a deed from Alexander Casteen to Ezekiel Chadwick, dated December 1, 1899, had been overlooked, which would have changed the judgment of the court as to the tract on the north side of the swamp; and this is so. This deed calls for the run of the swamp, while the deed from Chadwick to the defendant does not. These deeds are not set out in full in the record, but simply by dates and boundaries, preceded and followed by much oral evidence; the deed to the plaintiff being on the eighteenth page, and the deed from Casteen to Chadwick being on the twenty-fourth page, of the record. In this way the last-mentioned deed was overlooked by the court. This deed does not put the title to the land in the defendant, but it takes the title out of the state. And, the state having no title to this land in 1893, at the date of plaintiff's grant, he got no title; and as the plaintiff had to recover upon the strength of his own title, and not on the weakness of the defendant's title, he must fail as to the tract north of the run. Therefore, without changing or modifying any principle of law enunciated in our opinion at the last term of court, the judgment then rendered is modified, on account of the oversight of the deed of Casteen to Chadwick, to the extent of declaring error as to that part of the land sued for on the north side of the swamp, and the petition to rehear is allowed as to the tract on the north side of the swamp, but not as to the other tracts. Costs of rehearing to be divided equally between plaintiff and defendant.

(61 S. C. 512)

CONE v. CONE.

(Supreme Court of South Carolina. Sept. 10, 1901.)

DOMICILE OF WIFE—GENERAL APPEARANCE—APPOINTMENT OF TRUSTEE—VENUE—PLEA IN ABATEMENT—DEATH OF TRUSTEE.

1. The domicile of the wife is presumed to be that of her husband, where there has been no legal separation.
2. By a general appearance and answer, defendant waives an objection that the court has not acquired jurisdiction of his person.
3. A petition for the appointment of trustee is not an action for recovery of real estate, to be brought in the county where the land lies.
4. Where a plea of abatement for defect of parties is filed, it must show the names of such parties, and that they are within the jurisdiction of the court.
5. Equity will appoint a trustee on application of one beneficiary under a trust deed upon notice to the other, where the deed provides that in case of a vacancy the beneficiaries shall join in appointing such a trustee, but the evidence shows that the feeling between the beneficiaries is such that they will not so join.
6. On the death of a trustee the title to the trust property descends to his eldest son.

Appeal from common pleas circuit court of Dorchester county; Watts, Judge.

Action by W. F. Cone against Mary J. Cone for appointment of trustee. Judgment for plaintiff, and defendant appeals. Affirmed.

The master filed the following report: "This case was referred to me by an order of his honor, Judge George W. Gage, bearing date October 19, 1899, which order is as follows: 'On hearing the petition of the said W. F. Cone, petitioner, and the answer thereto of Mary J. Cone, and after hearing Messrs. Izlar Bros. & Reed, attorneys for the petitioner, and Messrs. Griffin & Padgett, attorneys for Mary J. Cone, it is ordered that it be referred to R. S. Weeks, Esq., master for Dorchester county, aforesaid, to take testimony upon issues raised by the said petition and answer, and to report the same with all convenient speed. It is further ordered that said master do also take testimony as to a fit and proper person to be appointed trustee in the place of J. H. Cone, deceased trustee, and to recommend in his report the name of a fit and proper person to be appointed such trustee. Finally ordered, said master have leave to report any special matter brought to his attention by the counsel engaged in the case.' In pursuance of said order, and after due notice, I held a reference, and took such testimony as was offered by the counsel for the petitioner and the respondent, and herewith submit the same. As to the fit and proper person for trustee, John D. Bivens was named by petitioner as such. The respondent names M. W. Cone, a son, or J. R. Tumbleston, a son-in-law. These last two being kin to the petitioner and respondent, namely, son and son-in-law, I would recommend the appointment of the said John D. Bivens. No special matter was brought in

by counsel. All of which is respectfully submitted."

The following is the circuit decree: "On hearing the report of R. S. Weeks, master of Dorchester county, bearing date May 9, 1900, in which he recommends the appointment of John D. Bivens as trustee in the place and stead of J. H. Cone, deceased trustee, and on motion of Izlar Bros. & Reed, attorneys for the petitioner, it is ordered that the said report of the master be, and the same is hereby, confirmed, and made the judgment of the court. It is further ordered and adjudged that the said John D. Bivens be, and he hereby is, substituted as trustee under the trust deed executed by the said W. F. Cone to the said J. H. Cone as trustee, and bearing date the 20th day of October, A. D. 1873, in the place and in stead of the said J. H. Cone, deceased trustee, with all the powers, duties, rights, privileges, and liabilities of the said J. H. Cone, deceased trustee, under the original trustee deed, a copy of which is attached to the petition of the petitioner herein as a part thereof; that the said John D. Bivens, so appointed and substituted, shall signify his acceptance of said trust in writing upon the margin of the record book in the office of the clerk of this court in which said deed is recorded, in the presence of the said clerk; and that thereupon the said John D. Bivens shall be considered to all intents and purposes as vested completely and absolutely with all the estate, right, title, intent, powers, privileges, and authority, and as liable to all the conditions, terms, and restrictions as original trustee under said trust deed was vested with or liable to, in whose stead now, and place, he, the said John D. Bivens, is appointed and substituted. It is further ordered that the said John D. Bivens, before entering upon the duties of his office, do enter into a bond to be approved by the master of Dorchester county, in the sum of five hundred dollars, for the faithful performance of his trust in collecting and disbursing the rents from the trust real estate; and that in case of application for sale and reinvestment of any portion of the real property of said trust estate that the said trustee, before making such sale, shall enter into bond, to be approved by said master, in the sum of five thousand dollars, for the faithful performance of his trust in regard to the proceeds of such sale."

From this decree the defendant appeals on following exceptions: "(1) Because, it is respectfully submitted, that the court of common pleas for Dorchester county did not have jurisdiction in personam or over the person of the respondent, appellant, Mary Jane Cone, it being proven without contradiction that she was a resident of Colleton county, and raising such question of jurisdiction in the pleading herein. (2) Because the court of common pleas for Dorchester county was without jurisdiction in rem, since the real property set out in exhibit to petition

having been proven without contradiction to be in Colleton county, and exception to such jurisdiction being duly taken by respondent, appellant, in the pleadings herein. (3) That the domicile of the wife being alleged and proven without contradiction to be separate and distinct from the husband, they living apart, as alleged in petition, the presumption of the common law that the 'domicile of the husband is that of the wife' does not apply, and her actual domicile is a matter of proof, and has been established as referred to in exception 1. (4) That it was error in holding and deciding that there was a vacancy in the office of trustee created by the deed referred to in the petition and filed with the same, it being proven that the deceased trustee died leaving heirs at law, who are the trustees. (5) That petitioner herein was and is estopped from taking any plan to substitute a new trustee without first carrying out the provisions fixed in the trust deed for the appointment of a new trustee in the place of J. H. Cone, and it was error in not so holding."

James Evans and Griffin & Padgett, for appellant. Izlar Bros. & Reed, for respondent.

McIVER, C. J. (after stating the facts). This was a petition in the court of common pleas for Dorchester county, praying for the appointment of a trustee in the place of J. H. Cone, deceased, under a deed executed by the petitioner, W. F. Cone, to the said J. H. Cone, bearing date the 20th day of October, 1873, conveying certain property, both real and personal, to the said J. H. Cone, upon certain trusts therein declared, to wit, in trust to pay the said W. F. Cone and his wife, Mary J. Cone, "the rents and profits of the real estate, and the increase and profits of the said personal property (or permit the said W. F. Cone and his wife, Mary Jane Cone, to have the use thereof at his discretion), annually, during the natural life of the said W. F. Cone and Mary Jane, his wife, and the survivor of them, * * * and from and after the death of the survivor of them, the said W. F. Cone and Mary Jane, his wife, * * * to divide the said property, real and personal, amongst the children of the said W. F. and Mary J. Cone then living," with a provision that the child or children of any child then deceased shall represent his, her, or their parent. The deed also contained a provision that the said J. H. Cone shall at all times have ample power, by and with the written consent of the said W. F. Cone, or, in case of his death, the written consent of the said M. J. Cone, to sell or dispose of a part or all of the said property, and invest the proceeds in any other property or securities he, the said W. F. Cone, or, in case of his death, the said M. J. Cone, may direct. The deed also contains another provision in these words: "That the said W. F. Cone and Mary Jane, his wife, shall have

full power, under their hands and seals, or, in case of the death of either of them, then under the hand and seal of the survivor, to nominate, constitute, and appoint another trustee in lieu and stead of the said J. H. Cone, who, when so appointed, shall have the same powers as are herein delegated to the said J. H. Cone, without the aid or intervention of any court." These matters, except the fact that the said J. H. Cone is dead, are all set forth in the first paragraph of the petition; a copy of the trust deed, set out in the "case," being referred to and made a part of the petition. In the second paragraph it is alleged "that the said J. H. Cone is dead, and the trusteeship vacant," and that the provision in the deed for the appointment of another trustee cannot be carried out, "as your petitioner and his said wife are now, and have been for many months, living separate and apart, and she declines and refuses to unite with your petitioner for [in?] the appointment and substitution of another trustee." The petition was duly verified on the 6th of September, 1899, and was probably filed about that time. Soon thereafter a notice or summons was served on the said Mary Jane Cone, requiring her "to appear before the court of common pleas for the county of Dorchester, at St. Georges, S. C., on the 18th day of October, A. D. 1899, to answer the petition herein, a copy of which is herewith served upon you, and to show cause, if any you can, why the prayer of the petition should not be granted." Subsequently, on or about the 14th of October, 1899, the appellant filed her answer (as it is duly verified on that day), in which she admits the allegations contained in the first paragraph of the petition, and so much of paragraph 2 "as alleges that the trustee, J. H. Cone, is dead, and that this respondent and petitioner have for many months been living separate and apart, and denies all the other allegations in said petition contained." In the second paragraph she says: "That, if the said trusteeship has not been executed, the same vests in the heirs at law of the said J. Hamilton Cone, who are necessary parties to any proceeding had for the substitution of a trustee, save by the mode specially provided for in the deed filed as an exhibit to the petition herein." In the third paragraph of her answer she says: "That this respondent is, and has been for many months past, a resident of the county of Colleton, and that the real property set out as being conveyed by the trust deed filed as an exhibit to the petition aforesaid lies within the limits of the county of Colleton." For further answer respondent says: "That during his lifetime the said J. Hamilton Cone fully executed and discharged his trust in so far as the same related to the real estate set out in the trust deed filed as an exhibit to the petition herein by executing and delivering to one H. T. Remley a title deed thereof;" and that "the personal

property therein mentioned and described has long since been exhausted and used for the benefit of the petitioner herein, and there now remains nothing as to which said trust can be exercised"; and she refers to certain affidavits attached to her answer, the purport of which are not stated, nor do they appear in the "case," and hence we have no means of ascertaining what may be their force and effect. It seems from the recitals in the master's report (which should be incorporated in the report of this case) that his honor, Judge Gage, made an order bearing date 19th of October, 1899, referring it to the master to take the testimony as to the issues between the parties, and also as to who would be a proper person to be appointed trustee in the place of J. H. Cone, deceased. In pursuance of this order the master took the testimony which is set out in the "case," and recommended the appointment of John D. Bivens. A good deal of the testimony relates to matters which do not relate to any issues which are brought before the court by this proceeding, and we shall therefore refer only to such of the testimony as we regard pertinent to the present case. It does appear from the testimony that the land described in the trust deed does lie in the county of Colleton, but it also appears that such land has heretofore been sold by the late trustee, by and with the consent of the petitioner, as provided for in the trust deed, for the sum of \$1,100; and the petitioner claims that the proceeds of such sale, after satisfying a mortgage on the property, have been applied to the purchase of other lands in the county of Dorchester and to the improvement of the same; but the appellant claims that these last-mentioned lands were purchased and paid for with her own money. This conflict of claims presents an issue not raised, and which could not be raised, in the present proceedings, in which the only questions raised are: First, whether the petitioner, who is one of the beneficiaries under the trust deed, is entitled to have another trustee appointed by the court in the place of J. H. Cone, the deceased trustee; and, second, if so, whether the proceeding in this case is the proper mode of obtaining such appointment. The "case" does not show that any exceptions were taken to the report of the master, and the case came before his honor, Judge Watts, who heard the same upon such report, and rendered judgment as set out in the "case," confirming the report of the master, and ordering that the said John D. Bivens be appointed trustee under the deed of trust hereinbefore referred to, and attached to the petition, in the place of the said J. H. Cone, the deceased trustee. From this judgment the appellant has taken this appeal upon the exceptions set out in the record, a copy of which, together with the decree or judgment of Judge Watts, will be incorporated in the report of the case.

The first exception raises the point that

the court of common pleas for Dorchester county had not acquired jurisdiction of the person of the appellant. In view of the fact that the appellant appeared not specially for the purpose of raising the question of jurisdiction, but generally, and answered the allegations of the petition, and inasmuch as the appellant's answer opens with a recital of the fact that she had been served with the petition and summons, it is difficult to conceive how it can be claimed that the court of common pleas for Dorchester county had not acquired jurisdiction of the person of the appellant, even though it should be conceded that the defendant was, and had been for many months, a resident of the county of Colleton; for the well-settled doctrine is that the domicile of the husband is the domicile of the wife, unless perhaps where a legal separation has been established (and here there is no pretense of anything of that kind). As was well said by Dargan, Ch., in delivering the opinion of the court in *Hair v. Hair*, 10 Rich. Eq. 176: "The husband has the right, without the consent of the wife, to establish his domicile in any part of the world; and it is the legal duty of the wife to follow his fortunes, wheresoever he may go;" which was quoted with approval in the recent case of *Wise v. Wise*, 60 S. C. 428, 38 S. E. 794. But it is not necessary to rest this case upon the ground just considered, as the case of *Rosamond v. Earle*, 46 S. C. 9, 24 S. E. 44, is quite sufficient to show that the appellant by appearing generally, and not specially, and answering to the merits, waived the right to raise the question whether the court had obtained jurisdiction of her person. The first exception must therefore be overruled.

The second raises the point that the court of common pleas for Dorchester county had no jurisdiction of the rem, because the real estate described in the original trust deed was situate in Colleton county, and not in Dorchester county, and the provisions of section 144 of the Code are invoked to sustain this point. That section provides that actions "for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest," etc., "must be tried in the county in which the subject of action or some part thereof is situated." In the first place, this is not an action, but a special proceeding by petition for the appointment of a trustee under a deed in place of the original trustee, who is dead. And, even if it were an action, it certainly cannot be regarded an action for the recovery of real estate, or of an estate or interest therein; for, if it were, either party could demand a trial by jury, and that certainly could not be demanded in a case like this. But, waiving this, the present proceeding cannot in any way affect the land described in the original trust deed, as the record before us shows that such land has been sold in accordance with the terms of

that deed, and the claim of the petitioner is that the proceeds of such sale have been reinvested in other lands, which the undisputed testimony shows are situate in the county of Dorchester. So that, in any view of the case, it is manifest that the second exception cannot be sustained, and it is therefore overruled.

The third exception, relating to the alleged domicile of the appellant, has been already disposed of by what has been said in considering the first exception. For the reasons there set forth, the third exception is overruled.

The fourth exception raises the point that there is no vacancy in the office of trustee, for, although J. H. Cone, the person appointed by the deed, is dead, yet the office descended to his heirs. This exception was no doubt intended to be based upon the allegations contained in the second paragraph of appellant's answer, which seems to be in the nature of a plea in abatement upon the ground of defect of parties. If it be so regarded, it is defective, in that, to use the phraseology of the former system of pleading, it "does not give the plaintiff a better writ"; and such seems to be the rule under the present system of pleading, for, in speaking of a plea in abatement for the nonjoinder of proper parties defendant, it is said in 1 Enc. Pl. & Prac. 17: "A plea in abatement for nonjoinder should give the names of the parties omitted, and show that they are alive, and within the jurisdiction of the court, and within reach of its process." Now, in this case it does not appear from the pleading whether the deceased trustee, J. H. Cone, left any heirs; nor, if he did, who they are. But it does appear from the testimony that the petitioner, W. F. Cone, was the brother of J. H. Cone, deceased, and, if so, then he would be an heir if the deceased left no wife or children, and he is a party to this case. We do not see, therefore, that there is any foundation for the fourth exception, and it must be overruled.

The fifth exception seems to make the point that the petitioner "is estopped from taking any plan to substitute a new trustee without first carrying out the provisions fixed in the trust deed for the appointment of a new trustee in the place of J. H. Cone." It is quite true that the deed, as we have seen, does provide for the appointment of a new trustee by the joint action of the petitioner and the appellant; but, if such joint action cannot be had in this case, as seems to be the case, for while the appellant does deny the allegation made in the petition that "she declines and refuses to unite with your petitioner for [in?] the appointment and substitution of another trustee," yet the testimony shows that the state of feeling existing between this man and wife, who are now separated, is such that it would be hopeless to expect that they would unite in appointing a new trustee. Under this state of things,

the court certainly has the power and will exercise it by appointing a trustee in place of the deceased trustee, for it is a maxim that the court of equity will never allow a trust to fail for want of a trustee. It is true that upon the death of a trustee, in whom real estate has been vested by a deed or other instrument creating the trust, the office and estate created by such instrument descends to and vests in the heir at law of the trustee; not his heirs under the statute of distributions, which, it seems, does not apply to trust estates, but his heir at common law. *Martin v. Price*, 2 Rich. Eq. 412 (see especially the opinion of Johnston, Ch., beginning at page 468). But that is for the purpose of preventing the fee from being in abeyance, and it might be a grave question whether the heir at law in such a case could be required to perform the duties of trustee. Be that as it may, however, the case of *Ex parte Knust*, Bailey, Eq. 489, affords ample authority for just such proceedings as this, and that case has been fully recognized in the comparatively recent case of *Sullivan v. Latimer*, 35 S. C. 422, 14 S. E. 933, where the late Justice McGowan, in delivering the opinion of this court, uses this language: "We know no reason why, in case of the death of a trustee, the court of common pleas, in the exercise of its equity jurisdiction, may not appoint another trustee in his place, with all the powers and duties given to the first, at the instance of the cestui que trust, and that by *ex parte* proceeding." The intervening case of *Wallace v. Foster*, 15 S. C. 214, is not in conflict with this view, for in that case the question was whether a trustee who was still living could be removed from his office, and another appointed in his place, by an *ex parte* proceeding, which, as Harper, Ch., said, in *Ex parte Knust*, could not, under the English practice, be done except by bill, to which, of course, the trustee should be made a party. The fifth exception must likewise be overruled. The judgment of this court is that the judgment of the circuit court must be affirmed.

(61 S. C. 548)

LAWTON v. SOUTH BOUND R. CO.
(Supreme Court of South Carolina. Sept. 20, 1901.)

RAILROAD — EMBANKMENT — WATER COURSE — OBSTRUCTION — COMPLAINT — SUFFICIENCY — DISPOSITION OF APPEAL — SUBSEQUENT AMENDMENT.

1. Where plaintiff sues a railroad company for obstructing a ditch which drained his lands, but fails to allege that the ditch was a natural water course, or that he had any right by grant or prescription to so use it, his complaint is insufficient, as merely alleging the damming up of surface water, for which no action lies.

2. Omissions apparent on the face of a complaint may be amended on leave granted by the circuit court after appeal and remittitur.

Appeal from common pleas circuit court of Hampton county; Townsend, Judge.

Action by W. H. Lawton against the

South Bound Railroad Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed, with leave to amend.

Plaintiff's complaint, omitting the formal parts, was as follows: "Second. That the plaintiff herein at the times hereinafter mentioned was, and is now, a citizen and resident of Hampton county, S. C., and is the owner of a large tract of land situate, lying, and being in the said county and state. Third. That said defendant railroad passes over and through the plaintiff's said tract of land, and near thereto, by its roadbed and track. Fourth. That on the 15th day of May, 1897, and on other dates, defendant railroad, by its servants, agents, lessees, and employees, caused an embankment to be erected near the thirty-eight mile post on said railroad, in Hampton county, S. C., and a ditch to be filled in, which had been of for a period of thirty or forty years, and, by the erection of said embankment and filling in of said ditch, has cut off the natural drainage of a large part of plaintiff's lands, and plaintiff has been actually damaged in the sum of \$1,000. Fifth. That defendant railroad was told not to place the said embankment so as to obstruct the natural drainage of plaintiff's land, and, after embankment was built under protest of plaintiff, defendant railroad was notified of damage it was doing plaintiff, and refused to remove the same or make a proper opening. Sixth. That, before embankment was built and ditch filled in by defendant railroad, plaintiff's lands were good planting lands, and now they are so soaked with water caused by the obstruction erected by defendant railroad that they are worthless for planting lands, and have been ruined by defendant railroad, causing said land to be worthless." From order sustaining demurrer, plaintiff appeals on following exceptions: "First. Because the circuit judge erred in deciding that the complaint of plaintiff did not state facts sufficient to constitute a cause of action, and dismissing said complaint, whereas he should have held that the pleadings raised a question of fact to be determined by the jury, as to whether the embankment which had been erected by defendant company was necessary for the protection of defendant's roadbed and right of way. Second. Because his honor erred in deciding that the defendant company had the right to close up a ditch which had been in existence thirty or forty years, and which drained the planting lands of plaintiff, without defendant first showing that it was necessary to close up such ditch for the protection of defendant company's roadbed. Third. Because of error in deciding that defendant company had the right to build an embankment over and across the natural water course which drained plaintiff's lands, and thereby overflow and render plaintiff's lands worthless. Fourth. Because of error in de-

ciding that the ditch, which had been in existence for thirty or forty years without interruption, used for the purpose of draining plaintiff's land, was not a natural water course, or had become so by lapse of time."

W. S. Smith, for appellant. O. J. O. Hutson and James W. Moore, for respondent.

McIVER, C. J. (after stating the facts). Inasmuch as the question presented by this appeal arises under a demurrer to the complaint upon the ground that the facts stated therein are not sufficient to constitute a cause of action, the reporter will incorporate in his report of the case a copy of the complaint, omitting the title, the first paragraph, and the prayer for relief, which contain nothing material to the question presented. The demurrer was sustained by his honor Judge Townsend in a short order, not assigning any reasons for his conclusion. From the judgment sustaining the demurrer the plaintiff appeals upon the several grounds set out in the record, which will likewise be incorporated in the report, omitting the formal parts.

Substantially, the complaint alleges that the plaintiff is the owner of a large tract of land situate in the county of Hampton, state of South Carolina, over and through which the track of the defendant's railroad runs; that on or about the 15th of May, 1897, the defendant "caused an embankment to be erected near the thirty-eight mile post on said railroad, in Hampton county, S. C., and a ditch to be filled in which had been of [here some word or words have been omitted which we cannot undertake to supply by conjecture merely] for a period of thirty or forty years, and by the erection of said embankment and filling in of said ditch has cut off the natural drainage of a large part of plaintiff's lands"; that defendant was notified not to place the said embankment so as to obstruct the natural drainage of plaintiff's lands, and, after the embankment was constructed under protest of plaintiff, defendant was notified of the damage it was doing to the plaintiff, and refused to remove the same or to make a proper opening; that, before said embankment was thrown up and said ditch was filled in, plaintiff's lands were good planting lands, and now they are so soaked with water caused by the obstruction aforesaid that they are worthless for planting lands. Before passing upon the specific exceptions upon which this appeal is based, it will be well to lay down certain fundamental and well-established principles applicable to cases of this kind.

The obstruction of the flow of surface water and the waters of a natural water course are two distinct and very different things, and are attended by entirely different consequences. The former is not actionable, while the latter, if resulting in dam-

age to an adjoining land proprietor, is actionable. In this state, at least, it is well settled that the common-law rule prevails, and that surface water is regarded as a common enemy, which each landed proprietor may keep off his own premises, even though by so doing he may throw or keep it on his neighbor's premises. *Edwards v. Railroad Co.*, 39 S. C. 472, 18 S. E. 58, 22 L. R. A. 246, 39 Am. St. Rep. 746, and *Baltzeger v. Railway Co.*, 54 S. C. 242, 32 S. E. 358,—especially the latter, where Mr. Justice Gary goes more fully into the question than was done in the former case. And in this respect a railroad company stands upon the same footing as an individual landed proprietor. 24 Am. & Eng. Enc. Law, 950; *Edwards v. Railroad Co.*, supra. It is material, therefore, to inquire first what was the character of the water which the defendant was charged with obstructing. Was it surface water, or the water of a natural water course? To determine this question, it is necessary to ascertain the characteristics of these two kinds of waters, and what are the tests by which the one may be distinguished from the other. In 24 Am. & Eng. Enc. Law, at page 896, it is said: "Surface waters are waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground, and are derived from rains and melting snows; occasional outbursts of water, which in time of freshet or melting of snows descend from the mountains and inundate the country; and the moisture of wet, spongy, springy, or boggy ground." And on the next page of the same valuable work it is said: "The distinguishing features of surface waters are purely negative, and consist in the absence of the distinguishing features which are common to all water courses. Hence it is that the courts have not attempted to give any complete and full definition of surface waters. The question that has arisen has usually been whether the water in question was surface water or was a stream or water course. If it has the characteristics of a water course, it is usually treated as such, and is governed by the rules of law applicable to water courses. If the characteristics of a water course are absent, it is usually treated as surface water, and is governed by the rules of law applicable to surface waters. To constitute a water course, there must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and it naturally discharges itself into some other stream or body of water. It must be something more

than mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes." Again, on the succeeding page, it is said: "It is essential to the existence of a water course that there should be a well-defined bed or channel, with banks. If these characteristics are absent, there is no water course, within the legal meaning of the term. Hence natural depressions in the land through which surface water from adjoining lands naturally flows are not water courses." These doctrines thus laid down in the text of that standard work are fully supported by the cases cited in notes. Indeed, one of the cases cited (*O'Connor v. Railway Co.*, 52 Wis. 526, 9 N. W. 287, reported also in 38 Am. Rep. 754) is so much like the present case in some of its features as to call for special reference to it. There, as here, the question arose on a demurrer upon the ground that the facts stated in the complaint were not sufficient to constitute a cause of action, upon the ground that there was no allegation in the complaint that any stream or water course had been obstructed. On the contrary, the cause of action stated in the complaint, as construed by the court, was that the defendant had filled up a ditch in constructing its roadbed, through which the water falling on the plaintiff's land was accustomed to flow. That case is also pertinent to another aspect of this case, which, though not presented in any of the exceptions, may have been contemplated by the allegation in the fifth paragraph of the complaint that the defendant had refused to "make a proper opening" in the embankment for the purpose of allowing the water to pass through or under it. But that case, and especially the authorities therein cited, shows that, if the water obstructed was surface water, then the defendant was under no obligation to do so, and hence its refusal to do what was not required by law would not constitute any cause of action.

We next propose to examine the allegation made in the complaint in the light of the foregoing principles of law. It is quite apparent that neither the terms "surface water" nor "natural water courses" are used in the complaint, but that alone would not be conclusive if there are facts alleged which would show that a natural water course was obstructed. For, if there are no such facts alleged, then, under the authorities above quoted, the water which was obstructed must be treated as surface water. There is no allegation that there was "a stream usually flowing in a particular direction," nor is there any allegation that the water obstructed flowed "in a definite channel, having a bed, sides or bank," nor is there any allegation that there was "any well-defined bed or channel, with banks," through which the water obstructed was accustomed to flow; and this, as said, "is essential to the existence of a water course." Indeed, there is not

a single fact alleged from which an inference could be reasonably drawn that the water in question was the water of a natural water course. On the contrary, the irresistible inference from the facts stated in the complaint is that the water obstructed was nothing but surface water, which was drained from plaintiff's land by the ditch,—a mere artificial channel. No lapse of time could invest such a channel with the characteristics of a natural water course. Looking at the complaint alone, it would seem that the gravamen of the plaintiff's claim is the filling up of the ditch referred to in the fourth paragraph of the complaint. If so, there is no allegation that the ditch or any part thereof was on the plaintiff's land, nor is there any allegation that the plaintiff had, either by grant or prescription, acquired the right to use such ditch as a means of draining his lands, and therefore the filling up the ditch would not afford him any cause of action.

It only remains to consider the specific exceptions taken in support of this appeal. The first and second exceptions, raising practically the same point, may be considered together. That point was, no doubt, based upon what was said in the case of *Edwards v. Railroad Co.*, supra; but in the light of the comments made upon that case in the subsequent case of *Baltzger v. Railway Co.*, supra, it is manifest that those exceptions cannot be sustained.

The third exception is based upon an assumption which was wholly unwarranted by anything that appears in the record before us; for there is nothing whatever to show that the circuit judge held that the defendant "had the right to build an embankment" over and across the natural water course which drained plaintiff's land, and thereby overflow and render plaintiff's land worthless.

The fourth and last exception cannot be sustained, for there is no allegation of any fact tending to show that the plaintiff had acquired, either by grant or prescription, the right to use the ditch as a means of draining his lands; for there is no allegation of any adverse use made either by plaintiff or any one else of the said ditch for that purpose, and certainly a ditch—a purely artificial channel—cannot with any propriety be regarded as a natural water course.

We do not think, therefore, that there was any error in sustaining the demurrer. But this court is always reluctant to dismiss a complaint for the want of allegations necessary to show that plaintiff has a cause of action, especially where, as in this case, there is a manifest omission in the complaint. For while it is true that cases must be decided upon the facts as they appear in the record, and if there is any omission, inadvertent or otherwise, in such record, it is incumbent upon the appellant to supply the same before the case is submitted for a hearing, yet recognizing the fact that every person, even the most careful, is liable to make mistakes or

omissions, we are disposed to allow the appellant the opportunity, if he can, to repair such faults. To this end, we will allow the appellant an opportunity to apply to the circuit court for leave to amend his complaint if he shall be so advised.

The judgment of this court is that the judgment of the circuit court be affirmed, with leave, however, to the plaintiff to apply to that court for permission to amend his complaint, provided that such application be made as soon as practicable after the remittitur is filed in that court.

POPE, J. I prefer to concur in the result. I am not satisfied that a water course is correctly defined.

GARY, A. J., concurs in the result.

(61 S. C. 569)

BARRETT v. MOISE et al.

(Supreme Court of South Carolina. Sept. 25, 1901.)

APPEAL — EXCEPTIONS — SUFFICIENCY — INTERESTS OF MINOR — EXAMINATION — JURISDICTION OF MINOR — GUARDIAN AD LITEM — APPOINTMENT — RECORD — EVIDENCE — DIRECTION OF VERDICT.

1. Exceptions for review on appeal, assigning error in not giving requested instructions, but which do not disclose what instructions were requested, will not be considered.

2. An exception to a charge given below which merely sets out quotations from the charge is insufficient, and will be disregarded.

3. The interest of a minor will be examined on appeal without regard to errors committed by her attorney in preparing exceptions.

4. Where the father and general guardian of a minor under 14 accepts service of a summons and complaint against the minor, and also of a notice requiring an application for the appointment of a guardian ad litem, the court thereby obtains jurisdiction of the person of the minor, though the acceptance of service recites that the minor does not reside with her father.

5. Where, in pursuance of a notice requiring the appointment of a guardian ad litem for a minor defendant, the minor's father and general guardian files a petition praying that a third person be appointed guardian ad litem, which petition is granted, and an order appointing such guardian is made, there is a sufficient appointment of a guardian ad litem to confer jurisdiction of the minor on the court.

6. Where all the evidence in a case is record evidence, and there is no testimony to impugn the facts appearing of record, it is proper to direct a verdict.

Appeal from common pleas circuit court of Sumter county; Townsend, Judge.

Action in partition by Little Dora Barrett, by Penelope V. Freeman, her guardian ad litem, against Marion Moise, Henry D. Barrett, and others. From judgment for defendants, plaintiff appeals. Affirmed.

A. B. Stuckey, for appellant. Lee & Moise, for appellees.

McIVER, C. J. The plaintiff brought this action against the defendants for the partition of a certain tract of land described in the complaint, alleging that she was entitled

to an undivided one-tenth interest in the said land; that the defendants are entitled to the remaining nine-tenths in the proportions set out in the complaint. The defendants answered, denying that the plaintiff has any interest whatsoever in the said land, and alleging that they are the absolute owners in fee simple of the said land; and they go on to allege that they acquired their title under an order made by the court of equity for the sale of said land, in a case wherein V. C. Barrett and Pauline B. Barrett were plaintiffs, and John K. Barrett and others were defendants. The issue of title thus raised by the pleadings came on for trial before his honor Judge Townsend and a jury, and, a verdict in favor of the defendants having been found, judgment was entered thereon. From this judgment the plaintiff appeals upon the several exceptions set out in the record.

The first five exceptions, not being taken in conformity to Rule 5 of this court (35 S. E. v.), might well be disregarded, for they simply impute error to the circuit judge in refusing to charge certain requests submitted by plaintiff, without setting forth in these exceptions what were the requests; and, what is more important, none of them "contain a statement of the proposition of law or fact which it is desired to review," as required by the rule referred to. The sixth exception is open to the same objection, for, although that exception does contain a copy of the defendants' third request, which it is claimed that the circuit judge erred in charging, yet it does not contain any distinct proposition of law or fact which appellant claims to have been violated by the charge. The eighth exception, which consists of nothing more than an extract from the charge of the circuit judge, and has so often been held not to be sufficient as not to need the citation of any authority, might also well be disregarded. The seventh exception, however, may by a liberal construction of its terms be regarded as sufficient to raise the question whether the circuit judge erred in holding that the fact that the late Judge Fraser granted the order for the appointment of a guardian ad litem for the plaintiff in the case under which the land was ordered to be sold, and was sold, afforded a presumption that "everything was regular up to that appointment." So, also, the ninth exception, by a like liberal construction, may possibly be regarded as sufficient to raise the question whether the circuit judge erred in not instructing the jury to bring in a verdict for the plaintiff, under the facts disclosed by the record which had been offered in evidence. While this court is always reluctant to decide a case upon technical grounds, yet in this case we would be less reluctant to do so, because from the "case," as prepared for argument here, it is conceded that the plaintiff's name does appear as a party to the

action of *Barrett v. Barrett*, under which the sale of the land in question was made through which defendants claim; and it also there appears that the land was sold for a full and fair price, and that the share of the plaintiff in the proceeds of such sale was received and receipted for by her general guardian, who was her own father, and hence the plaintiff has no just ground of complaint. For, also, though it is stated in the argument of counsel for appellant "that the property in question was sold soon after she [the plaintiff] inherited it; that the master paid over the money to the father and guardian, who had given only a \$400 bond for the purpose of receiving the rents of the plantation, which bond was never increased, he having paid out most of the 1,800 and odd dollars soon after receiving, checking on it as guardian, in part payment of another plantation bought for and in the name of his second wife, no blood relation to the plaintiff, which has been lost to her by a foreclosure," whereby, as counsel says, "the plaintiff has derived no benefit whatever from her inheritance, and there is scarcely room to hope for a cent except under this proceeding,"—yet, in the first place, we remark that under the wise, salutary, and well-settled rule, this court is not at liberty to consider any facts which appear only in the argument of counsel; and, in the second place, even if we were at liberty to consider these statements of counsel, we are at a loss to perceive by what rule of good morals the defendants, who have in good faith paid their money for property sold under the order of a court of equity, should be required to make good any losses which the plaintiff may have sustained by the fault or misconduct of others, and to which it is not alleged or even intimated that the defendants in any way contributed. Still; as the rights of a minor are involved, we will not decline to consider the case without regard to any fault in the manner in which the exceptions have been taken; for a minor has the right to insist upon his strict legal rights, and, if the plaintiff has been deprived of her interest in the land in question by any want of compliance with the strict requirements of the law, she should be protected. We will therefore proceed to consider the questions which are thus stated by counsel for appellant in his argument here: "(1) Did the court acquire jurisdiction of Little Dora Barrett in the case of *Barrett v. Barrett* by the service of the summons as required by law? (2) Was a guardian ad litem properly and legally appointed for her after the service of the notice for that purpose, as required by law, so as to give authority to proceed to order a sale of the land?"

As to the first question, we do not see how it is possible to have a doubt. The record of the case under which the land in question was sold by the order of the court, as set

out in the "case" as prepared for argument here, shows affirmatively that the plaintiff herein was personally served with the summons in that action, and also that G. M. Barrett, the father and general guardian of the plaintiff herein, accepted service of the said summons, and also of the notice attached thereto, requiring an application for the appointment of a guardian ad litem, which was addressed to all the minors, including the plaintiff herein, and also to G. M. Barrett, the father and general guardian of the said plaintiff. The fact that the said G. M. Barrett, in his acceptance of service, recites that certain of the minors, not including the said plaintiff, resided with him, and the further fact that in the address of this notice, after the name of G. M. Barrett, the following words are added, "with whom all the infant defendants reside, except Little Dora Barrett, and to Mrs. Penelope Freeman, with whom Little Dora Barrett resides," cannot affect the question; for the fact still remains that G. M. Barrett, the father and general guardian of the plaintiff herein, was served with the summons, and also with the notice requiring an application for the appointment of a guardian ad litem for all the minors; and this was a full compliance with all the requirements of the statute, and therefore there can be no doubt that the court did acquire jurisdiction of the plaintiff herein in the action under which the land was sold. See *Faust v. Faust*, 31 S. C. 576, 10 S. E. 262, and the very recent case of *Kennedy v. Williams*, 59 S. C. 878, 38 S. E. 8. As to the second question there is as little doubt. Without repeating what has already been said as to the acceptance of service of the notice, the "case" shows that in pursuance of such notice the said G. M. Barrett, the father and general guardian of the plaintiff herein, duly filed his petition praying that one James D. Graham be appointed guardian ad litem for certain of his infant children, among whom was the plaintiff herein, and that the late Judge Fraser, upon hearing said petition, granted an order appointing the said Graham guardian ad litem for the said plaintiff. What more could be required, we are at a loss to conceive.

We are therefore of opinion that the plaintiff herein was duly made a party to the action of *Barrett v. Barrett*, under which the land in question was sold, and that a guardian ad litem of said plaintiff was duly appointed to represent the interests therein, and hence she is bound by the decree and judgment made in that case. Inasmuch as all these facts upon which the case turned appeared on the record, and there was no testimony whatever to impugn the facts there appearing, there was no error on the part of the circuit judge in directing a verdict for the defendants in this case.

The judgment of this court is that the judgment of the circuit court be affirmed.

(61 S. C. 575)

CRESWELL et ux. v. SMITH.

(Supreme Court of South Carolina. Oct. 3, 1901.)

DEED—ACCOMPANYING LEASE—MORTGAGE—SEIZURE OF CROPS—RENT—CLAIM BY THIRD PERSON—LANDLORD'S TITLE—CONSTABLE—DEFENSE.

1. Where a conveyance is absolute on its face, and it appears that it was made to cancel an existing mortgage debt, and that the grantor paid rent under a lease executed to him contemporaneously by the grantee, it is error to instruct that the deed constituted merely a mortgage.

2. A constable who has seized crops under a rent lien attachment may set up title in the landlord for whom he seized as a defense to a suit by a third party who claims the proceeds of the crops.

Appeal from common pleas circuit court of Abbeville county; Aldrich, Judge.

Action for proceeds of crop seized under rent lien by Thomas V. Creswell and Jane Creswell against Robert Smith. From judgment for plaintiffs, defendant appeals. Reversed.

Sheppards & Grier and Parker & Greene, for appellant. Wm. N. Graydon, for appellees.

JONES, J. The defendant, as constable for Magistrate Price in Abbeville county, seized two bales of cotton as the property of Henry Cox by virtue of a warrant issued by said magistrate under an agricultural lien for rent at the instance of A. T. Robinson, claiming as landlord. The tenant, Cox, raised no question. The plaintiffs, however, appeared before the magistrate, and claimed that the cotton should be turned over to them for rent, as owners of the premises. Under an issue framed by the magistrate between the Creswells and Robinson, the jury found in favor of Robinson's claim, but on appeal to the circuit court these proceedings were set aside, and the case remanded to the magistrate, the court holding that the magistrate had no right to try such issue in such proceedings, and that the Creswells should proceed by summons and complaint. No appeal was taken from that judgment. This action was then commenced by the plaintiffs to recover of the defendant, Smith, damages equal to the proceeds of the sale by him of the said cotton so seized, amounting to \$52. The case was tried before Judge Aldrich and a jury. The jury found a verdict for the plaintiffs, and from the judgment thereon is this appeal.

The only witness examined in the case was the plaintiff T. V. Creswell, who testified substantially that the land belonged to his wife, Jane Creswell; that they were in possession of it; that they rented land to the said Henry Cox for the year 1898, including the 40 acres hereinafter referred to, for 1,000 pounds of lint cotton; that when he went to collect the rent in the fall of 1898 Cox refused to give the cotton up; that

thereafter the defendant, Smith, seized the two bales of cotton, and sold it. On the cross-examination, the execution thereof being admitted, defendant's counsel read and introduced in evidence a deed by Jane B. Creswell, dated March 11, 1898, conveying to A. T. Robinson and Thomas M. Dendy, their heirs and assigns, a tract of land, containing 40 acres, described therein. The deed recites that it was "in consideration of the sum of \$240.38, to me in hand paid," etc. The deed further recites that "there is no subsisting lien of any kind whatever" upon said premises. Defendant at the same time introduced in evidence, executed on the same day of the execution of the deed, the following indenture between A. T. Robinson and T. M. Dendy, of the first part, and Jane B. Creswell and T. V. Creswell, of the second part: "State of South Carolina, Abbeville County. This indenture, made and entered into this day between A. T. Robinson and T. M. Dendy, of the first part, and Mrs. Jane B. Creswell and T. V. Creswell, of the second part, witnesseth: First. That the party of the first part have this day bought a certain parcel of land from the party of the second part for and in consideration of the party of the first part paying to the party of the second part the sum of \$242.38; said amount being the amount of a certain note and mortgage given by Mrs. Jane B. Creswell to the parties of the first part on the 12th day of May, 1891, with interest to date. Second. That the parties of the first part have this day leased unto the party of the second part the said parcel of land, said to contain forty acres, more or less, for a term of five years, for and in consideration of the party of the second part paying to the party of the first part the sum of \$30 for each year, which amount shall be due and payable on or before the first day of November of each year. Third. That it is further agreed by the parties of the second part that, if they shall for any cause or reason refuse or fail to pay the said stipulated rent of \$30 as it shall become due and payable, then this lease shall be considered as canceled, and no longer in force. And the party of the first part shall have the right to take possession of the said parcel of land on the first day of January following the failure to pay the annual rent as it shall fall due. Fourth. That it is also further agreed by the parties of the first part that, if the said parties of the second part shall at any time within the said five years for which the land is leased pay or cause to be paid to the parties of the first part the amount of the purchase money of the land, \$240.38, with interest at eight per cent., they hereby obligate and bind themselves, their heirs and assigns, to make good and perfect titles to the party of the second part, and to accept any amount that shall have been paid as rent as part payment of the purchase money and interest that may be due on same when

the payment shall be offered." Creswell testified that he had paid rent for the years 1893, 1894, 1895, and 1896; that he paid no rent for 1897; that in the spring of 1898, Jim Dendy, a brother of Thos. M. Dendy, named in the deed, who was then dead, agreed to give him "the papers" for \$75; that Robinson would not agree to a settlement. Mrs. Creswell, the grantor, did not testify at all. Defendant moved for a nonsuit on the grounds that Robinson and Dendy were the owners of the premises, that the lease to the Creswells had expired, and that plaintiffs had entirely failed to show any title in themselves in the 40-acre tract, or any right to the rent of the same; but that, on the contrary, the testimony showed that Robinson and Dendy were entitled to the rental thereof for the year 1898. The circuit court refused the nonsuit, construing the papers above, in connection with the testimony, as a mortgage. Upon this ruling defendant's counsel said he would offer no testimony, and that he would allow a verdict without offering any testimony. The court instructed the jury "that said deed was in law nothing but a mortgage, and gave them [Robinson and Dendy] no right to collect rents." The practical question before us is whether the court erred in so construing the papers in evidence. We think the court erred in this. While it is true that a deed absolute on its face may be shown in equity to be a mortgage, the evidence should be clear to that effect. In this case there was no evidence that the parties intended otherwise than expressed in the papers. By these it is clear that the parties intended an absolute conveyance, with an agreement to lease and recovery upon the payment of a specified sum. The consideration of the deed was the cancellation of the then existing mortgage debt. In the absence of positive evidence, it is unreasonable to suppose that the parties, having already a mortgage, should merely intend to substitute another for the same amount. It is shown in *Hodge v. Weeks*, 31 S. C. 281, 9 S. E. 953, which quotes with approval from 3 Pom. Eq. Jur. 1195, that the fundamental characteristic of a mortgage is that it is a security for a debt, that a debt is essential to a mortgage. In this case the mortgage debt was extinguished by the conveyance, and no liability remained on said debt which Robinson and Dendy could enforce. The Creswells did not agree to pay anything absolutely except the stipulated rent, which is wholly inconsistent with the view that they retained titles to the premises. The case of *Brown v. Bank*, 55 S. C. 70, 32 S. E. 816, shows that in the absence of clear, unequivocal, and convincing evidence the presumption will prevail that a deed of conveyance is what on its face it appears to be. The indenture of same date in all its provisions is consistent with the deed absolute on its face, and there is no extrinsic evidence to the con-

trary. Responding to certain grounds upon which respondents seek to sustain the judgment, we hold: (1) That the defendant had the right to avail himself of the defense that Robinson was the real landlord in defeat of the claim set up by plaintiff. (2) To this end it was proper to allow the deed and indenture to be introduced in evidence after execution admitted. (3) The deed being an absolute conveyance, and the lease having expired either at the end of 1897 by the default in paying the stipulated rent of that year, or on March 11, 1898, the termination or the five-year limit of the lease, the plaintiffs were not entitled to the rent due for the year 1898, especially as against one holding at the instance of the true owner. We do not direct a nonsuit, because it appeared that Cox rented land of the plaintiffs outside the 40-acre tract, and it does not clearly appear whether the cotton seized was wholly grown upon said 40-acre tract. We set aside the verdict and judgment thereon because of the ruling and charge that the deed in question was a mortgage, and that Robinson and Dendy had no right to collect rent. The judgment of the circuit court is reversed, and the case remanded for a new trial.

(61 S. C. 556)

JONES v. CHARLESTON & W. C. RY. CO.
(Supreme Court of South Carolina. Sept. 23, 1901.)

RAILROAD — FOOT PASSENGER — DEATH — LICENSEE — EVIDENCE — ADMISSIBILITY — SUFFICIENCY — INSTRUCTIONS — MODIFICATION — PROPRIETY.

1. In an action against a railroad company for negligently causing the death of plaintiff's intestate, evidence of the use of the railroad as a footway with the company's consent is admissible to show that defendant was required to exercise care towards decedent.

2. Evidence in an action against a railroad company for negligently causing the death of plaintiff's intestate that the roadbed was used as a footway by the public with the company's acquiescence; that the train which struck decedent was running backward, on a dark night, at from 6 to 10 miles per hour, without rear-end lights, lookout, or warning of any kind; and that decedent was killed on a trestle, which she was then using as a footway,—is sufficient to justify the refusal of a nonsuit.

3. A person walking on a railroad track in a populous portion of the city, which track the public is accustomed to use as a footway with the railroad company's acquiescence, is not a trespasser, but a licensee.

4. Where disputed facts are stated as illustrations of the law, but not in a hypothetical manner, the charge is on the facts.

5. Negligence being a mixed question of law and fact, it is error to instruct that a certain state of facts will or will not constitute negligence.

6. In an action against a railroad company for negligently killing plaintiff's intestate it is error to add to the correct definition of contributory negligence, "unless the railroad company could have avoided injuring her notwithstanding her negligence."

Appeal from common pleas circuit court of Anderson county; Aldrich, Judge.

Action for damages for killing Susan V. Jones, by her administrator, J. L. Jones, against the Charleston & Western Carolina Railway Company. From judgment for plaintiff, defendant appeals. Reversed.

B. F. Whitner and S. J. Simpson, for appellant. Bonham & Watkins and Quattlebaum & Cochran, for appellee.

JONES, J. This is an action for damages for personal injury resulting in the death of plaintiff's intestate through defendant's alleged negligence in operating its train of cars at Anderson, S. C., and the appeal comes up from a judgment on verdict in favor of the plaintiff.

The first, second, and third exceptions relate to the admissibility of certain testimony. Over the objection of defendant, witnesses were allowed to testify that the railroad track of the defendant company from the depot station to the Orr Cotton Mills, on which plaintiff's intestate was injured, was used by persons without objection on the part of the defendant. Appellant, in the first exception, alleges that this was error, because the track was not a traveled way where said intestate had a right to be. Conceding that the evidence was wholly insufficient to establish that the track at the place of the injury was a traveled place, where the public had a legal right to travel, the testimony was admissible for what it was worth on the issue raised in the pleadings whether persons were accustomed to use the track as a walkway with the consent or acquiescence of the defendant, and for the purpose of showing the circumstances which called for the exercise of care on the part of the defendant. The second exception was not pressed, and need not be noticed. The third exception assigns error in admitting in evidence an ordinance of the city of Anderson making it unlawful for any moving engine or train of cars to cross any street of the city at a rate of speed faster than four miles an hour, and making it the duty of the persons in control to ring a bell for at least 50 yards immediately before reaching such crossing, when it appeared that the injury did not occur at a crossing. There does not appear in the "case" any basis for this exception. The ordinance was set out in the pleading, and when proof was being offered defendant's counsel said, "We admit the ordinance as set out in the pleading." It does not appear that a motion was attempted to be made to strike out the ordinance from the evidence after the refusal of the motion for nonsuit, and that it was agreed by counsel that this motion should be taken up after the close of the testimony; but we do not find that such motion was ever taken up, or ever ruled upon by the circuit court.

The fourth exception alleges error in the refusal of the motion for nonsuit, which motion was based on the ground that the evidence showed that the plaintiff's intestate

was a trespasser when injured, and there was no evidence of gross or willful misconduct of the defendant in the management of its train. The general rule undoubtedly is that a railroad company owes no duty to a bald trespasser on its track, except not to do him any wanton or willful injury. *Small v. Railway Co.*, 57 S. C. 243, 35 S. E. 499, and authorities therein cited. Ordinarily, the mere failure to keep a lookout for adult trespassers that may be on the track is not evidence of negligence to the trespasser, because negligence involves a breach of duty to the injured person, and the railroad company owes no such duty to the adult trespasser. It is the trespasser's duty to look out for himself, and to give the railroad company a clear track by getting out of the way. If, however, the servants of the railroad company should discover a trespasser upon the track, and should then fail to use ordinary care, under the circumstances, to avoid running him down, this would be evidence from which a jury might infer that the injury was the result not of mere inadvertence, but of a conscious failure to observe due care, or of wantonness or willfulness. In this case, however, the complaint alleged that the track where the injury occurred "traverses a populous part of the city of Anderson, and is much frequented by people passing to and fro along said railway, which fact was well known to the defendant and its agents, servants, and employes," and there was some evidence tending to establish such allegations, which made it proper to submit the case to the jury. If such allegations be true, then the circumstances were such as to call for a higher degree of care to avoid injury than if plaintiff were a bald trespasser. Even though the use of the track by the public as a walkway was not for such length of time nor of such character as to give a legal right to so use the track, and even though the evidence fell short of showing any positive consent of such use by the company, yet if there was evidence tending to show knowledge of an acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons upon the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the company. Under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care, under the circumstances, to avoid injury. The evidence tended to show that on December 25, 1899, the plaintiff's intestate, with her husband and two children, were passengers on defendant's train from Starr to Anderson; that the plaintiff, with his family, resided at the Orr Cotton Mills, which is something over a mile south from the station at Anderson, and situate near the defendant's track; that before the train reached the Orr Cotton Mills the

plaintiff or her husband requested the conductor to put them off at the mill, but, as it was against his orders, the conductor declined to do so. The train reached the station at Anderson after dark. On arrival the plaintiff, with her husband and two children and two other persons, left the train, and started back down the track to the Orr Cotton Mills. As stated, there was evidence tending to show that the track was constantly used by the public with the knowledge of the defendant company. There was a way by streets from the station to the cotton mills, but the route down the track was considerably nearer. The night was dark and cold, and the wind was blowing hard. Some 10 minutes after arrival, the train, as usual, was being backed down the track towards the Orr Cotton Mills, for the purpose of shifting, it being customary in shifting for the train to be backed about six car lengths beyond a trestle about 330 yards south of West Market street, near which is the station. This trestle is 56 yards below Reed street, and is 24 yards long. The injury occurred at the south end of this trestle. James L. Jones, the husband, testified that at the time of the accident his wife was on the trestle, leading her little boy, and holding a gun in the other hand; that he was holding the baby in his arms, and while upon the trestle looked around, and saw the train about 30 or 40 feet away; that he called to his wife that the train was coming, and to get off the trestle; that he jumped off the trestle with the baby, and that the train ran over his wife and killed her; and that the little boy was found hanging between the ties of the trestle uninjured, and that the others of the party escaped by jumping off the trestle. The evidence was that the speed of the train was from five to six or from eight to ten miles an hour. There was also evidence on the part of the plaintiff to the effect that no bell was rung, no whistle was blown, and no warning given of the approach of the train; that there was no lookout on the train, and there were no rear-end lights on the train. In view of the foregoing, the case was properly submitted to the jury.

The fifth exception complains of error in failing and refusing to charge defendant's second request to charge, which is as follows: "If the jury find from the evidence that the said Susan V. Jones was injured by the train on the railroad track other than at a public crossing, or a crossing which the public was accustomed to use to cross the track, she was a mere trespasser, and the plaintiff would not be entitled to recover in this action, unless the jury further find from the evidence that the injury was the result of wanton and willful misconduct of the defendant in the running of its train at the time. Except at crossings, the railroad company has the right to the exclusive use of its track, and is entitled to assume that it is clear. It is not bound to anticipate that persons will be upon it, or to make provision

for the safety of such persons." Responding to this request, the court said: "Well, defendant has submitted an abstract proposition of law that is in one sense correct, because the right of way,—the track of the railroad company,—being the property of the railroad company, and maintained for its use, it is the property of the railroad company, and it is not bound to anticipate that, as a rule, a person is to obstruct that track by getting upon that track; and the railroad company has a right to assume that its legal right will be respected by the people, and it is not its duty to anticipate that people will be upon that track." The defendant was not entitled to have the court charge the request without qualification, for it assumed that the plaintiff was a trespasser if the injury happened at other than a public crossing, and that, therefore, the defendant was not liable unless the injury was the result of defendant's wanton and willful misconduct; whereas plaintiff's complaint and evidence in support thereof was directed to show that plaintiff was not such a trespasser, but rather a licensee, using the track with the knowledge and acquiescence of the defendant, and in a populous part of the city of Anderson, where people were accustomed to travel, which circumstance would call for greater care on the part of defendant than in the case of a bald trespasser. In view of what has been said, the sixth exception must also be overruled, since it complains that the court erred in charging the jury that if they believed from the evidence that the deceased was at the time of the accident walking along the track of the defendant company at a place where the track had been in use by the public as a walkway with the knowledge and acquiescence of the railroad company, then the deceased was not upon the tracks as a trespasser, but as a licensee.

The seventh exception complains that the court erred in charging the jury plaintiff's fourth request, as follows: "'A railroad company which runs a train of cars backward along its track, on a dark night, through a populous part of the town, and where its said track has been for a long time used by the public, with its knowledge and acquiescence, as a walking place, is under a duty to use due care and take due precaution to prevent injuries to persons who may be on its said track either by ringing the bell, or sounding the whistle, or displaying rear-end lights, or giving due notice or warning in some other reasonable or proper manner of the approach of the said train.' It is objected that this charge was (1) a charge on the facts, in violation of the constitution; and (2) that it undertook to instruct the jury what acts a railroad should do under the conditions in order to exercise due care." It was disputed by the defendant company that the place of the accident was in a populous part of the city of Ander-

son, where its track had been used by the public with its knowledge and acquiescence. Therefore to state such fact other than in a hypothetical way as a basis for declaring its legal effect was an improper reference to the testimony, as it was likely to convey to the mind of the jury that the court assumed as true what the defendant disputed. *Norris v. Clinkscales*, 47 S. C. 523, 25 S. E. 797. Furthermore, as shown in *China v. City of Sumter*, 51 S. C. 460, 29 S. E. 206, negligence is a mixed question of law and fact, and while the court may define negligence, it is for the jury to say whether the facts proved are sufficient to show negligence; hence it is improper for the court, and especially when the facts are in dispute, to charge the jury that certain facts show negligence. For the same reason it would be improper for the court to state to the jury that certain facts in evidence would negative negligence.

The tenth and eleventh exceptions relate to the charge as to contributory negligence, and are as follows: "Tenth. Because the presiding judge refused to charge the jury, as requested in the defendant's request numbered 8, that, 'even if the defendant was guilty of negligence in the backing of its train, and such negligence was a proximate cause of the injury, if the jury also believe that the said Susan V. Jones showed a want of ordinary care in walking down the track that night, under all the circumstances, and such carelessness was a proximate cause of the injury, she was guilty of contributory negligence, and the plaintiff would not be entitled to recover;' and in qualifying this request by adding that: 'If the deceased, Mrs. Jones, was guilty of negligence in acting as you may find from the testimony that she acted, and if her conduct, her negligence, together with the negligence of the railroad company, contributed to her injury as the proximate cause, then the railroad company would not be responsible, unless the railroad company could have avoided injuring her notwithstanding her negligence,'—the error being: (a) That he refused to charge defendant's request as presented, which was a correct proposition of law, and applicable to this case; (b) that he thereby gave the jury the law upon contributory negligence incorrectly; (c) that he instructed the jury, in effect, that the plaintiff could recover against the defendant if they should find that its want of due care was a proximate cause of the injury, even if plaintiff's intestate was guilty of contributory negligence." "Eleventh. Because the circuit judge erred in charging the jury, as requested in plaintiff's ninth request, as follows: 'Contributory negligence is a matter of defense, and must be proved by defendant by a preponderance of the evidence; but unless the contributory negligence was the proximate cause of the accident, and if in spite of such contributory negligence the acci-

dent could have been avoided by the use of ordinary care on the part of the defendant, then plaintiff is still entitled to recover.' This instruction being erroneous for the same reasons as are given in subdivisions 'b' and 'c' of the tenth exception." The testimony being undisputed that Mrs. Jones, plaintiff's intestate, was walking down the railroad track at the time of the injury, the defendant was entitled to have the sixth request to charge above mentioned in the tenth exception submitted to the jury as entirely correct. The remarks by the court down to the clause, "unless the railroad company could have avoided injuring her notwithstanding her negligence," were not improper nor inconsistent with the request, but the addition of such qualification was erroneous, and wholly inconsistent with the well-settled principles governing contributory negligence. The same error was made in the charge excepted to in the eleventh exception above, when the court instructed the jury, "But unless the contributory negligence was the proximate cause of the accident, and if in spite of such contributory negligence [that is, negligence which contributed as a proximate cause] the accident could have been avoided by the use of ordinary care on the part of the defendant, then the plaintiff is still entitled to recover." The charge destroyed the defense of contributory negligence. In every case where there is contributory negligence the defendant could have avoided the injury by ordinary care, for the simple reason that there can be no such thing as contributory negligence unless the defendant be negligent. The error complained of is the same error which was condemned in *Cooper v. Railway Co.*, 56 S. C. 94, 34 S. E. 16. The law in this state is settled that contributory negligence, as defined in *Cooper's Case*, supra, to any extent, will always defeat plaintiff's recovery, unless the injury is wantonly or willfully inflicted; for the law cannot measure how much of the injury is due to the plaintiff's own fault, and will not recompense one for injury resulting to himself from his own misconduct. The objection to the charge is that it instructed the jury that, although plaintiff's negligence contributed to her injury as a proximate cause, she could recover if the defendant, by ordinary care, could have avoided the injury. Is it not manifest that such a rule would abolish contributory negligence as a defense? The qualifying terms, "unless the railroad company could have avoided injuring her notwithstanding her negligence," would necessarily mislead a jury; for they would at once say the railroad company could have avoided the injury by not being negligent in the manner alleged in the complaint, by having suitable rear-end lights, by a reasonable lookout, by loud warning of the train's approach, by running at such slow speed as to enable any one warned to get off the track, and then utterly

ignore the defendant's plea and evidence of contributory negligence because of the instruction that plaintiff, notwithstanding her negligence, which proximately caused her injury, could still recover if the defendant could have avoided the injury. The jury ought to have been instructed without qualification that, if plaintiff was negligent, and that negligence contributed as a proximate cause to her injury, she could not recover, unless the injury was wantonly or willfully inflicted.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(62 S. C. 1)

DANIELS v. FLORIDA CENT. & P. R. CO.
(Supreme Court of South Carolina. Sept. 25, 1901.)

CARRIERS—PASSENGER—WRONGFUL EJECTION—EVIDENCE—NONSUIT—CONDITIONS OF CONTRACT—BURDEN OF PROOF—PASSENGER'S KNOWLEDGE—PRESUMPTION—INSTRUCTIONS—CONDUCTOR'S RUDE LANGUAGE—COMPANY'S LIABILITY—CONTRACT OF CARRIAGE—QUESTION FOR JURY—NEW TRIAL.

1. In an action against a carrier for wrongfully ejecting a passenger on her return trip, the plaintiff's evidence that the regular fare from her starting point to her destination was a certain amount, but that on the present occasion she bought a round-trip ticket for a less amount, is sufficient to show her right to a return passage, so as to justify the refusing of a motion for a nonsuit.

2. Where a carrier defends an action by a passenger for wrongful ejection on the ground of the passenger's failure to comply with conditions of his ticket, the burden of proof is on the carrier to show such conditions.

3. Where a person of ordinary intelligence signs a railroad excursion ticket, it will be conclusively presumed that he knew and assented to its conditions, though it was not read before or after signing, or its conditions called to his attention.

4. It is not error to instruct, in giving a general definition of contracts, that there can be no binding contract in case of fraud or misrepresentation, though there is no allegation or proof of fraud or misrepresentation.

5. In an action against a carrier by a passenger for wrongful eviction, it is error to instruct that, if one party was misled by the misrepresentations of the other, the former is not bound by the contract of carriage, there being no allegation or proof of fraud or misrepresentation.

6. A railroad company is not liable in damages for mere rudeness of language used by its conductor towards its passenger, where such language is not abusive.

7. In an action against a carrier by a passenger for wrongful eviction, it appearing that plaintiff has lost her ticket, and defendant producing secondary evidence of its contents, consisting of the testimony of the agent as to what sort of tickets were sold for the excursion in question, it is proper to submit to the jury the question as to the kind of ticket plaintiff purchased.

8. A new trial will be granted for an instruction erroneously presenting the law, without inquiring on what other grounds the jury may have based its verdict.

Appeal from common pleas circuit court of Richland county; Townsend, Judge.

Action by Isabella Daniels, by her guardian

ad litem, David Cooper, against Florida Central & Peninsular Railroad Company for damages for ejecting her from a passenger train. From judgment for plaintiff, defendant appeals. Reversed.

So much of the charge as pertains to the questions raised on appeal is as follows:

"I will say to you, however, gentlemen, before I take up the requests to charge, that it takes two to make a contract; that is, there must be two contracting parties. There may be more than two contracting parties, but there must be one on one side and one on the other; and there is no contract unless and until their minds meet. They must come together on some proposition, and on the proposition about which the contract is to be made. The minds must meet. They must agree; must come together and discuss the matter; a week, a day; no matter how long; discuss the matter about which they shall contract. There will be no contract until the minds meet, come together; and there will be no binding contract if there is misrepresentation or fraud, because that vitiates everything. But it is for you to say whether there was a contract between these parties, plaintiff and the railroad company, by the agent of the railroad or otherwise. You must say whether there was a contract, and, if you find there was a contract, then you must say what the contract was. That is a matter of fact for you. I have nothing to say about that. You must say whether the contention of the plaintiff is correct,—whether it was simply a contract to carry the plaintiff to Savannah and bring her back,—or whether it was a contract contended for by defendant, if there was a contract; that it was a contract with limitations; special contract with certain limitations. Whether you find the one contract or the other, it is for you to find whether the contract such as you find was violated by either party. That is all a matter of fact for you. I have nothing to do with that at all. I charge you, further, if you were to find that there was a special contract with limitations in it, then I charge you that the plaintiff was bound by the limitations, if she knew it or should have known it. I will touch upon that point 'should have known it' again. If she knew or should have known of the limitations, she should be bound by them; and, if she failed to comply with them, the conductor, the agent of the road, usually called 'conductor,' I believe, would have the right to put her off the train; but before doing so he should examine the ticket to see that she had; to satisfy himself; to see that she had complied with the requisites of the tickets. The burden of proof is on the railroad to show that these special limitations were in the contract.

"I will take up the requests to charge. I do not consider that the law covers a great deal of ground in the case. I will take first the requests of the defendant, as that is the order in which the arguments were made,

and the plaintiff last: '(1) That when a person who intends traveling on a railroad train, and purchases a round-trip ticket at a reduced rate of fare, and signs the contract printed upon its face, is bound by all of its reasonable provisions, whether she had actually read the same or not, and she is presumed to know the same.' I charge you that, under the case of *Betha v. Railroad Co.*, 26 S. C. 91, 1 S. E. 372; and, furthermore, on the general principle that a person who can read should read the contract he signs. '(2) That a condition in a round-trip railroad ticket, sold at a reduced rate of fare, that the purchaser will identify himself to the satisfaction of the agent of the company at the point of destination, and sign the same and have it stamped, is a reasonable condition, and the purchaser of such a ticket is not entitled to return on such a ticket until it is so signed and stamped.' I charge you that, while it sounds like charging upon the facts of the case, reasonableness is a matter generally left with the jury. Our supreme court has said that in the same words that stipulation is reasonable; at least, it is not unreasonable. I charge you that stipulation is reasonable. '(3) That it is the right of a railroad company to expel a passenger who is found upon one of its trains who fails to present a valid ticket for her passage; or to pay her fare.' I charge you that is the law, as I understand it. If the ticket is wrong, the conductor must go according to the rules of the company, which has to carry the public and at certain times has a great duty imposed upon it; and, if he has to put off a passenger because the ticket is wrong, the conductor must do that. The railroad may be liable for issuing the wrong ticket, but not for putting him off. '(4) That a railroad company is not liable for rude language used by one of its conductors to a passenger, lawfully requiring such a passenger to get off of its train.' That is a very general proposition to charge,—that the company is not liable for rude language; depends upon the degree of rudeness. I would say the company is not liable for strict, business language,—firm, business-like talk. But, if the rudeness goes to such extent as to be abusive, I would not charge you that the railroad is not liable, where everybody is presumed to be on the train correctly until shown to the contrary. So decided by our supreme court. I will not charge you that proposition as it stands, but for ordinary, strict, business language, I would say the company is not liable; but if it should go to an unreasonable extent, so as to become abusive, I would say that the company is liable for it.

"The plaintiff requests me to charge you as follows: '(1) A person upon a railroad train is presumed to be a passenger and to be rightfully there, and such a person could not be considered a trespasser until she had refused to exhibit her ticket or pay the fare demanded.' I charge you that. '(2) A conductor of a railroad train has no right to eject a passenger until the passenger has refused to ex-

hibit her ticket or pay the fare demanded; and, if he does, the railroad company is liable in damages to the person ejected.' I charge you that. '(3) Where a railroad company issues tickets with special conditions, the burden of proof is upon it to show what were those special conditions, where they are relied upon to relieve the railroad from liability.' I charge you that. I have already charged you that in substance. '(4) Even if you find that the plaintiff's ticket was required to be signed and stamped in Savannah, yet, if the plaintiff was misled as to its requirements by the representations and conduct of the agent of the company who sold the ticket, then she would not be bound by those requirements, she being ignorant thereof.' I charge you that. I have already charged you that, when the minds of two persons meet, there is a contract, unless there is fraud or misrepresentation. Then the party who is deceived is not bound by the contract. '(5) I charge you that it is for you to say what the contract was. I further charge you that it takes at least two parties to make a contract, and that to constitute a contract the two parties must concurrently assent to the same thing at the same instant of time.' I charge you that.

"You are to be governed by the preponderance of the evidence in reaching your verdict. I don't know that there is anything else to charge you on.

"Juror Brennen: Have we the right to consider the person being an infant,—as to whether or not it would not be an ex parte contract on the part of the railroad in making an infant sign a contract of that kind; would it be binding? The Court: If counsel wish to say anything about it, I will hear them. Mr. Lyles: I do not see the competence of the question. At the same time, I do not think there is any doubt about it that an infant may purchase a railroad ticket, and if she purchase a railroad ticket with qualifications in it, and if they are reasonable and are binding upon the public generally, why she is bound by it. In other words, it would be a fraud, if an infant were to purchase a railroad ticket with special provisions which were ordinarily binding in law, for \$1.50, when the regular fare would be \$9.90. Now, an infant is not bound by an ordinary contract, except for necessities, but she cannot take advantage of a contract she has entered into without bearing the burden of it. In this case they are suing upon a contract, and, if they take it, they take it with the burden; and, moreover, it is shown that the ticket was purchased by the aunt. Mr. Brennen: Mr. Lyles argued that this contract had been violated by the person who had purchased this ticket because she had not gone to a certain point and got it stamped; and the question would arise, or might arise, whether or not it was an ex parte contract on the part of the railroad. Mr. Thomas: I do not think it needs

any discussion. The Court: In the case of Roundtree against Moore, where an infant had obtained supplies for the year, used them in the crop, and would not pay, Moore levied on the crop; and he took the ground he was an infant, and not liable for the contract which he had made. I decided he was liable because he had made the contract; he had the benefit of it, and was bound same as anybody else. The supreme court confirmed it. *Moore v. Roundtree*, 35 S. E. 396. So that my view of the matter is generally that there are some contracts that infants are not liable for, and only liable as a general thing for necessities, raiment, food, something of that kind; but where infants go and undertake to act for themselves, start out in life, act for themselves, and are allowed to do so, and make a contract with others, and get the benefit of the contract, they are bound by it as much as anybody else. That is all I have to say to you, gentlemen. If you have any confusion, come out and ask for instruction."

O. J. C. Hutson and Wm. H. Lyles, for appellant. Jno. P. Thomas, Jr., and P. H. Nelson, for appellee.

McIVER, C. J. This was an action to recover damages for ejecting plaintiff from one of the trains of the defendant company. The allegations of the complaint, so far as they affect the questions involved in this appeal, may be stated substantially as follows: That on the 6th of August, 1899, at the station of the defendant in the city of Columbia, the plaintiff purchased and paid for "a round-trip ticket for her transportation from said city of Columbia to the city of Savannah, in the state of Georgia, and return," and boarded defendant's train at the said city of Columbia, and was thereupon carried to the said city of Savannah; that on the 7th of August, 1899, the said plaintiff boarded the defendant's train at Savannah for the purpose of returning "on her said ticket" to the city of Columbia; "that when said train had gotten only a few miles from Savannah, Ga., the defendant's agent in charge of the train caused the same to stop, and peremptorily ordered plaintiff, together with certain other passengers, to leave the train, without having demanded of plaintiff her said ticket, or without having seen the same, or without demanding of her fare for her transportation from the said city of Savannah to the said city of Columbia, and thereupon this plaintiff offered her said ticket to the said agent of the defendant, but he refused to accept the same"; that the defendant, at a point between stations about $4\frac{1}{2}$ miles from Savannah, where there was no shelter or convenience for passengers, "and with intent to degrade, humiliate, and wound the plaintiff in her person and feelings, caused and forced her to be ejected from the said train,

willfully and unlawfully, in a high-handed manner, and without regard to the rights of the plaintiff, and with a design to injure, humiliate, degrade, and oppress her in the exercise of her lawful rights"; and that the plaintiff was compelled to walk back in the nighttime to Savannah, where she was detained until the next day, and was compelled to purchase a ticket from defendant, for which she paid the sum of \$4.95, for her transportation to Columbia, in order to return to her home in said city. The defendant answered, denying every allegation in the complaint material to the points raised by this appeal. The case came on for trial before his honor Judge Townsend and a jury, and at the close of the testimony for the plaintiff a motion for a nonsuit was made, which was refused without assigning any reasons, and the case went to the jury, after hearing the testimony adduced by defendant and that in reply by plaintiff; and, after hearing the argument of counsel and the charge of the circuit judge, the jury rendered a verdict for the plaintiff in the sum of \$400. The defendant thereupon moved for a new trial on the minutes, which was refused without assigning any reasons; and from the judgment entered upon the verdict the defendant, appealed, basing its appeal upon 14 exceptions, which are set out in the record, but which need not be here stated specifically, as we propose to consider the points made by these exceptions under the several heads presented in the argument of counsel for appellant, omitting the first head, which, being based upon the first exception, which was abandoned on the argument here, need not be further noticed. Inasmuch as the exceptions are based mainly upon alleged errors in the charge of the circuit judge, it will be necessary for the reporter to incorporate in his report of the case a copy of the charge as set out in the "case."

The first point made by counsel for appellant in his printed argument having been abandoned, as above stated, we proceed to consider his second point, which is thus stated in his printed argument: "That the action was based upon a special contract alleged in the complaint, [and] that there was no evidence on the part of the plaintiff to show that by the terms of that contract she was entitled to return passage from the city of Savannah to the city of Columbia." From this counsel argues, first, that there was error in refusing the motion for a nonsuit. The conclusive answer is that it is a mistake to say that there was no evidence on the part of the plaintiff to show that by the terms of that special contract she was entitled to return passage from the city of Savannah to the city of Columbia. The only testimony before the court at the time the motion for a nonsuit was made and refused was that of the plaintiff herself; and she testified that the regular fare from Columbia to Savannah was \$4.95, but that on

the occasion in question she bought a round-trip ticket for \$1.50, called a "Saturday night ticket," and that she had lost her ticket after she was ejected from the train. This testimony, to say the least of it, certainly afforded some evidence that the ticket which she bought entitled her to return passage from Savannah, as she alleges in the complaint; for, as every one knows, a "round-trip" ticket entitles the holder to return passage. It is clear, therefore, that there was no error in refusing the motion for a nonsuit upon the ground stated. Next it is contended that there was error in refusing the motion for a nonsuit because the plaintiff had failed to prove the terms of the special contract alleged in the complaint. It must be remembered that at the time the motion for a nonsuit was made it did not appear that the special contract contained any other condition than that under it the holder was entitled to return passage, and as to that condition there certainly was evidence. The ticket itself had been lost, and therefore could not be offered in evidence; and whether it contained any other terms or conditions was a matter of conjecture purely, for the plaintiff testified that she had never read the ticket, and, of course, could not say what it contained. It is true that she signed the ticket at the instance of the agent who sold her the ticket, but she says she did not read it and did not know what was in it. There was therefore no error in refusing the nonsuit on this ground.

It is next contended that the circuit judge erred in his charge to the jury with respect to the burden of proof as to the terms and conditions mentioned in the ticket such as that the plaintiff is said to have purchased in this instance. We see no error in the instructions given to the jury upon this point. Indeed, the defendant did offer testimony tending to show that the ticket bought by the plaintiff did contain a condition that if it was not signed by the plaintiff in Savannah, and stamped by the railroad agent at that point, it would not be good for the return passage to Columbia, and that was the real ground of defense. It is true that, the ticket held by the plaintiff having been lost, the primary evidence of what were its conditions could not be offered; but the secondary testimony afforded by a sample copy of the ticket and the testimony of Mr. Seay, the ticket agent at Columbia, which was not controverted, tended to show that plaintiff's ticket contained such a condition; and the testimony of the conductor, which, however, was contradicted by the plaintiff, afforded direct evidence that the plaintiff's ticket did contain such a condition, and that it had not been complied with. Exceptions 2, 3, 7, 9, 13, and 14, raising this point, are overruled.

Appellant next contends that there was error in the instructions given to the jury in regard to what is necessary to constitute a

contract, when he said to the jury: "It takes two to make a contract; that is, there must be two contracting parties, * * * and there is no contract unless and until their minds meet. They must come together on some proposition, and on the proposition about which the contract is to be made. Their minds must meet; they must agree; must come together and discuss the matter; a week, a day; no matter how long; discuss the matter about which they shall contract"; the error alleged in the fourth exception being that the judge thereby indicated to the jury that a contract could not be made by the mere purchase and signing of a special round-trip excursion ticket, without a discussion between the purchaser and the agent of the railroad company; and in charging as complained of in the twelfth exception, as follows: "I charge you that it is for you to say what the contract was. I further charge you that it takes at least two parties to make a contract, and that, to constitute a contract, the two parties must concurrently assent to the same thing at the same time;" the error indicated by this exception being that the language used by the judge was well calculated to make the jury believe that, even although the plaintiff had signed the contract embodied in the ticket, she would not be bound by the terms thereof if her mind had not actually acted upon and assented to such terms. This, we think, was error, especially under the undisputed testimony in this case that the plaintiff had bought the ticket at the office in Columbia, knowing it to be a round-trip ticket, and had there signed the same; and the fact testified to by plaintiff, that she had not read and did not know that one of the conditions embraced in such a ticket was that it would not be good for a return passage unless she also signed it in the presence of the agent at Savannah, and had it stamped by such agent, cannot affect the question, for, while it may be true that the purchase was somewhat hurried, yet she had abundant opportunity of reading it, and thus learning the conditions which it contained, before she undertook to return on that ticket. For in *Bethea v. Railroad Co.*, 26 S. C. 91, 1 S. E. 372 (a case very similar to the case under consideration), in disposing of an exception making the point that the plaintiff was not bound by any of the special (small type) conditions on the ticket, "for the reason that they were not brought to his attention before he signed his name to them and paid his money, and because he had no knowledge of them," the court used the following language: "We have little doubt that the transaction of purchasing the ticket at Florence was somewhat hurried, but the plaintiff signed the contract, and in doing so certainly made himself a party to all the conditions therein stated. It would tend to disturb the force of all such contracts if one in possession of ordinary capacity and intelligence

were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation, or mistake, it must be presumed that he read the contract and assented to its conditions." To the same effect, see *Boylan v. Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290,—a case quite similar to this,—where Mr. Justice Gray, in delivering the opinion of the court, used this language: "The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were." In view of the authoritative decisions, it is clear that there was error in giving to the jury the instructions excepted to in these two exceptions, 4 and 12, and that these exceptions must be sustained, as they were well calculated to induce the jury to believe that if the plaintiff had not read and did not know the terms of the contract evidenced by the ticket, as the plaintiff testified, she would not be bound by the condition stated in the contract, evidenced by the ticket,—that it would not be good for return passage unless it was signed by plaintiff and stamped by the agent in Savannah. The plaintiff, though a colored girl of about the age of 18 years, was able to read and write, as she testified, and did actually read while on the stand this notice printed on the sample ticket offered in evidence, which Mr. Seay says was the only form used on that occasion (referring to the time when the plaintiff bought her ticket), in bold-face, clear type, easily legible, which read as follows: "To Purchaser: Read this contract, and take notice that the return part of this ticket must be stamped and your signature witnessed in the manner prescribed, before it will be honored for passage." In the absence of any evidence to the contrary, and especially in the face of the testimony of the plaintiff herself that she could read and write, it must be assumed that she was a person of ordinary intelligence, and when she bought and signed a round-trip ticket from Columbia to Savannah at a price less than one-sixth of the regular fare (a circumstance which of itself was well calculated to invite her attention to the terms and conditions of such ticket), which distinctly informed her of the conditions upon which she could use it for return passage, and also contained a notice especially calling her attention to the terms upon which alone she could use it for her return passage, it must be conclusively presumed (as the cases cited practically hold), as matter of law, that she knew the terms of the contract and was bound thereby, even though the actual fact

may be (if it be a fact) that she did not discuss the matter "with the agent who sold her the ticket, or that her mind had not actually acted upon it and assented to it," which could not very well be the case if she did not read and did not know what were the terms contained in the contract evidenced by the ticket.

We next proceed to consider the fourth ground taken in the argument for appellant, which is based upon the language quoted from the judge's charge in exceptions 5, 10, and 11, in reference to fraud and misrepresentation; the error imputed being that there being no allegation of fraud or misrepresentation in the complaint, and no testimony to that effect, it was erroneous and misleading to the jury to introduce the element of fraud and misrepresentation into the inquiry to be made by the jury. It is true that there is no allegation in the complaint of any fraud or misrepresentation, and no testimony upon that subject, and, if the jury had been instructed to inquire whether there was any fraud or misrepresentation, that might have been erroneous. The language quoted from the charge in the fifth and eleventh exceptions is only a portion of a sentence in which the judge was instructing the jury as to what would constitute a contract generally; and, while it may not have been necessary, we do not think it was error of law to include in his general instruction the matter of fraud or misrepresentation, as the jury were not instructed to inquire whether there had been any fraud or misrepresentation in this case. Those two exceptions must therefore be overruled. It is different, however, with the tenth exception, for there the jury were instructed, at the request of the plaintiff, as follows: "Even if you find that the plaintiff's ticket was required to be signed and stamped in Savannah, yet, if the plaintiff was misled as to its requirements by the representations and conduct of the agent of the company who sold that ticket, then she would not be bound by its requirements, she being ignorant thereof." This was a plain indication to the jury that they must inquire into a fact which was not alleged in the complaint, and of which there was not the slightest testimony. The plaintiff was the only witness who testified as to what occurred when she bought her ticket from the agent in Columbia, and she does not pretend to say that said agent made any representations whatever to her in regard to the necessity of signing and stamping the ticket in Savannah. All that he did or said to her was to push the ticket to her and tell her to sign it, which she did as required by the terms of the ticket. If, therefore, the jury had undertaken to inquire whether the plaintiff was misled as to the requirements of the ticket by the representations of the agent of the company who sold the ticket, as they were required to do by the charge, they would have had to inquire as

to a fact which was not only not alleged in the complaint, but of which there was no testimony whatever, and their finding as to such fact would be based purely upon conjecture. This was error, and exception 10 must therefore be sustained.

The next point made is based upon exception 8, in which complaint is made of error in modifying defendant's request to charge "that a railroad company is not liable for rude language used by one of its conductors to a passenger, lawfully requiring such passenger to get off its train." We do not see any error in the modification of this request which appears in the judge's charge, for he practically instructed the jury that the company would not be liable for any language used by the conductor unless it was abusive, and there was no pretense that any such language was used; for, according to the plaintiff's own testimony, the language used was: "Get in there. Get your things and get out of here. Got no time to waste." While it is quite probable that the conductor spoke in a quick, peremptory tone, there was no element of abuse in what he said to her when she went to the door of the car, seeing the people in front of her getting off. This exception is overruled.

The last point made by counsel for appellant is based upon exception 6, in which error is imputed to the circuit judge in charging the jury as follows: "You must say whether the contention of the plaintiff is correct; whether it was simply a contract to carry the plaintiff to Savannah and bring her back, or whether it was a [the?] contract contended for by defendant. If it was a contract, that it was a contract with limitations; special contract with certain limitations;" the error indicated being that there was no evidence save that offered by defendant which tended to prove a special contract with certain limitations. It is true that the testimony on the part of the plaintiff tended to show that the only condition contained in the ticket which was actually known to the plaintiff was that she was entitled to return passage; but the plaintiff having lost her ticket, which it was claimed contained the other condition that it would not be good for return passage unless it was signed by the plaintiff and stamped by the agent in Savannah, it was necessary to introduce secondary evidence of the contents of the lost ticket, and this was done by the defendant offering Mr. Seay as a witness, who testified that he was the ticket agent of the defendant company in Columbia; and, while he did not in person sell to the plaintiff a ticket on the occasion in question, yet he could state as a fact that the only form of ticket used for that occasion was the X-o form, of which he produced a sample, which was received in evidence and constitutes a part of the testimony set out in the "case." But, of course, it was for the jury to pass upon the force and effect of this testimony.

There is therefore no basis for the error imputed in the sixth exception, which is overruled.

If it should be said, as has been intimated in the argument of counsel for respondent, that the jury may have based their verdict upon the fact testified to by plaintiff, that the conductor did not examine her ticket and did not demand her fare before ejecting her from the train, the answer is obvious that such a position is based on conjecture purely; for neither this nor any other court has the means of ascertaining the ground upon which the jury based their verdict, and will not and cannot enter into any such inquiry; and where, as in this case, there appears to be error in the instructions given to the jury, a new trial must be granted, especially where, as in this case, the facts testified to by the plaintiff upon which this conjecture rests are emphatically contradicted both by the conductor and by the witness Jefferson Grant, who held the light for the conductor while he was examining the tickets of all those who were required to leave the train on the occasion in question.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

(61 S. C. 566)

HUNTLEY v. WELSH.

(Supreme Court of South Carolina. Sept. 25, 1901.)

EQUITY—APPEAL—ISSUES OF FACT—DISPOSITION OF CAUSE.

Where the determination of issues in a suit in equity depends largely on the credibility of witnesses, the supreme court has jurisdiction to remand an appeal to the circuit court with instructions to submit such issues to the jury.

Appeal from common pleas circuit court of Chesterfield county; Gage, Judge.

Action by Emily Huntley against Sebra Welsh to cancel deed. From order dismissing complaint, plaintiff appeals. Reversed.

W. P. Pollock and J. M. Johnson, for appellant. Stevenson & Matheson, for respondent.

McIVER, C. J. This action was commenced on the 13th of September, 1899, for the purpose of having a paper, purporting to be a deed, conveying plaintiff's interest in a certain tract of land to the defendant, canceled and declared null and void. The grounds upon which this claim is based are that the plaintiff at the time she signed said paper was quite old and in a feeble state of health, and that by fraud and undue influence she was induced by the defendant to sign said paper; that there was no consideration, or at most a very inadequate consideration, for the said paper; and that the said paper was never delivered so as to pass the title to the defendant. An order, by consent, was pass-

ed, referring it to a referee to take the testimony, and to hear and determine the issues both of fact and law. In pursuance of this order the referee took the testimony, which is fully set out in the "case," and made his report, finding that the plaintiff at the time she executed said paper was fully capable of transacting business, that no fraud or undue influence was practiced upon her, that the said paper was duly executed and delivered to the defendant, and that it was based upon valuable consideration. He therefore recommended that the complaint be dismissed. To this report the plaintiff filed sundry exceptions, and the case was heard by his honor Judge Gage upon said report and exceptions, who rendered judgment confirming the report of the referee, declaring that said paper was a good and valid deed, and requiring the plaintiff to surrender the same to the clerk of the court for the defendant. From this judgment plaintiff appeals upon the several grounds set out in the record, which substantially raise but two questions: (1) Whether there was any valuable consideration for the paper claimed to be a deed, and, if so, whether the same was so grossly inadequate as to justify the conclusion that the plaintiff was induced by fraud or undue influence on the part of the defendant to sign said paper. (2) Whether said paper was ever in fact so delivered as to take effect as a conveyance from plaintiff to defendant. These two questions turn largely upon the testimony, in which we find very considerable conflict as to some of the most material points. It must be regarded now, since the case of *Finley v. Cartwright*, 55 S. C. 198, 33 S. E. 359, as the settled rule that in an appeal in a case in chancery (such as this case unquestionably is) this court has jurisdiction to review any finding of fact by the circuit court, and reverse such finding if the finding of the circuit court is against the preponderance of the testimony. Whether this is so in the present case depends largely upon the credibility of the witnesses,—a question peculiarly appropriate to a jury,—which we are unable to determine satisfactorily without the aid of a jury; and therefore we have concluded to remand the case to the circuit court, in order that issues may be framed and submitted to a jury to try the following questions: (1) Was there any valuable consideration for the paper purporting to be a conveyance of the interest of the plaintiff in the land described in the complaint; and, if so, what was the amount of such consideration, and what was the real value of the plaintiff's interest in said land at the time said paper was signed? (2) Was the said paper delivered to the defendant by the plaintiff with intent to pass the title to her interest in said land? It is true that it was at one time doubted whether this court had the power in a case like this to order such issues; but the case of *Shaw v. Cunningham*, 9 S. C. 271, and the authorities therein cited, fully show that this court

has such power, and it was exercised in that case, which was like the present.

The judgment of this court is that the judgment of the circuit court be set aside, without intending to express any opinion as to its merits, but solely for the purpose of remanding the case to the circuit court for the trial by a jury of the two questions above stated, the result of which trial shall be certified to this court.

(61 S. C. 537)

HAWKINS et al. v. COLLINS.

(Supreme Court of South Carolina. Sept. 20, 1901.)

PENDING LITIGATION—RELEASE—CONSIDERATION—QUESTION FOR JURY—EXCEPTION ON APPEAL—SUFFICIENCY—COMPLAINT—DUPPLICITY—ELECTION—WAIVER OF RIGHTS—ACTION FOR CONVERSION—JUDGMENT—VESTING OF TITLE—CHATTELS—JOINT OWNER—CO-OWNER'S TITLE—WAIVER—AGREEMENT.

1. Where a release by a plaintiff to a defendant from a pending lawsuit is based on valuable consideration, it is a bar to the action.

2. The question whether a release by a plaintiff to a defendant from a pending lawsuit is based on valuable consideration is for the jury.

3. Where chattels are attached, and suit is brought by the owner for damages for a conversion, and the defendant, pending such suit, returns to the owner some of the converted property as a consideration for a release from the suit, such release is based on a valuable consideration only in case the defendant was lawfully entitled to the property.

4. An exception for review on appeal, charging error in an instruction, without showing in what particulars the court's remarks were prejudicial, will not be considered.

5. Where a complaint states a cause of action in claim and delivery, and also for the conversion of chattels, and the record on appeal does not disclose that plaintiff had elected, when he executed a release to defendant from the action, on which cause of action he would proceed, it cannot be held that by electing to proceed for damages he waived his property rights in the chattels.

6. Where plaintiff claiming attached property waives his rights and sues for damages for conversion, and the defendant denies a wrongful conversion, title does not vest in the defendant until judgment in his favor.

7. One a joint owner cannot enter into an agreement waiving the right of his co-owner to set up title to the property.

Appeal from common pleas circuit court of Greenwood county; Benet, Judge.

Action by Frederick Hawkins and Mamie Hawkins against W. A. Collins and John Collins. From judgment for plaintiffs against defendant W. A. Collins, he appeals. Affirmed.

Caldwell & Park, for appellant. E. S. F. Giles, for respondents.

GARY, A. J. The record contains the following statement:

"This action was commenced by the plaintiffs on the 11th day of November, 1898, against the defendants, in the court of common pleas for Greenwood county, the plaintiffs alleging that on the 9th and 10th days of November, 1898, the defendants wantonly,

willfully, and unlawfully took and carried away, and converted to their own use, the following described personal property, then in the possession of and belonging to the plaintiffs, to wit: 2 bales of lint cotton, 900 pounds of seed cotton, 68 bushels of cotton seed, 500 bundles of fodder, 15 two-horse loads of pea-vine hay, 13 bushels of oats, 6 two-horse wagon loads of corn, and 3 large black hogs; and asking for actual and punitive damages in the sum of \$500. The defendants, in their answer, set forth that they seized the said chattels under a warrant of attachment issued by a magistrate, and that the said chattels were covered by an agricultural lien and a certain mortgage given to the defendant W. A. Collins by the said plaintiffs. By a later supplemental answer the defendants set forth that on the 10th day of January, 1899, the defendant W. A. Collins, for himself and his codefendant, Frederick Hawkins, delivered to the plaintiff three hogs, in full settlement of the claims and demands of the plaintiffs set forth in their complaint, and that the said hogs were accepted by the said plaintiffs; and in consideration of the same Frederick Hawkins executed and delivered to W. A. Collins the release set forth in this case, of which a copy was appended to the answer. On these pleadings the case was, at the November, 1900, term of the court of common pleas for Greenwood county, called for trial, and after the introduction of testimony, the rulings and charge of the presiding judge, the jury rendered a verdict for the plaintiffs against the defendant W. A. Collins, on which judgment was duly entered. The defendant W. A. Collins within the proper time made a motion for a new trial on the minutes of the court, based on the undisputed testimony that after the commencement of this action the plaintiff Frederick Hawkins executed and delivered to the defendant W. A. Collins a release from all liability to himself and his coplaintiff arising out of this cause of action in consideration of three hogs, which hogs were the same for which this action was brought, in part, to recover damages, and that Frederick Hawkins has never returned or offered to return the said hogs; it having been submitted that when the plaintiffs elected to bring this action to recover the value of the property, having another effectual and alternative remedy at hand in an action for claim and delivery, by their election waived their property rights in the chattels to the defendants, and the legal title to the property became vested in the defendants; and a return of a portion of this property as a consideration for the release was a valuable consideration, and a complete bar to the recovery by these plaintiffs. From the judgment in this case the defendant W. A. Collins appeals to this court."

The release hereinbefore mentioned was as follows:

"In consideration of three hogs given me,
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or returned to me, this day by W. A. Collins, —value of hogs is \$15, and receipt of which is hereby acknowledged by me,—I hereby agree to discontinue a certain suit or suits brought against W. A. Collins and also John Collins, for \$500, on the 11th of November, 1898, entitled 'Frederick Hawkins and Mable Hawkins, Plaintiffs, against W. A. Collins, also John Collins, Defendant,' and I hereby acknowledge that I have received satisfaction in full for same, and the same is settled in full by said considerations and amounts above mentioned.

"[Signed] ^{his} Frederick X Hawkins.
mark.

"Witnesses: J. K. Harvley. H. M. Harvley."

The following are the appellant's exceptions, to wit:

"(1) Because his honor erred in allowing the witness Frederick Hawkins, one of the plaintiffs, to testify as to his condition when he executed the release; whereas the witness had already stated that he had executed the release, for which three hogs were given him, and that he had never returned, or offered to return, the three hogs. Thus, having accepted and retained a consideration for the release, he could not be heard to impeach his act without first returning the consideration for which his act was done. (2) Because his honor erred in charging the jury: 'If the testimony satisfies you that, if Fred. Hawkins did sign such a paper, he was not acting as a free agent, but was doing it under some sort of compulsion. If he was frightened into it, or threatened into it, or induced to do it under duress, that would mean that it was not such a contract or agreement as would bind Fred. Hawkins, or affect this suit,'—whereas his honor should have charged the jury that, if a valuable consideration was given to Frederick Hawkins for the execution of the release, such consideration must have been returned, or offered to be returned, before any fraud, duress, or threats would render the release voidable. (3) It having been admitted that the three hogs, the consideration for the said release, were the same for which this suit was brought, among other chattels, to recover their value in damages, therefore, from the commencement of this action, the plaintiffs having thereby elected to sue for the value of the property rather than the property itself, waived what property right they might have had in the three hogs; and his honor should have charged the jury that, if these hogs were returned to Hawkins as a consideration for the release, that such consideration was valuable, and Hawkins would be bound by it, no matter what fraud, duress, or undue influence was used to obtain the release, unless he had returned the consideration, or offered to return the same; and when his honor charged the jury: 'If you come to the conclusion that the hogs

were not the property of Collins, but were the property of Hawkins, or himself and his wife, then they could not stand as a consideration of an agreement binding on Fred. Hawkins,—he committed error, because in so charging he led the jury to believe that, if the purported consideration of the release was the same three hogs for which this action was brought to recover damages, then such consideration was not valuable, and the release not binding. (4) Because his honor erred in charging the jury: 'If you are satisfied from the testimony that he was under unlawful arrest or imprisonment, unlawfully in the custody of the law, as has been argued to you, you are to say what the testimony is as to that. However, if you come to the conclusion that he was not acting freely and voluntarily, but signed the paper, if he signed it under duress, that it was extorted from him by fear or any undue influence, then the paper would not bind him,'—whereas he should have charged the jury that, if the agreement was executed for a valuable consideration, and such consideration had not been returned or offered back, then, even though the said Hawkins was not acting freely and voluntarily, was under duress, or it was extorted from him by fear or undue influence, the release would still have been binding upon him. (5) That in using the expression, 'as has been argued to you,' his honor committed error, in that he thereby commented upon the facts of the case, for he thereby referred the minds of the jurors to the argument of plaintiff's attorneys upon the matter of this release, and their inferences from the testimony, making the argument of counsel upon this point a part of his charge, in violation of section 26, art. 5, of the constitution. (6) That his honor erred in refusing to grant the motion of the defendants for a new trial, based on the undisputed testimony that after the commencement of this action the plaintiff Frederick Hawkins executed and delivered to the defendant W. A. Collins a release from all liability to himself and his coplaintiff arising out of this cause of action, for which release W. A. Collins delivered to the said Hawkins three hogs, which hogs were the same for which this action was brought in part to recover damages as alleged in the complaint, and that Fred. Hawkins has never returned, or offered to return, the said hogs; for when the plaintiffs elected to bring this action to recover the value of the property, having another effectual and alternative remedy at hand in an action for claim and delivery, by their election they waived their property rights in the chattels to the defendants, and the legal title to the property became vested in the defendants, and a return of a portion of this property as a consideration for the release was a valuable consideration, and a complete bar to the recovery by these plaintiffs, and his honor should have so held. (7) The defendant W.

A. Collins asks the court to dismiss the action on the ground that the undisputed testimony in the case shows that after the commencement of this action the plaintiff Frederick Hawkins executed and delivered to the defendant W. A. Collins a release from all liability arising out of this cause of action to himself and his coplaintiff, and accepted, and still retains, a consideration for such release, and has never offered to return the same. This defendant submits that such release is a complete bar to this action."

His honor, the presiding judge, charged the jury: "If the three hogs mentioned in the paper, or referred to in the paper, were the property of Collins, and given to Fred. Hawkins as the consideration for which he was to stop the lawsuit, then that consideration would be regarded a valuable consideration, and would be the basis of a valid agreement. Of course, if you come to the conclusion that the hogs were not the property of Collins, but were the property of Hawkins himself, or himself and his wife, then they could not stand as the consideration of an agreement binding on Fred. Hawkins."

The defendant's fifth request was as follows: "(5) That the release from or discontinuance of a suit for damages by one of two joint owners of personal property operates to put an end to the suit unless it is shown that such release was procured by fraudulent collusion between the releasing plaintiff and the defendant, or unless in the case of fraud, duress, or deception, alleged solely against the defendant, any valuable consideration furnished for such release be returned by the party receiving it to the defendant furnishing it." In response to this request his honor said: "That is law, and it means just what I have already said, that two joint owners of property, in suing for damages or the recovery of the property, must sue together. The suit cannot originally be brought by only one of them, but must be brought by both jointly; and, if one of them discontinues the suit,—and by 'discontinue' we mean puts an end to the suit so far as he is concerned,—then that also puts an end to the suit so far as the other is concerned, unless the release or discontinuance has been procured by fraud, by a fraudulent collusion between one of the plaintiffs and the defendant, and when there has been fraud or deception or duress used and brought to bear upon a plaintiff to induce him or compel him to grant a release or discontinuance, and a valuable consideration has been given him. If such is the case, he may not, after he discovers the fraud, hold on to that consideration and also hold on to the lawsuit; which means in this case that if it be the fact—if the testimony satisfies you—that Fred. Hawkins was imposed upon by the Collineses, or by W. A. Collins, in giving that alleged release for the consideration of three hogs given him, and if he afterwards did not feel bound by that release, and still

continues the lawsuit, then, if the three hogs were the property of Collins, given to Fred. Hawkins, and accepted by him as a consideration, then Hawkins cannot hold on to the hogs and also hold on to the lawsuit. He must give back the hogs before he can go on with the lawsuit. He cannot accept a benefit from the fraud, and then go on still and ask for damages. Of course, if the hogs in question were not the property of Collins, but were the property of Hawkins, then this proposition of law would not apply to such a state of facts."

The defendant's sixth request was as follows: "(6) No matter what force, fraud, or deception is employed by a defendant in a suit for damages by two joint owners of personal property for the purpose of forcing a release and settlement of such a suit, if such defendant furnishes a valuable consideration for such release or settlement, the plaintiff, or the one of them receiving such valuable consideration, must return it to the defendant, in order to resist such release or settlement and proceed with the action; and this is the law whether the release be by one or both of the plaintiffs." His honor said, "That is the law."

The defendant's eighth request was as follows: "(8) Any property of the least value constitutes a valuable consideration; and the estimated proportion of the value of the consideration furnished for the release of an action to the damages claimed in the action, or the actual amount of such damages, is entirely immaterial." In commenting on it the presiding judge said: "That is the law,—purely a question on the part of the person agreeing to release how much he will do it for. If he does it for a large amount or a small amount makes no difference. If it is a valuable consideration, it is binding."

We will first consider the exception numbered 1. The witness was asked, "What was your condition at that time?" The defendant's attorney objected to the testimony, "because the witness has stated that he has accepted this consideration, and has never offered to return it, and has never returned it, and he cannot undertake to show that fraud was practiced upon him, and at the same time take advantage of that fraud." The objection was based on the assumed fact that the release was for valuable consideration, whereas this was to be determined by the jury, and was submitted for their consideration. Furthermore, the presiding judge charged the jury that they could not consider the question of fraud if the release was founded upon a valuable consideration.

The second and fourth exceptions will be considered together. By reference to the charge to the jury it will be seen that the circuit judge charged the propositions of law which the said exceptions submit he should have charged.

We will next consider the third exception. It will be observed that the question "wheth-

er, from the commencement of this action, the plaintiffs, having thereby elected to sue for the value of the property, rather than the property itself, waived what property right they might have had in the three hogs," was not presented for consideration, nor did the presiding judge make a ruling thereon, except upon the motion for a new trial, herein-after discussed. It is not claimed that there was error in the proposition of law whereby the presiding judge instructed the jury: "If you come to the conclusion that the hogs were not the property of Collins, but were the property of Hawkins, or himself and his wife, then they could not stand as a consideration of an agreement binding on Fred. Hawkins,"—further than "the jury were led to believe that, if the purported consideration of the release was the same three hogs for which this action was brought to recover damages, then such consideration was not valuable, and the release was not binding." In the first place, even though it should be conceded that, if the consideration of the release was the same three hogs for which this action was brought to recover damages, and that such consideration was not valuable, and the release not binding, there was nothing in the charge leading the jury to this belief. But, in the second place, if the three hogs were not the property of Collins, but belonged to the plaintiffs, and they were entitled by law to the immediate possession thereof, they could not be made by Collins the basis of an agreement demanding a valuable consideration. Under such circumstances Collins could not be said to part with anything of value.

The fifth exception will next be considered. It falls to specify in what particulars the argument of counsel was erroneous, or wherein the passing remark of the presiding judge was prejudicial to the appellant.

We proceed to a consideration of the sixth exception. The only question presented by this exception which is not disposed of in considering the other exceptions is whether, "when the plaintiffs elected to bring this action to recover the value of the property, having another effectual and alternative remedy at hand in an action for claim and delivery, by their election they waived their property rights in the chattels to the defendants, and that the legal title to the property became vested in the defendants." The allegations of the complaint were appropriate either to an action for claim and delivery or for damages arising from a conversion thereof. The record does not disclose the fact that at the time Fred. Hawkins signed the foregoing agreement the plaintiffs had elected upon which cause of action they would rely. There is, however, another reason why the exception cannot be sustained. Even if it appeared that the plaintiffs were willing to waive their right to sue for the return of the property, and relied upon their right to recover damages for the conversion thereof, the defend-

ants denied that there was a conversion on their part which implies an act of wrong. See separate opinion in *Holliday v. Poston*, 60 S. C. 106, 38 S. E. 449. The title to the property was certainly not vested in Collins until the verdict of the jury or the entry of judgment thereon.

We will next consider the seventh exception. This exception cannot be sustained, as it assumed that the release was based upon a valuable consideration. There is also another reason why the court could not have dismissed the complaint. Even if the agreement had been binding on Fred. Hawkins, he had no right to enter into an agreement so as to affect the rights of the other joint owner of the property. *McCaslan v. Nance*, 46 S. C. 568, 24 S. E. 812; *Freem. Coten*. § 349.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J. (concurring in result). As the circuit judge left it to the jury as a question of fact to determine whether there was any valuable consideration for the release (which was not under seal) set up in the supplemental answer, and, as their verdict must be regarded as a finding that there was no valuable consideration (the ownership of the hogs being the turning point of the case), there was nothing to be returned; and for this reason I concur in the result.

(129 N. C. 99)

STRAUSS v. CITY OF WILMINGTON.
(Supreme Court of North Carolina. Oct. 15, 1901.)

JUDGMENT—FINDINGS—SUFFICIENCY—REVIEW.

1. Where, in an action for injuries sustained by plaintiff's testator, which it was alleged resulted in his death, the answer denied that the injury was caused by defendant's negligence, and also that it caused his death, a finding that decedent was "injured" by defendant's negligence will not sustain a judgment for plaintiff.

2. The insufficiency of the finding of fact to support the judgment is a defect on the face of the record which is presented for review, notwithstanding the insufficient issues submitted to the jury were agreed upon by the counsel, since the appeal itself is an exception to the judgment.

Appeal from superior court, New Hanover county; Hoke, Judge.

Action by Jessie R. Strauss, executrix, against the city of Wilmington. From a judgment in favor of plaintiff, defendant appeals. Reversed.

El. K. Bryan and Rountree & Carr, for appellant. Bellamy & Bellamy and A. J. Marshall, for appellee.

CLARK, J. This is an action for damages for injuries sustained by plaintiff's testator, which it is alleged resulted some months later in his death. The answer denies that

the injury was caused by the negligence of the defendant, and also that it caused his death. The issue thus raised has not been passed upon by the jury. The issue submitted and found affirmatively, "Was the plaintiff's testator injured by the negligence of the defendant?" does not find that such injury caused the death, but by implication, at least, finds that it did not. If the injury caused the death, this action is maintainable by virtue of Code, § 1498, which changed the common law in such cases. *Killian v. Railway Co.*, 128 N. C. 261, 38 S. E. 873. If, however, nothing more appears than that the testator was injured by defendant, as found by the jury, and has since died, as appears by admission of administration, the action is not maintainable. Code, § 1491, subd. 2; *Harper v. Commissioners*, 123 N. C. 118, 31 S. E. 384. With that material allegation denied by the answer and not passed upon by the jury, no judgment can be entered. It is true that, if all the points raised can be presented to the jury upon the issues submitted, they will be deemed sufficient; but such is not the case when, as here, the verdict is not a sufficient basis for a judgment. *Redmond v. Chandley*, 119 N. C. 575, 26 S. E. 255; *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45, and cases cited. By the addition made to the case on appeal by the judge it appears that the issues were not seen by him, having been agreed upon by counsel at a previous term. This shows that there was mere inadvertence by his honor, who did not himself frame the issues, but this does not cure the defect. Usually it is not appealable error when additional or proper issues are not asked. That is true as to errors on the trial, which cannot be considered unless set out in the case on appeal and duly excepted to. But the insufficiency of the verdict—"the facts found"—to support the judgment is a defect upon the face of the record proper, which is presented for review, since the appeal is of itself an exception to the judgment. The omission of a vital issue is not cured by the charge of the court, for there is no finding by the jury. This renders it unnecessary to consider the other exceptions, since they may not arise on another trial.

New trial.

(129 N. C. 107)

HERRING v. SUTTON et al.
(Supreme Court of North Carolina. Oct. 15, 1901.)

LIFE INSURANCE—BENEFICIARIES—RIGHTS.

Where a guardian takes out a life insurance policy in the names of his wards for the purpose of protecting them and his bondsmen against any loss that may occur to such wards' estate, such wards are not thereby constituted trustees of the policy, or money collected thereon, but take a vested right of property therein, of which they cannot be divested without their consent.

Cook, J., dissenting.

Appeal from superior court, Lenoir county; Allen, Judge.

Action by Edward Herring, as guardian of John Hardy Sutton and another, against Mary F. Sutton, executrix of B. F. Sutton, deceased, and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Shepherd & Shepherd, for appellants. N. J. Rouse, for appellee.

FURCHES, C. J. This is an action on a guardian bond given by B. F. Sutton, Jr., in the sum of \$2,600, as guardian of his two minor children J. H. Sutton and Annie L. Sutton, with Junius E. Sutton, Thomas Sutton, and Flavius Allen as his sureties. The guardian is dead, and Mary F. Sutton is his executrix. The case was referred to Mr. Ormond to find the facts, declare the law, and report the same to the court, which he did. Besides finding the amount due on said guardianship, he further found as follows: "That B. F. Sutton, deceased, had no insurance for any of his other children or widow, and at the time of taking out said insurance policy in the name of his said wards, John Hardy Sutton and Annie Laura Sutton, it was his purpose, and he so declared it to be, to protect said wards and his bondsmen against any loss which might occur to the estate of said wards." He also found: "That when the defendant Junius E. Sutton signed the guardian bond of said B. F. Sutton, Jr., he was influenced to do so by the promise of said B. F. Sutton to have his life insured for the protection of his wards and sureties." The referee then declares as a matter of law that these facts did not constitute the said John H. and Annie L. Sutton trustees of the insurance policy, or the money collected thereon. The defendants excepted to the facts and the law as found and declared by the referee, but upon the hearing of the report before the judge the same in all things was confirmed, and judgment given for the plaintiff, from which defendants appealed.

Upon B. F. Sutton's taking out this policy of insurance, naming his two children J. H. and Annie L. Sutton the beneficiaries therein, it became theirs. They had a vested right of property therein, of which they could not be deprived without their consent. *Burton v. Farinholt*, 86 N. C. 260; *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. This is so unless they took and held it in trust, as contended by defendants; and this contention seems to be settled against them by the case of *Wood v. Cherry*, 73 N. C. 110. We quote with approval the introduction of Chief Justice Pearson's opinion in that case as especially applicable to this case: "According to justice, using the word in its broadest sense, as distinguished from law or equity, the defendant ought not to be disturbed in her occupation of the prem-

ises during her lifetime or widowhood; and we have considered the case in every point of view to see if we could sustain the decision of his honor in her favor, but we can find no ground on which to do so." The court then says: "The promise of Wood cannot be enforced on the ground of its creating a trust, for a trust can only be created in one of four ways: (1) By transmission of the legal estate when a simple declaration will raise the use or trust; (2) a contract, based upon valuable consideration, to stand seised to the use of or in trust for another; (3) a covenant to stand seised to the use of or in trust for another upon good consideration; (4) when the court by its decree converts a party into a trustee on the ground of fraud." The allegation of the defendants in this case is that John H. Sutton and Annie L. Sutton are trustees of the \$2,000 collected upon this policy of insurance out of the insurance company for the benefit of the defendants, and if they are it is because they fall within one of the four reasons stated above. It cannot be that they are trustees under the first ground, as there is no transmission of a legal estate. The policy of insurance is only a chose,—a promise to pay the defendants \$2,000 upon certain conditions and contingencies, which might be defeated by B. F. Sutton's not paying the premiums and by the company's canceling the policy. It cannot be under the second ground, as there is no contract on the part of John and Laura to stand seised to the use of the defendants. It cannot be under the third ground, as there is no covenant on the part of John and Annie to stand seised to the use of or in trust for the defendants. It cannot be under the fourth ground, as it is not alleged that there is any fraud in the transaction on the part of B. F. Sutton, John H. Sutton, or Annie L. Sutton. It therefore seems plain to us that neither John H. nor Annie L. Sutton nor their guardian are trustees for the benefit of the defendants of the money collected from the insurance company, and the judgment below must be affirmed.

Affirmed.

COOK, J. (dissenting). I do not concur with the court in its opinion in this case. The report of the referee shows a clear and distinct agreement between the obligor of the bond, B. F. Sutton, Jr., and Junius E. Sutton, one of his sureties, on behalf of himself and cosureties. He signed the same and assumed the liability upon the inducement and promise that he (the guardian), would insure his life for the protection of his wards and bondsmen. In compliance with this agreement, he did take out a life policy for the sum of \$2,000 with the declared purpose of protecting said wards and bondsmen against any loss which might occur to the estate of said wards. The indemnity was required because the guardian was not a man of means. The pol-

icy was issued in the names of John and Laura. The guardian died after having squandered the wards' funds, and the present plaintiffs qualified as their guardian, collected the amount of the insurance policy, and now sue upon breach of the bond for the penalty, to be discharged upon payment of about \$1,500, the amount of default. Defendants contend that John and Laura became trustees of the insurance policy for the benefit primarily of defendants, and that the fund, when collected, should be applied first to discharge the liabilities of the sureties upon the guardian bond. This contention seems to me to be sound in law and equity. In giving effect to it the guardian fund is protected and made whole, and a great wrong and hardship to the sureties averted. There was a contract entered into between the guardian and sureties, based upon a valuable consideration, viz. the assumption of an obligation to pay money for him, which became executed when the policy was taken out. The legal title to the policy was placed in John and Laura, but the record shows that it was done with the expressed intention and purpose of the assured to create a fund in compliance with his agreement with Junius E. Sutton to secure the money due said wards and protect his said sureties. The language and acts of the parties were unequivocal, and there can be no doubt about the intention of the parties that the policy should be held in trust, which they had a right to create by parol. *Adams, Eq. 28; Beach, Mod. Eq. Jur. § 161.* And there can be no question as to the right of an obligor to insure his life for the protection of a surety upon an official bond. *Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192.* In creating this trust by parol, it was not material whether the trustees accepted or declined,—in fact they were infants and incapable of accepting, declining, or acting,—for a court of equity will not allow a trust to fail for want of a trustee, nor be vitiated by reason of the incapacity of the trustee named on account of infancy, lunacy, or otherwise. Any defect of this character would be supplied by the court.

The plaintiff further contends that the funds arising from the policy belong to his wards, John and Laura, because they were the children of the assured, and that the father is entitled by law (Const. art. 10, § 7) to insure his life for the benefit of his (wife and) children, and the amount thus insured shall be paid over "free from all claims of his representatives or any of his creditors." This contention would be sound if the insurance had been effected solely for their benefit. But the record shows that it was not so effected. The assured had four children besides John and Laura, two of whom were still younger, and for neither of these was any benefit provided by the policy. John and Laura were his creditors, and the insurance was obtained for them as his wards, who, as such wards and creditors, had an insurable interest in his life, independent of the relation-

ship, which clearly appears to have been the sole motive prompting the parties in taking out this insurance. The constitution (article 10, § 7) does not impose any obligation upon the father to insure his life for the sole use of his children (and wife), but simply licenses him to do so. "The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors." He may so insure his life or otherwise, as he may deem fit. He may insure it for the benefit of creditors, or in part for creditors and in part for wife and children. *Insurance Co. v. Robertshaw, 26 Pa. 189.* In effecting the insurance he has the right to do so for the benefit of any one who may have an insurable interest in his life. The only guaranty given him by our constitution is that, having insured for the benefit of his wife and children, the amount thus insured shall be their property, and no part of his estate; or he may insure it for his own benefit, so as to make it assets in the hands of his personal representative. It is true, a presumption of law arises, when a father takes title to property in the name of a child, that he intended to make a provision for the child, and not to create a trust; which presumption becomes still stronger when the child is an infant, and legally incapable of acting as a trustee for the father. But in this case it was not the intention or purpose that the beneficiaries named should have an absolute estate and interest in the policy, which is clearly shown by the facts found, and rebuts the presumption of law raised in their favor. The fact that it was placed in the name of John and Laura gives them no greater right or interest than was intended by the party creating the trust. They paid nothing for the policy, and obtained only such title as was intended by the creator of the trust. Being infants, they did not and could not consent or act. It became their property, charged with such incumbrance as their father had seen fit to place upon it; and in this instance it was a proper and honest charge, and the contention of the plaintiff ought not to prevail. All that the plaintiff could, in good conscience, expect and require from the sureties on the bond of his wards' father, was the full amount of their money which they had obligated to secure and make good to them; and this they have received, for it was at the instance of Junius E. Sutton that the policy was taken out, and the condition upon which he signed the bond and became liable, and it has insured to the full benefit of his wards, for which they should be content. After receiving every dollar of their money from the source provided for that purpose by Junius on behalf of himself and co-sureties, it would be unconscionable, as well as gross in-

justice, for the plaintiff to recover the amount again out of the property of the sureties. I therefore think that the proceeds of the policy ought to be applied first to the discharge of the liability of the sureties upon the bond.

(129 N. C. 114)

BURNETT et ux. v. SLEDGE et al.

(Supreme Court of North Carolina. Oct. 15, 1901.)

NOTES—SURETY—PAYMENT BY SURETY—EVIDENCE—APPLICATION OF PAYMENT.

1. Plaintiff owed defendant's testator \$440, and testator had signed as surety plaintiff's notes to the amount of about \$1,300, taking a mortgage as security; and after testator's death there was found among his papers two notes of plaintiff to testator,—one for \$615 and one for \$300. The holder of one of the notes which testator had signed as surety testified that testator paid the debt, and it was shown by defendant's attorney that plaintiff had once agreed to execute another mortgage securing notes amounting to \$1,608,—among them, one of January 17, 1894, for \$615, and one of December 8, 1890, for \$300. *Held*, that the evidence was sufficient to justify a finding that the note for \$300 and the one for \$615 represented moneys paid by testator as surety.

2. Where a debtor gives his creditor no instructions as to the application of a payment until after the credits have been entered by the creditor, the latter is entitled to its application where he chooses.

3. Where a surety on unsecured notes was himself secured by a mortgage, and he paid the notes, the fact that the debt discharged and the mortgage were not assigned to a trustee for the benefit of the surety as required as to existing security for the debt paid, did not render him a simple-contract creditor and release the mortgage.

Appeal from superior court, Franklin county; Coble, Judge.

Suit by Wesley Burnett and wife against J. H. Sledge and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

F. S. Spruill and W. H. Ruffin, for appellants. T. W. Bickett and W. H. Yarborough, Jr., for appellees.

COOK, J. The questions involved in this appeal arise upon exceptions taken by plaintiff to the rulings of his honor in confirming the report of the referee, to whom the cause was referred to state an account of the sum remaining due to defendants by plaintiff upon the mortgage debt, and also the sum which may be due on an unsecured indebtedness, and to take the testimony and report the same with his findings of fact and law. The exceptions raise three issues: (1) Whether there was any evidence to sustain the referee in finding that the \$615 note and the \$300 note represented or were in evidence of moneys paid by defendants' testator as surety for plaintiff; (2) whether there was any evidence to sustain his findings as to the application of certain payments made by plaintiff to the defendants; and, (3) whether the payment and cancellation by the testator of the notes to which he was surety operated as a

release of the security and indemnity which had been conveyed to him under Mortgage B, set out in the record.

It appears from the facts stated that the plaintiff was indebted to Ford & Egerton in about the sum of \$700, to Green & Yarborough in about the sum of \$300, and to Pretzfelder, Kline & Co. in the sum of \$357.50, which were evidenced by his notes with Sherrod Sledge as surety, and also to Sherrod Sledge in about the sum of \$440. And to secure the said debt due to Sherrod Sledge, and to hold him harmless and to indemnify him against loss on account of his suretyship, plaintiff on the 16th day of December, 1889, executed to him a mortgage upon real and personal property, with power of sale in case of default. Said Sledge died about the year 1896, and his executors undertook to sell the securities contained in the mortgage to satisfy the amount due to their testator on account of the individual indebtedness, and also the amount which they claimed that he had been compelled to pay in satisfaction of those notes upon which he was surety. Plaintiff claimed that he had paid a part of said secured indebtedness himself, and had also made payments to the testator to such amount that there was but little, if anything, due, and that the testator did not cause to be assigned to a trustee for his benefit such note or notes as he may have paid off for plaintiff, whereby upon payment the same were cancelled, and thus became a simple liability upon assumption, and exempt from the operation of the mortgage, and applied for and obtained an order of court restraining defendants from making sale of the property, and asking that an account be taken to ascertain his true and legal indebtedness, if any. The matters in dispute were referred to a referee, who reported his findings of fact and conclusions of law, accompanied by the evidence, to the court, upon the hearing of which his honor overruled exceptions taken by plaintiff and rendered judgment in favor of defendants, to which plaintiff excepted and appealed.

The evidence shows that among the papers of the testator the executors found the following, concerning the dealings between the plaintiff and the testator: (1) Note for \$286.26, dated December 10, 1889, executed to Green & Yarborough, due December 10, 1890, with interest at 8 per cent., signed by Wesley Burnett and Sherrod Sledge, with divers credits of interest indorsed. (2) Note for \$443, dated February 14, 1889, due on December 31st after date, payable to order of Sherrod Sledge, bearing 8 per cent. interest, with credits of interest indorsed, signed by Wesley Burnett. (3) Note dated January 17, 1894, due at one year, for \$615, with interest at 8 per cent., payable to the order of Sherrod Sledge, signed by Wesley Burnett, with credits of interest indorsed. (4) Note dated December 6, 1890, due one day after date, for \$300, with interest at 8 per cent.

payable to the order of Sherrod Sledge, signed by Wesley Burnett, with divers credits of interest indorsed. (5) Note dated December 10, 1889, for \$107, payable December 10, 1890, to order of F. N. Egerton, with interest at 8 per cent., signed by Wesley Burnett and Sherrod Sledge, with divers credits of interest indorsed. The referee found as facts, and so stated in his report, that the \$615 note represented a part of the indebtedness due Ford & Egerton, which was paid off by Sherrod Sledge, who accepted it in evidence thereof, and that the \$300 note represents the money furnished by Sledge to Burnett to pay off the Pretzfelder, Kline & Co. note, and was given in evidence of the same. His honor sustained said findings, to which plaintiff excepted upon the ground that there was no evidence to support the findings; being exceptions Nos. 1, 2, 3, and 4. In considering these exceptions, a careful search of the record fails to discover any error in the rulings of his honor in sustaining the findings of the referee. From the evidence of F. N. Egerton, it appears without contradiction that Sherrod Sledge paid the debt due Ford & Egerton, which was secured in the mortgage, Exhibit B. And from the evidence of T. W. Bickett it appears that he had in his hands for collection, as attorney of the executors, all of the evidences of indebtedness against plaintiff, of which he notified Burnett; that Burnett came to see him, and he went over all the papers with Burnett, and insisted that the property conveyed in the mortgages was inadequate security for the debts, and that he would have to reduce the amount. He went over the property in Mortgage B with him, and at no time did Burnett suggest that any of the notes were unsecured, but contended that upon a fair sale the security was sufficient to pay all the notes. He afterwards made a proposition to Burnett that if he would make a new paper covering all the notes, and would convey the 63 and 35 acre tracts, which were mentioned in Mortgage A, together with all the property in Mortgage B, the executors would agree to accept 6 per cent. interest from the time the 6 per cent. interest law went into effect. Burnett accepted the proposition, and in pursuance thereof he drew the paper marked "Exhibit D," dated January 17, 1896, and read it over to Burnett; and he agreed to what was in it, and agreed to execute it, and carried it home for the purpose of having his wife execute it. In Exhibit D, which was a mortgage drawn for Burnett and his wife to execute to complete the proposition made and accepted, conveying as security the lands proposed, there is recited the indebtedness of Burnett to Sherrod Sledge which was intended to be secured, viz.: "Note of December 10, 1889, executed to F. N. Egerton and transferred to said Sledge, for \$107; note of December 10, 1889, executed to Green & Yarborough and duly transferred to said Sledge, for \$286.26; note of

February 14, 1889, for \$448; note of January 31, 1888, for \$600; note of December 6, 1890, for \$300; note of January 17, 1894, for \$615, —all of which notes are past due, and bear interest at 8 per cent. per annum, and are secured by two several mortgages recorded" (being Mortgages A and B). And it further states that "the said Wesley Burnett desires, without in any way destroying, altering, or abridging the existing securities to said debt (it being expressly understood that the same shall stand), to give to the said Sherrod Sledge still other and further security to save him harmless from all loss, and to that end," etc. (The italics being ours.) To all of which Burnett then assented, but afterwards refused to execute the paper. But at no time did he ever suggest during their negotiations that any of those notes were unsecured. This we think was clearly some evidence to establish the facts as found by the referee, that the \$615 note and the \$300 note represented money paid by Sledge for Burnett on account of his suretyship, specified and secured in Exhibit B, and was properly considered by him. The \$300 note was executed by Burnett about one year after the execution of Mortgage B, and just about the time of the maturity of the Pretzfelder, Kline & Co. note; the \$615 note was executed by Burnett to Sledge a little over four years thereafter,—upon each of which Burnett annually paid the interest, and admitted to the witness Bickett that they were secured in Mortgage B by acknowledging that the debts and recitals therein were correct, which is further supported by the evidence of F. N. Egerton, who said that the debt due to Ford & Egerton was paid by Sledge. It is true, as counsel insist, that Burnett testified positively that he paid the Pretzfelder, Kline & Co. note himself, and did not get the money from Sledge. But there being evidence to the contrary, and the referee being the trier of the facts, personally observing the manner, conduct, and bearing of the witnesses, and the proper judge of the weight to which the evidence was entitled, we think his honor properly sustained his findings as to them. Nor do we find any error in his sustaining the report and findings as to the application of the payments (being exceptions 5 and 7) made under the arrangement between them, whereby, upon payment of a certain part of the indebtedness within a given time, the residue would be indulged. Plaintiff failed to pay the amount agreed upon, and gave no instructions as to the application of the amount paid until after the credits had been entered by the creditor, who was justified in law in applying it to such debts as he saw fit. *Jenkins v. Beal*, 70 N. C. 440; *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366.

The last contention to be considered (being exceptions 6 and 8) was pressed with great force by the learned counsel for plaintiff, but we cannot agree with him, and must

sustain his honor in overruling those exceptions. It is based upon the principle that, if a surety desires to preserve for his benefit an existing security for the debt which he is called upon to discharge, the debt and security (which follows the debt) must be assigned to a trustee; otherwise the payment will be in satisfaction and cancellation of the debt, and a release of the security, leaving the surety a simple-contract creditor. *Sherwood v. Collier*, 14 N. C. 380, 24 Am. Dec. 264; *Briley v. Sugg*, 21 N. C. 386, 30 Am. Dec. 172; *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. 227; *Browning v. Porter*, 116 N. C. 62, 20 S. E. 961. But in this case the debts for which the testator was security were not themselves secured. They were simple-contract debts, and made good to the creditor solely by the liability of Sledge, the surety. Sledge, the surety, was secured and indemnified against loss by reason of his suretyship by Mortgage B, wherein the plaintiff conveyed certain lands and personalty for that purpose, having declared and recited therein, "Whereas, the said Sherrod Sledge has become security on said note to their payment when due, and the said Wesley Burnett desires to hold him harmless and to indemnify him against any and all possible loss on their account * * * if the said Wesley Burnett shall fail to pay the amounts due on the therein several notes above described when they shall become due, and by such failure and default the said Sledge is compelled, as surety, to pay the same, or either of the same, or any part of either. * * * From the expressed terms of the instrument, it clearly appears that it was not intended to secure the notes to the creditor, but to secure to the surety such amount as he might be compelled to pay by reason of his liability assumed for Burnett in the extinguishment and cancellation of said notes. The intervention of a trustee could in no event have been a benefit to Sledge, for his redress against Burnett under the terms of Mortgage B was for the recovery of such amount as he would have to pay in extinguishing said notes, or any part thereof. The liability of Burnett, therefore, under his said mortgage, is for such amount as Sledge may have had to pay, which amount has been ascertained by the referee; and, there being no error in the rulings of his honor, the judgment must be affirmed.

(120 N. C. 132)

KOCH et al. v. PORTER et al.

(Supreme Court of North Carolina. Oct. 22, 1901.)

JUDGMENTS—PROCEEDINGS TO SET ASIDE—EXCUSABLE NEGLECT—SUFFICIENCY OF EVIDENCE—APPEAL.

1. Where there is evidence to support the findings of a trial court in proceedings to set aside a judgment for excusable neglect, as authorized by Code, § 274, and no abuse of discretion is shown, the facts so found are not subject to review on appeal.

39 S.E.—49½

2. A nonresident defendant employed a resident attorney, who on August 16th obtained 60 days in which to plead. Before the expiration of such time, plaintiff's attorney told defendant's attorney that the former would not object to a continuance at the following term, and would take no advantage of a default by the latter, but requested him to file his answer. Thereafter, plaintiff's attorney wrote defendant's attorney that the former desired to try the cause at the term commencing October 23d. Defendant's attorney failed to file his answer before or on such date, under the mistaken belief that there was an agreement to extend his time to plead. Held sufficient to authorize the setting aside of a judgment taken on such default, under Code, § 274, authorizing such relief where the entry of a judgment is caused by excusable neglect.

3. Where the trial court sets aside a default judgment for excusable neglect, but refuses to hold that certain errors therein also warranted the order, and the defendant does not appeal, the court's ruling as to such errors cannot be reviewed.

Appeal from superior court, Columbus county; Brown, Judge.

Action by T. F. Koch and others against L. C. Porter and others. Judgment by default was rendered in favor of plaintiffs, and from an order setting aside such judgment for excusable neglect the plaintiffs appeal. Affirmed.

J. B. Schulken, for appellants. McNeill & Bryan and McLean & McLean, for appellees.

FURCHES, C. J. This is a motion to set aside a judgment for excusable neglect, under section 274 of the Code. Therefore the merits of the controversy are not before us. We do not think we can give a better statement of the case on appeal than by incorporating the findings and judgment of the court below in our opinion: "Motion by defendants to set aside judgment rendered in this cause October term, 1899. Motion heard by G. H. Brown, Jr., judge, at August term, 1900. Columbus superior court, upon affidavits and exhibits filed by plaintiffs and defendants. It was agreed that the judge should take the papers and render his findings and judgment at any time out of term. Messrs. McLean & Bryan for defendants. Messrs. Rountree, Schulken & Lewis for plaintiffs. After carefully considering and weighing all the matters and facts recited in the several affidavits and exhibits, and having considered carefully arguments of counsel, I find the following facts: This action was commenced on October 1, 1898, against Luther C. Porter and wife, George F. Porter and wife, and others, named in original summons. That said summons was served as to Luther C. Porter and the other nonresidents of this state, as appears in the papers in the cause, on March 22, 1899, and also on said defendants, by sheriff of Hennepin county, Minnesota, in October, 1898. That shortly thereafter Luther C. Porter died in said county, and state of Minnesota, and another summons was issued March 16, 1899, against his executors

and others therein named, legatees of Luther C. Porter. The complaint herein was duly filed May 13, 1899. The plaintiff was then and is now a nonresident of this state. The defendants the executors of Luther C. Porter, and George F. Porter and wife, and others, legatees of Luther C. Porter, were then and are now residents and citizens of Minneapolis, in the state of Minnesota. These said defendants at once employed Messrs. Wishart & Frazier, reputable attorneys of the superior court, and residents of Whiteville, Columbus county, to appear for them and file their answer and defend the said cause. That said defendants paid the said attorneys, and they accepted the employment, and entered into correspondence with defendants and their representative and agent. I find that neither of said firm of attorneys are worth over the homestead exemption allowed by law, and that execution cannot be collected out of them. That at August term, 1899, said attorneys entered a general appearance for their clients, that being the appearance term. That 60 days was granted said attorneys upon their motion on August 16, 1899, within which to file answer for their clients, the defendants. The August term, 1899, commenced on August 14. Said answer was not filed within said 60 days. Nor was it filed on October 23, 1899, the commencement of October term of said court. That about the 1st of October, 1899, and before the 60 days had expired, Wade Wishart, Esq., of said firm of Wishart & Frazier, met George Rountree, Esq., counsel for plaintiff, who brought this action, in Wilmington, N. C. That Mr. Rountree told Wishart that he would take no advantage of any failure to file the answer within the 60 days, and that he had no objection to a continuance of the cause at October term, 1899, but that he desired Wishart to hurry and file the answer. At this time about 45 of the 60 days had expired. A few days after this conversation, in consequence of a letter from the plaintiff, Mr. Rountree wrote Wishart that he should insist on a trial at October term, and to hurry up and file his answer at once, as his client, the plaintiff, insisted on trial. I further find as a fact, from the testimony of Wishart, that within the said 60 days allowed defendants to file answers, and in ample time for said attorney to have prepared and filed the answer, all the facts, circumstances, and documents upon which defendants relied for a defense were placed in his possession by defendants, and that such data were in Wishart's possession in ample time to have filed said answer within time allowed, and that his clients, being residents of far-off states, could not well know, except through Wishart, whether the answer was filed or not. Wishart's testimony in this respect seems to be corroborated by George F. Porter and the exhibits filed. It was admitted in open court that Wishart

was a reputable attorney of this court. In justice to Wishart, I find that he failed to file the answer, laboring under a bona fide but mistaken belief that Mr. Rountree had consented that an order for enlargement of time to plead might be entered at the then approaching October term. I find that the defendants are not responsible for the neglect of Wishart and his firm to prepare and file the answer as they should have done. The defendants David Nealy and wife, Dorcas, and J. G. Jackson, appear to be only nominal defendants, and have no definite interest set out in complaint. (See sections 5 and 6.) All other defendants are the executors and legatees under the will of Luther C. Porter, deceased. At October term, 1899, the defendants' counsel, Wishart, moved for further time to file answer. Plaintiffs moved for judgment. The court rendered the judgment set out in record for want of answer. I find that the defendants have a bona fide and prima facie a valid defense, as set out in the affidavit of George F. Porter, dated August 16, 1900, filed, and that the demand of plaintiffs consists largely of open account vs. estate L. C. Porter, which would require some proof to substantiate. The defendants moved to set aside the judgment: (1) Because irregular and not warranted by law; (2) because of excusable neglect. I am of the opinion that as to the money demand a judgment by default and inquiry only should have been rendered; but it appears that defendants' counsel was present and objected to the judgment and appealed to the supreme court, and failed to prosecute the appeal. Therefore, this contention cannot now be sustained. (The defendants duly except.) I am of opinion, upon the facts, that defendants are entitled to relief because of excusable neglect. *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661. (The plaintiffs duly except.) It is therefore ordered and adjudged that the judgment rendered at October term, 1899, be set aside, and the defendants are granted 60 days from date of this order within which to file an answer. (The plaintiffs duly except.)"

The facts found, it seems to us, entitled the defendants, in the discretion of the court, to the relief granted. *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661. The facts found by the court below are not reviewable by us, unless there is no evidence to support their finding. *Sikes v. Weatherly*, 110 N. C. 131, 14 S. E. 511; *Nicholson v. Cox*, 83 N. C. 48; *Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022. Or where it appears that the discretion of the judge has been abused. *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476. And we cannot say there was no evidence to support the findings of the court below, nor an abuse or power.

We think this case is distinguishable from *Manning v. Railroad Co.*, 122 N. C. 824, 28 S. E. 963. In that case the defendant em-

ployed Mr. Watts, a nonresident attorney, who had no right to practice in the courts of this state, except by the courtesy of the court and bar. And while it is true that Luther Porter, who lived in Minnesota, had been consulted by some of the defendants, he was one of the defendants in the action, and did not expect to appear as counsel in the case; nor did his codefendants expect him to do so, but at once proceeded to employ and pay attorneys living in this state, who were regular attendants at Columbus court. We think it distinguishable from *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269. That was an action of ejectment, where it was necessary to give bond before answer could be filed. This was purely the duty of the defendant, and he neglected to give the bond. Besides, in that case the court failed to find that the defendant had a meritorious defense. It is also distinguishable from *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64, where the negligence seems to have been entirely the negligence of the defendant. It also seems to be distinguishable from *Cobb v. O'Hagan*, 81 N. C. 293, where the defendant lived within 37 miles of the court, but did not attend the same, or give his case any attention whatever.

The judgment, it seems to us, is both irregular and erroneous, at least so far as it applies to the open accounts stated in the complaint. But the judge refused to set aside the judgment on that account, and as the defendants did not appeal that question is not before us. But from the facts found, which are final, the judge was authorized, in his discretion, to set aside the judgment, which he did, and his ruling must stand.

Affirmed.

(129 N. C. 130)

IN RE HYBART'S ESTATE.

(Supreme Court of North Carolina. Oct. 22, 1901.)

DOWER—CHARGE ON LAND—PROCEEDINGS TO SUBJECT LAND TO PAYMENT—JURISDICTION.

1. An ex parte proceeding by a widow to subject land in the hands of heirs to overdue payments of dower charges thereon cannot be had before the clerk, or by motion in a terminated cause allotting dower; the remedy being obtainable only by action on the claim.

2. Where the record shows an adversary motion made before the clerk to subject realty to overdue payments of dower charges thereon in an ex parte cause, which has been terminated by final judgment, but fails to show any appeal or transfer from the clerk to the judge, the trial court's dismissal of the motion for want of jurisdiction will not be disturbed.

Appeal from superior court, Cumberland county; Moore, Judge.

Proceedings to subject the estate of Wm. M. Hybart to payment of dower charges thereon. From a judgment of dismissal for want of jurisdiction, Della J. Hybart appeals. Affirmed.

N. A. Sinclair and H. L. Cook, for appellant. Geo. M. Rose, for appellee.

CLARK, J. In 1899 dower was regularly allotted to Della J. Hybart in an ex parte petition by her and her heirs at law. The report of the commissioners allotted her the farm of her husband for life in severalty, and, to make up her third, further charged upon the realty allotted to the heirs at law the payment of all taxes on the entire estate, and the payment by the heirs to the widow of \$5 per month out of the rents of the realty allotted to them. For a while these payments were made, but, having fallen into arrearage of 11 months, this is a motion in the cause to subject the realty in hands of the heirs to the payment of the \$55 overdue. The remedy sought could not be had before the clerk. Nor could it be had by a motion in the cause, that cause having been terminated by a final judgment confirming the allotment of dower. *Causey v. Snow*, 120 N. C. 279, 26 S. E. 775. This is an adversary proceeding, and, if for a merely personal judgment against the heirs at law, should have been begun before a justice of the peace; and, if it is sought to enforce the lien of \$5 per month conferred by the judgment above recited, it should have been begun by summons returnable to term. It is true, a motion in the cause may sometimes be treated as an independent action. *Stradley v. King*, 84 N. C. 635. But that motion was in an adversary cause, and in the proper court. Here this is an adversary motion in an ex parte cause, and begun before the clerk, when it should have been brought to term before the judge. If we could pass the first point, counsel insist that by virtue of chapter 276, Laws 1887, amending Code, § 255 (see *Clark's Code* [3d Ed.] pp. 265, 267), the case having gotten into the superior court, the judge is vested with jurisdiction. It is true, to prevent the anomaly of a cause brought before the clerk, and regularly carried by appeal or transfer to the judge of the same court (the clerk being only the finger of the court), being dismissed, to be begun again before the same judge, the above act does provide that the judge shall have jurisdiction. *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188; *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518, and cases cited in the latter at page 497, 127 N. C., and page 519, 37 S. E. If this were not so, our practice would be no whit better than when an action in covenant was dismissed because not brought in assumpsit, or an action in contract was put out of court because not brought in tort, or when a man might be dismissed because his suit was on the equity side of the docket, when, after paying a big bill of costs, he could bring an action in the same court at law. But here this adversary motion is not only made in an ex parte cause which had been terminated by final judgment, but if treated as a new action brought before the clerk, when it should have been begun to term, the record shows no appeal or transfer placing it be-

fore the judge. Nothing indicates how it got before him, or that it was rightly carried before him. There is nothing before us except his very proper judgment that upon the record he had no jurisdiction to grant the petitioner the relief she asks. There is nothing that by any construction, under the most liberal practice, puts the jurisdiction in the judge. No error.

(129 N. C. 146)

HARRINGTON v. HATTON et al.

(Supreme Court of North Carolina. Oct. 22, 1901.)

CREDITORS—FRAUDULENT TRANSFER BY DECEDENT—SALE BY ADMINISTRATOR—INNOCENT PURCHASERS—PROCEEDINGS BEFORE CLERK—APPEAL—JUDGMENT.

1. Under Code, § 1446, declaring that real estate conveyed by decedent with intent to defraud creditors shall be subject to sale for the benefit of creditors, except when such sale would interfere with the rights of innocent purchasers, an administrator cannot be compelled to sell real estate in the hands of an innocent purchaser, since his intestate had no title thereto at his death.

2. In a proceeding by a judgment creditor before the clerk to compel the sale of decedent's property transferred to an innocent purchaser, such purchaser, together with the administratrix and heirs at law, were parties. Held that, on appeal to the judge, judgment should have been rendered directing a sale of the property under the judgment lien, under Code, § 255, as amended by Laws 1887, c. 276, providing that, whenever a cause is sent up to the judge from the clerk, he may fully determine the cause himself, or remand it for proceedings in accord with his orders.

Appeal from superior court, Pitt county; Hoke, Judge.

Proceedings by W. H. Harrington against P. E. Hatton, administratrix, and others, to compel the sale of land for the benefit of creditors. Judgment for defendants, and plaintiff appeals. Reversed in part.

A. M. Moore, for appellant. Skinner & Whedbee, for appellees.

CLARK, J. The jury having found that the defendant James R. Davenport was a "purchaser for a valuable consideration, and without knowledge of any fraud" on the part of E. N. Hatton, of the lands described in the petition, the court properly refused judgment to compel the administratrix of E. N. Hatton to sell the land to make assets. Proviso to Code, § 1446; *Paschal v. Harris*, 74 N. C. 335; *Heck v. Williams*, 79 N. C. 437; *Egerton v. Jones*, 107 N. C., at page 290, 12 S. E., at page 435; *McOaskill v. Graham*, 121 N. C. 190, 28 S. E. 264. The reason is that in such case the purchaser has gotten a valid title to whatever interest the vendor had (*Savage v. Knight*, 92 N. C. 493, 53 Am. Rep. 423), and there is nothing which his personal representative can sell. Such sale by E. N. Hatton, it is true, could not impair whatever lien his judgment creditor had by virtue of his prior docketed judgment, but the creditor must proceed to enforce that lien by

some direct proceedings on his part. Upon the issues found, E. N. Hatton had no interest in the land; and the judge properly refused to order the administratrix to sell for assets E. N. Hatton's interest in the land, since, after the execution of his conveyance, he had no interest left which could have passed to his heirs at law, and hence nothing to be turned into assets by his administratrix. If the issue had been found the other way, the judgment would have been different, of course. *Paschal v. Harris*, supra, is exactly "on all fours." *Murchison v. Williams*, 71 N. C. 135, presents an entirely different state of facts. There the property subject to the lien of the docketed judgment descended to the judgment debtor's heirs at law, who had a right to have the personality applied first; and the administrator had the right to sell the land for assets, if necessary, and discharge the judgment. Here there is only \$50 personality, and, by reason of E. N. Hatton's conveyance, no interest in the realty descended to the heirs at law. Hence there is nothing which can be sold by the administratrix to make assets. What the creditor must seek to enforce is a sale of the realty by virtue of his judgment lien thereon, and not to apply E. N. Hatton's interest therein to his debt. If by the lapse of time plaintiff's judgment lien had been lost, the benefit would have accrued to Hatton's vendee, and not to Hatton's heirs at law.

In this proceeding, though begun before the clerk, the purchaser as well as the administratrix and heirs at law are parties, and judgment should have been rendered directing a sale of the property under the judgment lien. Code, § 255, as amended by Laws 1887, c. 276; *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518; *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188; and other cases cited in *Clark's Code* (3d Ed.) p. 267. All the parties being before the court, there is no reason to compel the bringing a new action, but the plaintiff should have any relief his allegations and proofs entitle him to, whether prayed for or not. *Clark's Code* (3d Ed.) p. 200.

In refusing the prayer of the petition, there was no error, but there was error in dismissing the action. The cause is remanded for proper judgment. The judgment below as to costs is affirmed, and the costs of the appeal will be divided. Code, § 527. Remanded for judgment.

(52 S. C. 52)

GLOVER v. REMLEY et al.

(Supreme Court of South Carolina. Oct. 7, 1901.)

EMINENT DOMAIN—COMPENSATION—PROCEDURE.

The remedy provided by Rev. St. §§ 1743-1755, for obtaining compensation for rights of way, is exclusive, except where right to compensation is disputed, and the owner has nei-

ther consented to nor permitted the entry by the corporation for construction.

Appeal from common pleas circuit court of Colleton county; Watts, Judge.

Action by Eleanor L. Glover against Annie W. Remley and others and the Charleston & Savannah Railway Company. From an order sustaining a demurrer to the complaint, plaintiff and all the defendants except the railway company appeal. Affirmed.

Young & Young and Howell & Gruber, for appellant Glover. Izlar Bros., for appellants Remley and others. Mordecai & Gadsden, for respondent.

JONES, J. This is an appeal from an order sustaining a demurrer to the complaint for failure to state facts sufficient to constitute a cause of action. The complaint is as follows: "(1) That the Charleston & Savannah Railroad Company is a corporation under the laws of the state of South Carolina. (2) That by his will the late Joseph Glover devised the lands hereinafter described to his son, Francis Y. Glover, for life, and after his death to his, the said Francis Y. Glover's, children who attained twenty-one years, the issue of a predeceased child to represent the parent. That the said Francis Y. Glover died on the 5th day of October, 1896, leaving one child, Eleanor L. Glover, and five grandchildren, the children of his deceased son, Francis Y. Glover, Jr. Both said children attained the age of twenty-one years. That the interest which was of Francis Y. Glover is now vested in the defendants other than the Charleston & Savannah Railroad Company. (3) That the piece of land above mentioned, and alone involved in this litigation, is a strip of land 150 feet wide, beginning at the west bank of the Edisto river, and extending therefrom to the boundary line of the tract of land now or late of the Rev. W. O. Prentiss, 6,282 feet, and containing 21.52 acres, now in the possession of the defendant the Charleston & Savannah Railway Company, erroneously styled in the caption of the case the Charleston & Savannah Railroad Company, as a right of way. That the said Charleston & Savannah Railway Company claims and maintains exclusive possession of the said right of way. (4) That the plaintiff and the defendants except the Charleston & Savannah Railway Company are entitled to compensation from the defendant the Charleston & Savannah Railroad Company for the use of their said lands by the said company for the purpose aforesaid, the life estate of the said Francis Y. Glover having terminated at his death on the 5th day of October, 1896; and that the possession and use of the said 21.52 acres of said lands for the purpose aforesaid are worth a large and considerable sum, to wit, the sum of \$21,620, but that no compensation has ever been paid to the plaintiff or to the defendants, other than the said Charleston & Savannah Rail-

way Company, by the said Charleston & Savannah Railway Company, for said strip of land, but the said company has taken the said land used as a right of way as aforesaid to entire exclusion of the plaintiff and the said defendant owners of the same without making any compensation therefor, contrary to the constitution and laws both of the state of South Carolina and of the United States. (5) That the defendants other than the said Charleston & Savannah Railway Company, while claiming an equal interest with the plaintiff in the premises, refuse to join the plaintiff in bringing this suit, alleging that they will not join in the costs and expenses thereof, nor render themselves liable for the same in the case. Wherefore the plaintiff prays judgment: First. That the amount of compensation to be paid by the defendant the Charleston & Savannah Railway Company to the plaintiff and the defendants, except itself, for the possession and use of the portion of the said lands as a right of way and for depots and other railroad purposes, be ascertained and fixed by the judgment and decree of this honorable court, and that said defendant be required to pay the same, to wit, the sum of \$21,620, with costs. Second. And that the plaintiff may have such other and further relief in all and singular the premises as to this honorable court shall seem meet and agreeable to equity, together with her costs and disbursements." The demurrer was upon the ground that the complaint was insufficient, inasmuch as the remedy provided by sections 1743-1755, Rev. St., for obtaining compensation for right of way, is exclusive. The court sustained the demurrer, and dismissed the complaint, holding that he was bound to do so under the case of *Tutt v. Railway Co.*, 28 S. C. 394, 5 S. E. 831.

The demurrer was properly sustained. The rule is settled in this state by many decisions that the remedy provided by statute for obtaining compensation for right of way is exclusive as to all cases falling within its provisions. So far this court has decided that there are two cases which do not fall within the statute: (1) Where the right to compensation is disputed, and (2) where the owner has neither consented to nor permitted, actually nor presumptively, the entry by the corporation for construction. *Railway Co. v. Riddlehuber*, 38 S. C. 308, 17 S. E. 24; *Cureton v. Railroad Co.*, 59 S. C. 376, 37 S. E. 914. It does not appear from anything in the complaint or the record before us, that plaintiff's original right to compensation under the condemnation statutes is disputed. It is alleged that the land is in possession of the railway company, and that said company "claims and maintains exclusive possession of the right of way," and that "said company has taken the said land used as a right of way as aforesaid to entire exclus-

of the plaintiff and the said defendant owners of the same, without making any compensation therefor," etc. These allegations may be true, and yet be entirely consistent with the taking and use of the right of way by the defendant company subject to plaintiff's right to demand compensation in the time and manner provided in the statute. The complaint does not show that the entry for construction was without the consent or permission of the owner, nor does it show any fact from which the court could infer that such consent or permission was impossible.

The judgment of the circuit court is affirmed.

(62 S. C. 42)

HICKSON v. EARLY.

(Supreme Court of South Carolina. Oct. 5, 1901.)

ACTION ON NOTE—ANSWER—SUFFICIENCY—APPEAL—EXCEPTIONS—REVIEW—REMAND.

1. In an action by an assignee of a note, an answer alleging that the note was obtained by the payee for articles purchased for the purpose of resale on the representations of the payee that they could be readily sold at a certain price and that they had never been sold at a less price, all of which representations were false to the knowledge of the assignee, states a good defense.

2. An exception on appeal stating the ground of demurrer to the answer as stated in the court below, and alleging error in sustaining the demurrer, is sufficiently definite.

3. Where an appeal is taken from an order sustaining a demurrer to the answer, appellant cannot ask to have the ruling sustained on any other grounds than those raised below.

4. Where one defense has been erroneously stricken out on demurrer, a verdict for plaintiff on the other defenses cannot be sustained, but the case must be remanded for trial on the defenses so stricken.

Appeal from common pleas circuit court of Darlington county: Gage, Judge.

Action by Henry Hickson against John H. Early. From an order sustaining a demurrer to the first defense, defendant appeals. Reversed.

Geo. E. Dargan, for appellant. Woods & Macfarland, for respondent.

McIVER, C. J. This is an appeal from an order sustaining a demurrer to the first defense set up in the answer. The action was based upon three promissory notes bearing date the 29th day of July, 1897, whereby the defendant promised to pay to the order of one S. W. Tate the sum of \$210, divided into three equal payments of \$70 each,—one payable the 1st of November, 1897, another payable on the 1st of December, 1897, and the other payable on the 1st of January, 1898,—evidenced by three separate notes, with interest after maturity of each note at the rate of 8 per cent. per annum, which notes, as it is alleged in the complaint, were transferred for valuable consideration, before maturity, to the plaintiff. The defendant answered,

setting up four distinct and separate defenses. The plaintiff demurred to the first, second, and third defenses upon the ground that they fail to state facts sufficient to constitute a defense to the plaintiff's action. The case came on for hearing before his honor Judge Gage and a jury, when the demurrer to the first defense was sustained, but the demurrer to the second and third defenses was overruled. The case then proceeded to trial on the issues raised by the second, third, and fourth defenses, and resulted in a verdict for plaintiff, upon which judgment was entered. The defendant appeals, basing his appeal upon the single exception that the circuit judge erred "in sustaining plaintiff's demurrer to defendant's first defense on the following ground, to wit: That it does not state facts sufficient to constitute a defense, 'because the alleged misrepresentations contained therein do not constitute fraud or deceit in law, are insufficient as a foundation to avoid payment of the purchase price said to be represented by the notes sued upon, and amount to nothing more than dealer's talk.'" The "case" shows that when the demurrer was interposed the plaintiff, in accordance with rule 18 of the circuit court, stated in writing the ground upon which he claimed that the allegation contained in the first defense was deficient, in language practically identical with that quoted in the exception. So that the real question involved in this appeal is whether the allegations in the answer setting up the first defense, if true, as they must be taken to be under the demurrer, are sufficient to constitute a defense to the action. For this purpose it is necessary first to ascertain what those allegations are. They are thus set out in the answer: "(1) That the defendant made and delivered to S. W. Tate the notes described in the complaint, pursuant to a contract between the defendant and the said S. W. Tate, assuming to act as agent for the National Cabinet Company, whereby the said S. W. Tate, assuming to act as agent as aforesaid, appointed the defendant the sole and exclusive agent to sell the National cabinets in the county of Williamsburg, in the state of South Carolina, for a period of three years from the date of said contract, and whereby the defendant accepted said appointment, and in consideration thereof purchased from the said S. W. Tate sixty National cabinets, making a payment thereon of \$210; the notes described in the complaint, amounting in the aggregate to \$210, being given and accepted by the said S. W. Tate in lieu of cash; and the defendant bound himself by the said contract to sell each and every cabinet so purchased for the regular list price, to wit, \$12.50. (2) That said notes were obtained from the defendant by the said S. W. Tate by fraud and misrepresentation, in that the said S. W. Tate induced the defendant to execute

the said notes by falsely representing to him that he, the said S. W. Tate, had found a ready sale for the said cabinets at the regular list price of \$12.50 each, and by giving to the defendant the names of numerous persons to whom he alleged he had sold the said cabinets at said list price, but who the defendant has since ascertained purchased said cabinets at a very much reduced price; and by further representing to the defendant that neither he, the said S. W. Tate, nor any one of his agents, had ever sold any of the said cabinets for less than the said list price; all of said representations being wholly false,—and that the said S. W. Tate knew the said representations to be false at the time that he made them, and made the same with intent to deceive and defraud the defendant. (3) That the notes described in the complaint were executed by the defendant in consequence of the representations hereinbefore mentioned. (4) That the defendant is informed and believes that the plaintiff had notice of the facts hereinbefore alleged at and before the assignment and delivery to him of the said notes.”

Now, if these allegations are true, as they must be assumed to be for the purposes of this inquiry, then it is shown that the defendant was induced to enter into the contract with Tate mentioned in the first paragraph of the answer, and to execute the notes sued on, by the false and fraudulent representations of the said Tate, and that Tate knew at the time that such representations were false. If this be so, then it follows that the facts stated in the answer setting up the first defense do constitute a good defense to the action, and that the circuit judge erred in holding otherwise. For, as is said in *McCorkle v. Doby*, 1 Strob., at page 400, 47 Am. Dec. 560: “It is generally affirmed as a rule that fraud avoids all contracts. But it would be more correct to say fraud makes all contracts voidable, for it is at the option of the party to be affected by the fraud whether or not he will treat the contract as void and rescind it.” See, also, *Lebby v. Ahrens*, 26 S. C. 275, 2 S. E. 387, cited in the argument of counsel for appellant. See, also, 14 Am. & Eng. Enc. Law (2d Ed.) at page 23 et seq.

The fact that this action is brought by one claiming to be a purchaser for valuable consideration before maturity of the notes sued on cannot affect the question, in view of the fact that it is alleged in the fourth paragraph of that portion of the answer setting up the first defense “that the plaintiff had notice of the facts hereinbefore alleged at and before the assignment and delivery to him of the said notes,” which must be assumed to be true under the demurrer, and deprives the plaintiff of the benefit which would be accorded to a purchaser for valuable consideration without notice; for the plaintiff, having notice of the fraud before the transfer of the notes, cannot be regarded as an

innocent holder. Indeed, no such position has been taken by counsel for respondent.

In the argument of counsel for respondent the contention is that the ruling below should be sustained upon three grounds: (1) Because the exception upon which the appellant bases his appeal is too general for consideration. (2) Because the demurrer was properly sustained. (3) Because, even if there was legal error in sustaining the demurrer to the said “first defense,” the error was harmless, inasmuch as the issues raised by the “second defense,” the demurrer to which was overruled, and the verdict of the jury thereon, settled all issues that could possibly have arisen under the first defense, and hence no injury resulted from the alleged misrepresentations set forth in the first defense, and no injustice was done to defendant by sustaining the demurrer, and thereby this appeal becomes merely speculative.

We do not think the exception was too general. When the demurrer was interposed, the plaintiff, in accordance with the requirements of rule 18 of the circuit court, reduced to writing the ground upon which he claimed that the pleading demurred to was insufficient, as hereinabove stated, which substantially amounted to this: that the false and fraudulent representations set forth in the answer, even if true, were insufficient to constitute a defense to the action. The circuit judge held that such representations as there set out were not sufficient to constitute a defense, and the exception assigns error in so holding. In other words, the circuit judge based his ruling upon a distinct proposition of law, and in the exception it is claimed that the proposition of law upon which the ruling below was rested is erroneous. We do not see how the exception could have been made more specific, and it is strictly in accordance with rule 5 of this court, which requires that an exception “must contain a statement of the proposition of law or fact which it is desired to review.” The first ground taken by counsel for respondent cannot, therefore, be sustained.

As to the second ground, we infer from the argument of counsel for respondent that it is based upon the idea that the false representations relied upon were not of an existing material fact, but were mere “dealer’s talk”; that defendant bought the articles mentioned for sale in Williamsburg county, and there was no allegation that he ever made any effort to sell in that county; that there is no allegation that defendant had no opportunity of examining the articles before the sale was concluded; and finally that there was no allegation of damage by reason of the false representations. It must be remembered that the main object of the amendment of rule 18 of the circuit court, requiring that in cases of this kind the demurrant must state in writing the points wherein the pleading demurred to is insuffi-

cient, was to prevent an evil which had been of not infrequent occurrence, whereby a demurrer was sought to be sustained in this court upon grounds not presented to nor passed upon by the circuit court, thus practically converting this court from an appellate tribunal into a court of original jurisdiction, besides doing great injustice to the circuit judge as well as to the parties, who were suddenly confronted with questions of which they had had no previous notice. Accordingly, since that amendment of the rule, it has been held here that an appeal from an order sustaining a demurrer to the complaint based upon one ground cannot be sustained here upon other grounds of insufficiency in the complaint not passed upon by the circuit court. *Millhiser v. Holleyman*, 37 S. C. 572, 16 S. E. 688. Of course, the same rule would apply to a demurrer to the answer. That case goes further than it is necessary to go in this case, for there the defendant had given notice that he would ask this court to sustain the demurrer upon other grounds than that taken in the circuit court, and yet the court declined to consider the additional grounds of demurrer; but here it does not appear that any such notice was given, and it is for the first time in the argument here proposed that this court shall sustain the demurrer upon other deficiencies than the one relied upon in the court below, and this the court cannot do without disregarding the rule of court as well as the decision last cited, which we are not inclined to do. We shall therefore confine our attention to the only question presented to and passed upon by the court below, to wit, whether the alleged false and fraudulent representations constitute such fraud as would render the contract void. It is, no doubt, true that such representations must be as to a past or existing fact, and must be material. It appears that Tate, who was the agent of the National Cabinet Company, was desirous of introducing the cabinets into this section of the country, and for this purpose he induced the defendant to purchase 60 cabinets for the sum mentioned in the notes sued on, and gave him the sole and exclusive agency for the sale of the same in the county of Williamsburg, S. C., binding him not to sell the cabinets at a less sum than \$12.50, and that the defendant was induced to execute the said notes by the false and fraudulent representations of the following facts: (1) That he (Tate) had found a ready sale for the said cabinets at the price named; (2) that he furnished to the defendant the names of numerous persons to whom he said he had sold cabinets at the price above mentioned; (3) that neither he, the said Tate, nor any one of his agents, had ever sold any of said cabinets for less than the said list price. All of these representations are as to past facts, and not of the expressions of mere opinions; and they all are admitted by the demurrer to be false,

and so known to be by said Tate at the time, and also that they were made with intent to deceive and defraud the defendant. Were they material? We think they were, and were well calculated to deceive the defendant and induce him to enter into the contract here in question, and it is quite certain that he did enter into such contract; and we think it equally clear that, if these allegations shall be proved upon the trial, he will be entitled to be relieved from the obligation of performing such contract by the fraud thus practiced upon him. The second ground relied upon by the counsel for respondent is therefore untenable. The case of *Lebby v. Ahrens*, 26 S. C. 275, 2 S. E. 387, which was cited by counsel for both sides, fully sustains our view. In that case the action was to recover from the defendant money which the plaintiff had by the false and fraudulent representations of the defendant been induced to pay to the defendant, while here the defendant is seeking to be relieved from the performance of a contract into which he was induced to enter by the false and fraudulent representations of the assignor of the plaintiff, of which the plaintiff had notice at the time of the transfer of the notes sued on to him. Thus, while the respective positions of the parties are reversed, the principle involved is equally applicable to both cases. As is said in that case: "While it may be true that false representations as to the value of the thing sold, being, as they usually are, mere expressions of opinion, will not, as a general rule, be sufficient to sustain an action, yet where there is any material fact which, if true, would be calculated to induce, and did actually induce, the purchaser to make the purchase, such false representations will be sufficient to sustain the action. Nor is it necessary that such false representations should be the sole inducement to the contract,"—citing the authorities.

So, also, the third ground taken by counsel for respondent is also untenable. That ground is that, even if there was error in sustaining the demurrer to the first defense, such error is harmless, because the issues raised by the second defense and the verdict thereon settle all the issues that could possibly have arisen under the first defense. That is an entire mistake; for, as we have seen, the issue of fraud is raised by the first defense, and no such issue is presented by the second defense. Fraud is not alleged in the second defense, and hence no testimony tending to show fraud would be competent in trying the issue first presented by the second defense; for the well-settled rule is that, where fraud is relied upon either to support an action or sustain a defense, the fraud relied upon must be alleged and proved. It is very true that in both the first and second defenses it is alleged that the plaintiff had notice of the facts "hereinbefore alleged" in each of those defenses, but that allegation in the second defense cannot be con-

strued to mean that the plaintiff had notice of anything more than the facts alleged in that defense, and certainly cannot be construed to mean that the plaintiff had notice of the fraud, which is not alleged or even mentioned in the allegations upon which the second defense is based; for it is well settled that, where several causes of action are separately set out in a complaint, allegations contained in a statement of one cause of action cannot be used to supply any deficiency in the statement of another cause of action in the same complaint, for each cause of action must be completely stated, and contain within itself all necessary averments, or it will be held bad on demurrer *Hammond v. Railway Co.*, 15 S. C. 10, and the authorities therein cited. The same principle would, of course, apply to a case in which separate and distinct defenses are set up in the answer, and there is a demurrer to two or more of the several defenses, which is the case here. See *Stanley v. Shoolbred*, 25 S. C. 181, where it was held that where the defendant pleads a general denial, and a further defense by way of confession and avoidance, the admissions made in the latter defense cannot be used by plaintiff to establish the issues raised by the general denial. See, also, to same effect, *Cohrs v. Fraser*, 5 S. C. 351, and *Glenn v. Sumner*, 132 U. S., at page 157, 10 Sup. Ct. 41, 33 L. Ed. 301. If it should be said that the verdict of the jury upon the trial of the issues presented by the second defense might have been based upon the fact that they found that the plaintiff had no notice of the facts relied upon to support that defense when he purchased the notes, the answer is obvious, and of a twofold character: (1) That it rests upon pure conjecture, as this court has no means of ascertaining what was the ground upon which the jury based their verdict; (2) even if it could be assumed that the jury rested their verdict upon the ground of want of notice to the plaintiff of the facts stated in support of the second defense, to wit, that the sale of the cabinets was made by sample, that the defendant purchased for the sole purpose of reselling, that the said Tate "represented and warranted" the cabinets to be in all respects like the sample exhibited, and that said cabinets, when delivered, proved to be inferior to the sample exhibited and totally unfit for sale, it would not by any means follow that the plaintiff had no notice of the totally different facts set up in support of the first defense. So that, in any view that may be taken, the position contended for by counsel for respondent cannot be sustained. It follows, therefore, that the judgment of the circuit court sustaining the demurrer to the first defense must be reversed, and the case remanded for a trial of the issues presented by the first defense; for, as the issues presented by the other defenses have already been tried, and a verdict thereon has been

rendered, to which no exception has been taken, the verdict on those issues must be regarded as final, so far as those issues are concerned.

The judgment of this court is that the order sustaining the demurrer to the first defense be reversed, and that the case be remanded to the circuit court for a new trial.

(52 S. C. 28)

SOUTHERN RY. CO. v. KAY, County Treasurer.

(Supreme Court of South Carolina. Oct. 5, 1901.)

CONSTITUTIONAL LAW—TAXATION—COLLECTION—VALUATION—COUNTY ROAD TAX.

1. Const. art. 10, § 13, to the effect that the taxes for the subdivisions of the state shall be levied and collected by the respective fiscal authorities thereof, confers administrative power in the collection of the tax, without reference to its creation.

2. Const. art. 10, § 13, providing that all taxes shall be levied on the same "assessment" which shall be made for state taxes, requires all taxes to be levied on the same valuation.

3. Const. art. 10, § 3, providing that no tax shall be levied except in pursuance of a law which shall state the object of the same, means an act of the general legislature, unless there is a provision of the constitution that is self-executing.

4. Act 1896 (22 St. at Large, p. 238), authorizing boards of county commissioners to levy an annual sum on their respective counties which shall constitute a part of the county road fund, was not repealed by the appropriation act of 1899, by which the levy of one-half of one mill for road purposes in a certain county was authorized.

5. The board of county commissioners of O. county have the power, under Const. art. 10, and Act 1896 (22 St. at Large, p. 238), authorizing county commissioners to levy annually a sum not exceeding one mill for road purposes, to levy such taxes, which was not taken away by the appropriation act of 1899, authorizing a levy not exceeding one-half of one mill for road purposes for such county.

Appeal from common pleas circuit court of Oconee county; Aldrich, Judge.

Action by the Southern Railway Company against J. R. Kay, county treasurer, to recover taxes paid under protest. Judgment for plaintiff, and defendant appeals. Reversed.

Stribling & Herndon, for appellant. T. P. Cothran, for respondent.

GARY, A. J. The facts are thus succinctly stated by the appellant's attorneys: "This is an action brought by the plaintiff, the Southern Railway Company, against the defendant, J. R. Kay, as county treasurer of Oconee county, to recover from the defendant the sum of \$224.72 and costs, the amount of taxes collected of plaintiff under protest by a levy of one-half of one mill on the property of plaintiff for road purposes made by the board of county commissioners for Oconee county. The contention of plaintiff is that the county commissioners had no authority to levy such tax, and such tax is un-

lawful. The defendant admits the collection of the tax, and that the payment was made under protest, and alleges that the levy was authorized by the constitution of the state and by Act of 1896 (22 St. at Large, p. 238, § 26). From judgment for plaintiff, defendant appeals."

We will first consider whether the levy was authorized under the provisions of the constitution. The provisions bearing on this question are the following sections of article 10:

"Section 1. The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property. * * *

"Sec. 2. The general assembly shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year, and whenever it shall happen that the ordinary expenses of the state for any year shall exceed the income of the state for such year, the general assembly shall provide for levying a tax for the ensuing year sufficient with other sources of income to pay the deficiency of the preceding year, together with the estimated expenses for the ensuing year.

"Sec. 3. No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same to which object the tax shall be applied."

"Sec. 5. The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. * * *

"Sec. 6. * * * The general assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose, except for educational purposes, to build and repair public roads, buildings, and bridges, to maintain and support prisoners, pay jurors, county officers and for litigation, quarantine and court expenses and for ordinary county purposes, to support paupers, and pay past indebtedness."

"Sec. 13. The general assembly shall provide for the assessment of all property for taxation; and state, county, township, school, municipal and all other taxes shall be levied on the same assessment which shall be that made for state taxes; and the taxes for the subdivisions of the state shall be levied and collected by the respective fiscal authorities."

In the case of *State v. Railroad Co.*, 54 S. C. 564, 32 S. E. 691, Mr. Justice Jones says: "Under the scheme of our tax laws the names of all taxpayers and a statement of their taxable property, with its value as assessed by proper officers for taxation, the rate of taxation, and the specific amount due by each, are entered by the county auditor on the book known as the 'County Duplicate,' and this duplicate, when delivered to the county treasurer, becomes his warrant

for the collection of taxes, subject to certain provisions for additional entries after delivery of the duplicate to the treasurer. Taxes are legally assessed and become a charge against the taxpayer when so entered according to law." The court in *People of New York v. Weaver*, 100 U. S. 539, 25 L. Ed. 705, shows that taxation has reference to the entire process of assessments, and includes the valuation of the shares as well as the ratio of percentage charged on such valuation. It says: "This valuation, then, is a part of the assessment of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio of percentage. There can be no rate or percentage without a valuation." Then the court proceeds to quote the following: "When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of value of benefits or the results of business." "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district." As the word is more commonly employed, an assessment consists in the two processes, listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation cannot be apportioned without it." *Cooley, Tax'n*, 258, 259; *Burroughs, Tax'n*, p. 198, § 94. So, also, Judge Bouvier defines "assessment" to be "determining the value of a man's property or occupation for the purpose of levying a tax. Determining the share of a tax to be paid by each individual. Levying a tax. *Bank v. Barry*, 1 Bond, 154, Fed. Cas. No. 12,204." This language is quoted with approval in *State v. Railroad Co.*, supra. In defining the meaning of the word "levy," under the head of "Taxation," 25 Am. & Eng. Enc. Law (1st Ed.) p. 181, says: "The term 'levy' is here used to indicate the legislative act, whether state or local, which determines that a tax shall be laid, and is to be distinguished from the levy on property incident to the enforcement of the collection of the tax, in which sense the term is also used;" and in defining the term "assessment," on page 199, it uses this language: "An assessment may be defined to be the act of assessing, determining, or adjusting the amount of taxation to be paid by an individual or a community, —an official valuation of property, profits, or income for purposes of taxation. Where taxes are to be levied in proportion to an estimate either of values, benefits, or the results of business, an assessment is indispensable." Webster's International Dictionary gives as one of the definitions of levy: "To raise or collect by assessment; to exact by authority, as to levy taxes, toll, tribute, or contribu-

tions." In *Morton v. Comptroller General*, 4 S. C. 430, the court says: "The duty enjoined on the legislature is to 'levy a tax.' A tax is the means by which a burden primarily borne by the state is transferred to the citizen * * * Three things are essential to a tax, as that term is understood by our constitution: First, the ascertainment of a sum certain, or that can be rendered certain, to be imposed on the collective body of taxpayers; second, a legal imposition of that sum as an obligation on the collective body of taxpayers; third, an apportionment of such sum among individual taxpayers so as to ascertain the part or share that each should bear. * * * The first two acts above described, namely, the ascertainment of a sum to be imposed on the collective body of taxpayers, and its imposition by a legislative declaration to that effect, are essentially legislative acts, or acts proper, directly, to the law-making function of the government. * * * The third act, namely, the apportionment of the whole sum imposed by way of tax on the collective body of taxpayers upon the separate individuals composing that body, is usually an administrative act, performed under specific statutory directions, ascertaining the mode and time of its performance. * * * When the aggregate value of property is ascertained at the time the tax levy is ordered, the legislature frequently makes the division, and directs the levy to be made according to the resulting rate which is thus established by law, instead of merely fixing the amount to be levied, and leaving the rate to be ascertained by computation after the aggregate valuation of property subject to taxation is ascertained and known. Both modes are resorted to, and both are equally appropriate to adoption by the legislative body. As there are two distinct stages in this process, the result of one of which is to fix an indebtedness on the collective body of taxpayers, and the other on the individual taxpayer, so the word 'levy' is indifferently employed, as commonly used, to express either one of these processes separately or both collectively. A tax is said to be levied when the amount or rate to be imposed is fixed by law; for what is wanting to complete such levy is supplied by the standing tax laws, and consists in a course of administrative action. When the levying of a tax is spoken of as a legislative act, it is commonly understood to describe such action on the part of the legislature as would, with standing tax laws, complete the legislative authority requisite to enable the administrative department to distribute and collect the tax. * * * In other words, the tax directed to be levied must be so far imposed, in order to comply with the letter and spirit of the constitution, that no further legislation will be necessary to enable its collection." The provision of the constitution upon which the appellant mainly relies is that portion of section 13 to the effect that "the taxes for the subdivisions of the state shall

be levied and collected by the respective fiscal authorities thereof." The meaning of the word "levied," therein used, is to be determined in connection with a consideration of the other provisions of the constitution. The word "levy," as hereinbefore shown, is frequently used in more than one sense, and its meaning in a particular instance is to be determined by resort to the context. It is sometimes used for the purpose of conferring all the powers incident to the creation and collection of a tax, as when "corporate authorities are vested with power to assess and collect taxes for corporate purposes," while again it is only intended to confer administrative powers in the collection of the tax, without reference to its creation, and this is the sense in which it is used in the thirteenth section. By this construction alone can force and effect be given to all the foregoing provisions of the constitution. It will be observed that the thirteenth section makes no reference to the creation of the tax, which only could be done by the general assembly, or by the county after the general assembly had "vested it with power to assess and collect taxes for corporate purposes." The intention was that the taxes for the subdivisions of the state should be collected by the respective fiscal authorities thereof, whether imposed by the general assembly or the corporate authorities of counties, etc., when vested by the general assembly with power to assess and collect taxes for corporate purposes.

From the foregoing provisions of the constitution we deduce the following conclusions: (1) That the word "assessment," in the provision that "state, county, township, school, municipal and all other taxes shall be levied on the same assessment, which shall be that made for state taxes," means "valuation." (2) That the word "law," in the requirement (section 8) that "no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object the tax shall be applied," means an act of the general assembly, except when there is a provision of the constitution that is self-executing, as in the case of the three-mills tax for school purposes. This construction is supported by section 16, art. 3, which is as follows: "The style of all laws shall be: 'Be it enacted by the general assembly of the state of South Carolina.'" There may be a compliance with the requirements of section 8, either by an act of the general assembly levying the tax, or by an act of the general assembly vesting corporate authorities of counties, etc., with power to assess and collect taxes for corporate purposes, when the act distinctly states the object of the same, and the corporate authorities aforesaid levy the tax in accordance with the provisions of such act. (3) That the power to collect the taxes for the subdivisions of the state is conferred by the constitution upon the fiscal authorities of such subdivisions, whether the tax was cre-

ated by any act of the general assembly, or by the said corporate authorities under an act of the general assembly. (4) That the tax was not authorized by the constitution without legislative action.

We will next consider whether the levy was authorized by act of 1896 (22 St. at Large, p. 238, § 26). His honor the circuit judge ruled that section 26 of the act of 1896 authorized the board of county commissioners to levy annually a sum not exceeding one mill in the respective counties, and that the general assembly, by the act of 1899, itself levied a tax of one mill for road purposes; that the act of 1899 necessarily had the effect of repealing and limiting the powers of the board of county commissioners. Section 26 of the act of 1896 is as follows: "Sec. 26. That the county board of commissioners of said counties be, and they are hereby, authorized to levy annually a sum not exceeding one mill on all the taxable property of the respective counties, which shall constitute a part of the county road fund, to be expended by the said board in the same manner as is provided by law for the use and expenditure of the commutation tax in lieu of road duty; and such tax shall be collected at the same time and in the same manner as is provided by law for the collection of taxes levied for ordinary county purposes: provided, that the provisions of this section shall not apply to Orangeburg county." The words of the act entitled "An act to raise supplies and make appropriations for the fiscal year, commencing January 1st, 1899" (23 St. at Large, p. 138), by which the levy of one-half of one mill for road purposes for Oconee county, are, "For roads, one-half of one mill ($\frac{1}{2}$). The legislature, by section 26 of the act of 1896, vested the board of county commissioners of Oconee county with power to levy annually a sum not exceeding one mill, which should constitute a part of the county road fund, but this did not prevent the general assembly from levying an additional tax for the same purpose. The two acts are consistent, and there was error, therefore, in ruling that the act of 1899 repealed, by implication, section 26 of the act of 1896.

It is the judgment of this court that the judgment of the circuit court be reversed.

(62 S. C. 26)

McBRAYER v. MILLS.

McBRAYER et al. v. SAME.

(Supreme Court of South Carolina. Oct. 3, 1901.)

PLEADING—LIMITATIONS—TOLLING STATUTE—FINDINGS OF MASTER—CONCLUSIVENESS—RES JUDICATA—ASSIGNMENT OF NOTE.

1. An allegation in a complaint on a note that defendant on a certain date made a payment on a note is a sufficient allegation of an act from which a new promise is implied.

2. Where a law case is referred by consent, a finding of fact by the master concurred in

by the court is binding on appeal, unless based on an error of law.

3. Where a case is referred to a master, and he holds that words in an answer were not an admission of a payment tolling the statute of limitations, and the circuit court reverses the master, holding that the allegations of the complaint as to such payment were admitted by the answer, and remanded the case to the master to try the issues, on such second trial defendant had no right to amend such answer and deny payment.

4. Where the payee of a note makes a payment to an assignee thereof with knowledge of the assignment, he is liable to pay the amount due on the note to such assignee as on a new promise.

5. Limitations begin to run in favor of a member of a firm, against an accounting, at his death.

Appeal from common pleas circuit court of Greenville county; Aldrich, Judge.

Action by C. E. McBrayer against O. P. Mills on a note, and action for partition by C. E. McBrayer and others against O. P. Mills. Judgment for plaintiffs, and defendant appeals. Affirmed.

Ansel, Cothran & Cothran, for appellant. Carey & McCullough, for respondents.

JONES, J. These two causes were heard together in the circuit court and in this court. The first action was commenced October 6, 1898, and the main question involved is whether the action was upon the original note, or the new promise evidenced by a payment thereon. It appears that the defendant, O. P. Mills, and H. I. McBrayer, the husband of plaintiff, were partners as Mills & McBrayer, and that Mills and McBrayer on February 1, 1882, executed a note to H. I. McBrayer for \$1,500, payable one day after date. H. I. McBrayer died in December, 1891, intestate, and his widow, the plaintiff, was appointed administratrix of his estate. In the settlement of the estate this note was assigned to plaintiff February 28, 1893, and plaintiff was discharged as administratrix in August, 1898. The complaint, after alleging the facts, alleged: "(6) That no part of the said note has been paid, except the sum of \$200, of date January 6, 1888; \$100, of date January 21, 1888; \$100, of date February 26, 1889; \$560.23, January 18, 1890; \$108, July 12, 1890; \$45.85, paid by defendant June 28, 1896. That the sum of \$1,500, with interest thereon at seven per cent. from February 1, 1882, less the credits aforesaid, is now due and owing on the said note, of which the defendant owes one-half, and for which amount the plaintiff prays judgment against the defendant, and for costs of this action." The defendant, not denying any of the facts alleged, pleaded the statute of limitations, and demanded an accounting between the partners, alleging that such accounting would show that the partnership owed H. I. McBrayer nothing. By consent all issues of law and fact were referred to the master. When the note was offered in evidence before the master, the defendant objected to the evidence

of payments indorsed upon the note on the ground that the action was brought upon the note, which was barred by the statute. This objection was sustained by the master, and, plaintiff offering no other testimony, motion for nonsuit was granted. On appeal therefrom the circuit court (Judge Gage presiding) reversed the master, holding that the allegations of the complaint were not denied, and therefore stood admitted; that the allegation above quoted showed that defendant had made a payment upon said note within the statutory period; that the action was upon the new promise implied thereby; and that the master's ruling as to the plea of the statute was erroneous. By his order dated August 10, 1899, he remanded the cause to the master "to try the issues and report thereon." Before the holding of any reference under the order the action second entitled above was commenced on November 15, 1899, by the widow and children of H. I. McBrayer for the partition of the real estate owned by Mills & McBrayer, and held by the plaintiffs and defendants as tenants in common. The defendant answered, admitting the right to partition, but demanded an accounting of the partnership affairs, and of the rents collected by the parties subsequent to the death of McBrayer. This partition case was also referred to the master by consent to hear and determine all issues of law and fact. The "case" shows that "on June 22, 1900, the day appointed for reference, it was agreed by counsel that the two cases (the note case and the partition case) should be heard together; that the testimony as to the accounting should be taken subject to objection, and made applicable to either suit. The master allowed the defendant to amend his answer in the note case so as to deny the payment of \$45.85 alleged to have been made by him on June 26, 1896. During the progress of the reference the defendant's counsel moved the master to suspend the accounting until a personal representative of H. I. McBrayer could be appointed. The master held that, as all the parties interested were before the court and *sui juris*, it was not necessary. The testimony was taken, arguments made, and on November 24, 1900, the master filed his report, overruling the defendant's plea of the statute of limitations as to the note and his right to an accounting in either suit except subsequently to the death of H. I. McBrayer, in December, 1892. From that time he stated the account between the parties, showing that O. P. Mills was entitled to a credit of \$255.30 and that Mrs. McBrayer was chargeable with \$532.12. To this report both parties excepted. The cause was heard by Judge Aldrich at November term, 1900, and on January 12, 1901, he filed his decree, dated January 9, 1901, in which he confirms the master's report in all essential particulars." In the first stated case the court gave judgment

against the defendant for \$1,120.85, one-half of the balance on the note, and in the second case decreed for partition, settlement, and division of proceeds of sale in accordance with the conclusions of the master, and from the judgment in each case the defendant appeals.

1. As to the note case. The first five exceptions relate to the order of Judge Gage of August 10, 1899, imputing error in holding that the action was upon a new promise, and not upon the original note, and in overruling the master, who sustained defendant's plea of the statute. We think there was no error in the ruling of Judge Gage. The Code requires a statement of the facts which constitute a cause of action, and not mere legal conclusions. When, therefore, a fact is pleaded, whatever inference of law or conclusion of fact may properly arise from it is to be regarded as embraced in such averment. *Mason v. Carter*, 8 S. C. 104; *Jerkowski v. Marco*, 56 S. C. 245, 34 S. E. 386. The allegation in the complaint of a payment made by the defendant upon the note described within six years before the commencement of the action is an allegation that defendant has done an act from which a new promise is implied by law; and therefore this case does not fall within the rule of *Fleming v. Fleming*, 33 S. C. 508, 12 S. E. 257, 26 Am. St. Rep. 694, wherein the complaint alleged neither a subsequent promise to pay the sum mentioned in a note barred by the statute, nor that any payment had been made thereon by the defendant within six years before the commencement of the action, from which such promise could be inferred. The sixth exception complains that Judge Aldrich erred in sustaining the master's findings of fact that the sum of \$45.85 credited upon the note of June 26, 1896, was made by defendant and entered as a credit by and with his knowledge and consent; and the ninth exception complains that there was error in not holding that the defendant consented to the use by Mrs. McBrayer of the \$45.85 collected by her out of the rents, subject to a general accounting of the partnership business, and that it was not an unqualified payment in acknowledgment that the amount purporting to be due upon the note was due by defendant. If the case was one in equity, and this court had jurisdiction to review the facts, we would be unable to say that the preponderance of the evidence is against the concurring findings of the master and the circuit court on the facts; but this case is one at law, and, having been referred to the master by consent, his conclusions of fact sustained by the circuit court are final, unless such conclusions were based upon some error of law duly excepted to. It is, however, urged in the seventh exception that the master erred in basing his finding of fact upon the allegations of the original answer, which was not offered in evidence when the defendant had been al-

lowed to amend his answer, denying that he had made such payment, and that the circuit court should have sustained defendant's exception to this action of the master. The master in his report said, "The original answer, taken in connection with his testimony, is evidence bearing upon the fact as to whether or not he made the said payment as alleged in the complaint." We agree with the circuit court that under the order of Judge Gage the master was limited entirely to a consideration of the matters growing out of the second defense in defendant's former answer. The order of Judge Gage reversed the master in sustaining the plea of the statute on the ground that the fact of payment of \$45.85 by defendant on the note stood admitted by the pleadings. No request for leave to amend was made to him, and he made no order allowing an amendment. The only issues before Judge Gage upon the pleading were as to the second defense, relating to an accounting of the partnership, which it was claimed would show that nothing was due upon the note. In order, therefore, to give defendant an opportunity to establish by testimony the allegations of the second defense, he with some hesitation remanded the cause to the master to try the issues and report thereon. In view of this, there was no error of law in the master in referring to the original answer, in connection with the other testimony, in determining whether the defendant had paid \$45.85 on the note on June 26, 1896. In addition to this, the circuit court found as a fact that such payment had been made as alleged, independent of the failure of the defendant to deny the same in his original answer, and such finding of fact concludes this court. Section 131 of the Code provides that "payment of any part of the principal or interest is equivalent to a promise in writing," and "shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title." As the note was the property of the plaintiff by due assignment, which fact, as found, was known to the defendant at the time of the payment, the legal effect of the payment was to make defendant liable to plaintiff as upon a new promise to pay plaintiff the sum due by him on said note. This practically disposes of all material questions involved in the first or note case.

2. As to the partition case. The main question in this case is whether the circuit court erred in sustaining the master in finding, as matter of law, that all items in defendant's accounts on account by the partnership matters of Mills & McBrayer previous to the death of H. I. McBrayer are barred by the statute of limitations. We do not think that the court erred in this. McBrayer died in December, 1891, and this worked a dissolution of the partnership, even if the partnership was not practically dissolved in January, 1884, when Mills &

McBrayer sold out their stock and ceased to do business. The action was not commenced until November 15, 1899,—nearly eight years after McBrayer's death. This conclusion practically disposes of the exceptions in this case, and renders it unnecessary to say more than that all the exceptions are overruled.

The judgment of the circuit court is affirmed.

(32 S. C. 18)

BRANDENBURG v. ZEIGLER et al.

(Supreme Court of South Carolina. Oct. 3, 1901.)

SURFACE WATERS—DRAINING ON ANOTHER'S LAND.

1. Where water from surrounding lands collects in a basin, which in rainy season holds large quantities of water, and there is no natural outlet, but the basin sometimes becomes dry by evaporation, it is surface water.

2. Where surface water collects in a pond during rainy weather, it is actionable injury for the owner of the land to drain by a ditch such surface water onto lower proprietor to his injury.

Appeal from common pleas circuit court of Orangeburg county; Gary, Judge.

Action by Eliza C. Brandenburg, guardian of Minnie Halman and others, against Jesse L. Zeigler and Charlotte Buyck. From an order of nonsuit, plaintiff appeals. Reversed.

Glaze & Herbert and Izlar Bros., for appellant. Raysor & Summers and J. B. McLaughlin, for respondents.

JONES, J. This is an appeal from an order of nonsuit in an action for damages, and to abate a nuisance alleged to result from defendants draining a pond of water which otherwise had no outlet from their lands onto the lands of plaintiffs by means of a ditch cut by them, thereby overflowing and mobbing about four acres of plaintiffs' land, and rendering it unfit for agricultural purposes, and thereby also causing impure water to percolate into plaintiffs' well, and rendering it unfit for drinking purposes, and thereby also causing malaria about plaintiffs' dwelling, to the injury of her health and that of her family. The answer, besides a general denial, sets up a prescriptive right to so drain onto plaintiffs' land. The circuit court, in granting the nonsuit, held that the water in question was mere surface water; that defendants could deal with it as a common enemy, and drain it by ditch onto the plaintiffs' land; that any injury resulting therefrom was *damnum absque injuria*; and that the case was governed by the doctrine announced in *Edwards v. Railroad Co.*, 39 S. C. 472, 18 S. E. 58, 22 L. R. A. 246, 39 Am. St. Rep. 746, and *Baltzger v. Railway Co.*, 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789. The exceptions raise practically two questions: (1) Whether the water complained of is surface water; (2) whether an upper proprietor has the right by artificial drains to

collect surface water, and thereby cast or throw it upon a lower proprietor to his injury.

We agree with the circuit court, that the water in question was mere surface water. The complaint described the water as drained from "a large open pond, basin, or sink, commonly called a 'savanna,' which is naturally and completely surrounded by high hills, and which for the greater part of the time, and especially during rainy seasons, collected and held large quantities of water, which was naturally safely kept and held in said basin, sink, or savanna by means of the surrounding high lands and hills; and that before the grievances hereinafter complained of and mentioned the waters from said pond, basin, or savanna did not and could not reach or in any way affect the said lands of plaintiff," etc. The evidence showed that the only source of supply to this pond or basin was rain falling upon the surrounding high lands, which drained over the surface thereof, and accumulated in the said basin, from which it had no outlet, except by evaporation or percolation, until the cutting of the ditch complained of; that said pond was not permanent; that it was dry at times; that one year it was planted to cotton, and that it was usually planted to rice. Such water is nothing more than mere surface drainage over the face of the surrounding lands sloping to the basin, occasioned by rains, and does not possess the essential characteristics of a water course, viz. a stream of water usually flowing in a definite channel. In a note to *Railroad Co. v. Brevoort* (C. C.) 62 Fed. 129, 25 L. R. A. 527, the learned annotator, after collecting many cases on the subject, says: "From all the cases and definitions it would seem that surface water is water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well-defined and substantial existence." In the recent case of *Lawton v. Railroad Co.*, 62 S. C. —, 39 S. E. 752, the court quoted with approval the following definition from 24 Am. & Eng. Enc. Law, 896: "Surface waters are waters of a casual and vagrant character, which ooze through the soil, or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground, and are derived from rains and melting snows, occasional outbursts of water, which at times of freshet or melting of snows descend from the mountains and inundate the country, and the moisture of the wet, spongy, springy, or boggy ground." Under this definition there can be no doubt that the water which supplied the basin or pond was surface water only, and we think

that such water would not lose its character as such simply because the water remained ponded in the basin for a time until it disappeared through evaporation or percolation, leaving the bottom of the basin either dry or in a boggy or marshy condition.

We do not agree with the circuit court, however, in the view taken as to the second question stated above. There being some evidence tending to show that plaintiff had sustained injury as alleged by the draining of said water by an artificial channel constructed by defendants, which cast the water onto plaintiffs' lands, where it would not have otherwise gone, the case ought to have been submitted to the jury. It is clearly settled by the decisions of this court that the common-law rule as to surface water prevails in this state. *Edwards v. Railroad Co.*, 39 S. C. 475, 18 S. E. 58, 22 L. R. A. 246, 39 Am. St. Rep. 746; *Baltzger v. Railroad Co.*, 54 S. C. 245, 32 S. E. 358, 71 Am. St. Rep. 789; *Lawton v. Railroad Co.*, 62 S. C. —, 39 S. E. 752. In the case first cited, the court, speaking by Chief Justice McIver, said: "Under the common-law rule, surface water is regarded as a common enemy, and every landed proprietor has the right to take any measures necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminal proprietor to his damage, which the law regards as a case of *damnum absque injuria*, and affords no cause of action." Under the civil law, by reason of the location, the upper estate has an easement or servitude in the lower estate for the natural flow of surface water from the former to the latter, so that the owner of the lower or servient estate cannot lawfully obstruct such flow. On the other hand, the common law does not recognize any such easement or servitude, and, in view of the owner's dominion over his property, permits the proprietor of land to protect his property from the invasion of surface water. Under this principle of the common law the three cases cited above were decided, each case involving the question whether a proprietor of land may not lawfully refuse to receive surface water upon his premises by embankment against it. We deal now with a different question. In the case of *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, the court said, "There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own." In that case the court recognized the principle that "the owner of wet and spongy land cannot, by drains or other artificial means, collect surface water into channels, and discharge it upon the land of his neighbor to his injury"; saying further, "This is alike the rule of the civil and common law." In the cases cited the court, enforcing the common-law rule, held that no action would lie for cutting off the flow of surface water, even though injury was

incidentally done to another. In Massachusetts, where the rule of the common law is enforced, the same distinction is recognized; for in the case of *Rathke v. Gardner*, 134 Mass. 14, the court said: "But there is a well-settled distinction that, although a man may make any fit use of his own land which he deems best, and will not be responsible for any damages caused by the natural flow of the surface water incident thereto, yet he has not the right to collect the surface water on his own land into a ditch, culvert, or other artificial channel, and discharge it upon the lower land to its injury." In 24 Am. & Eng. Enc. Law, 928, it is stated: "Nor can the owner of the upper land collect the waters of his estate into a ditch or drain, and discharge it in a volume on the lower land to its injury. It is no defense to an action for wrongfully discharging surface water on the plaintiff's lands that the plaintiff might, by taking steps to protect his land, have avoided or prevented the damage. The rule that one owner of land who collects water in a body and casts it upon the lower premises to their injury is responsible in damages is followed alike in the states which have adopted the common law as well as those which have adopted the rule of the civil law." The author cites many cases, and, in so far as we have been able to examine the cited cases, they support the text. In an elaborate note to *Gray v. McWilliams* (Cal.) 21 L. R. A. 593 (s. c. 32 Pac. 976, 35 Am. St. Rep. 163), the learned annotator shows that "the great majority of the courts, whether inclined to follow the civil law or the so-called common law, unite in holding that, whatever else may be done with surface water, the proprietor whose land it has reached cannot divert it from its natural course, and cast it in a body on an adjoining proprietor." See the following cases from states which have adopted the common-law rule: *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec. 742; *Pye v. City of Mankato*, 38 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671; *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; *Rychlicki v. City of St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 3 Am. Rep. 50. See, also, *Ang. Water Courses* (7th Ed.) p. 133, and cases collected in 4 Shars. & B. Lead. Cas. Real Prop. 340. In a recent case from Wisconsin (*Schuster v. Albrecht*, 73 N. W. 990, 67 Am. St. Rep. 804) the court held that the owner of land on which there is a pond of surface water cannot lawfully conduct it by an artificial channel to a point where it would inevitably permeate the surrounding soil, and percolate through the same into and permanently injure his neighbor's land. The rule announced, we think, is reasonable. When one having the right to cut off surface water from his land nevertheless permits such water to collect in a natural

basin on his land, he has an absolute right of property in such water, and may use it exclusively as his own. His dominion over such water is as great as his dominion over the realty upon which it rests, and of which it is a part. He can no more cast such water, by artificial means, injuriously upon his neighbor, than he could cast the mud or soil upon his neighbor's premises. In either case he would violate the neighbor's right of dominion over his own property. The absolute right of the lower proprietor to embank against the flow of surface water, and thereby cause it to rest upon the upper proprietor's land, is wholly irreconcilable with the claimed right of the upper proprietor by artificial means to collect and cast such water upon the lower proprietor. It is a maxim of the common law ("Sic utere," etc.) that every one must so exercise his legal right as not necessarily to injure another in the exercise of his legal right. If, therefore, the upper proprietor has no easement to drain surface water upon the lower proprietor either by natural or artificial means, and the lower proprietor has the legal right to cast it back upon the upper proprietor, it would seem unreasonable to hold that the upper proprietor may, nevertheless, lawfully collect such water in artificial channels, and throw it upon the lower proprietor. The upper proprietor may acquire the right to drain surface water onto his neighbor's land through artificial channels by prescription. This, of course, involves a right of action to prevent such prescriptive right.

The testimony in this case was to the effect that the pond of water was wholly upon the land of the defendant Zeigler; that in 1873 John Brandenburg, a former owner, partially drained this pond by a ditch of small depth over his land to the land of defendant Charlotte Buyck, then owned by R. E. Clark; that about 1886 Clark extended this ditch some distance across his land; that about 1894 the defendants Zeigler and Buyck deepened this ditch so as to completely drain the pond; that the ditch ended on Buyck's land 428 yards from plaintiff's land, but that the water flowing from the ditch made a gully down the slope through which it flowed into plaintiff's land below; and there was evidence tending to show that plaintiff was thereby injured.

It was improper to nonsuit. The judgment of the circuit court is therefore reversed, and the case remanded for a new trial.

(32 S. C. 25)

CAIN v. SOUTH BOUND R. CO.

(Supreme Court of South Carolina. Oct. 3, 1901.)

SURFACE WATER—DRAINING ON ANOTHER'S LAND.

Where a railroad company, in turning surface water off its right of way for the purpose of protecting its roadbed, casts it upon another's land in a concentrated flow, it is an actionable injury.

Appeal from common pleas circuit court of Bamberg county; Watts, Judge.

Action by A. C. Cain against the South Bound Railroad Company. From an order sustaining demurrer of defendant, plaintiff appeals. Reversed.

J. P. Matheney, Howell Gruber, and A. M. Bostick, for appellant. O. J. C. Hutson and Laurie T. Izlar, for respondent.

JONES, J. This appeal is from an order sustaining a demurrer to the complaint, said demurrer being based on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that the sole damages claimed by the plaintiff are alleged to have occurred by the flowing of surface water on the lands of the plaintiff by the defendant in turning it off its right of way for the purpose of protecting and preserving its roadbed. The complaint is as follows (after alleging the incorporation of the defendant company and the ownership by plaintiff of the land described): "(3) That a short distance south of plaintiff's said land, and before entering said land from the Savannah side, the aforesaid railroad of defendant traverses a natural depression in the adjoining lands, wherein the surface waters from the adjoining lands of other owners were from time immemorial wont to accumulate, making a natural pond or reserve of water during and after the seasons of considerable rainfall, which said accumulation of surface water had always been accustomed, before the construction of defendant's said railroad, to waste away and disappear from absorption and evaporation, there being no outlet therefor, without coming upon or in any wise affecting plaintiff's said land. (4) That the construction of defendant's said railroad through said depression has since caused the accumulation of waters therein to follow the grade of said railroad, and flow along the drain constructed by defendant along the west side thereof where it intersects the aforesaid land of plaintiff, being confined within the said drain on the west side of said railroad by the natural conformation of the land on the one hand and by the bed of defendant's said railroad on the other, whereby it was prevented from crossing on the lands of plaintiff on the east side of said railroad. (5) That at a point where said railroad crosses a considerable and fertile field of plaintiff on his said land accustomed for many years before and ever since the construction of said railroad to be planted in cotton, corn, and other crops, and where the lowest, and naturally the most productive, portions thereof lie, in order to direct the course of the aforesaid water from its said right of way, defendant, its servants, agents, and employees, threw up an embankment across said drain on the west side of its roadbed, and placed at the abutment of said embankment upon its roadbed a waste pipe under its track and

39 S.E.—504

through and across its said roadbed, causing the said waters to flow through and under its said track, and to discharge themselves upon and into the said field of plaintiff, thereby causing during each and every year frequent inundations of a considerable portion of said field, and destruction of crops growing thereon, and injury to the soil from the washing away thereof, and the deposit of worthless sand brought down by the flow of said waters; all of which was done by defendant wrongfully, unlawfully, and without right or authority. (6) That the aforesaid pipe and embankment, with the drainage therethrough, are now, and have been for the whole period of plaintiff's ownership of said lands, maintained and kept up by defendant, its servants, agents, and lessees, wrongfully, unlawfully, and without regard or permission, in willful, reckless, and wanton disregard and violation of the rights of plaintiff, and to the great, continuing, and constantly increasing damage of plaintiff's said land, and its utility and rental value for agricultural purposes, in utter, reckless, willful, and wanton disregard of the damage that thereby has ensued and is now ensuing to the said plaintiff, and after repeated notice from plaintiff to defendant, its servants, agents, and lessees, requiring the abatement of said nuisance, to the damage of plaintiff in the sum of five hundred dollars." We think it was error to sustain the demurrer. Conceding that the water which defendant caused to flow upon plaintiff's land was surface water, it was an actionable injury for the defendant to collect such water in an artificial channel, and cast it onto plaintiff's land in concentrated flow. This subject has been recently considered in the case of *Brandenburg v. Zeigler* (S. C.) 39 S. E. 790, and the rule as therein stated should govern this case.

The judgment of the circuit court is reversed.

(62 S. C. 68)

TRUSTEES OF BURROUGHS SCHOOL v. BOARD OF CONTROL OF HORRY COUNTY.

(Supreme Court of South Carolina. Oct. 26, 1901.)

INJUNCTION—PLEADING—DEMURRER—DISPENSARY—ESTABLISHMENT—NOTICE.

1. Where, on a petition for an injunction in the supreme court, a demurrer is filed, resting on alleged facts which appear nowhere else in the record, and supported by no testimony, such allegations cannot be considered.

2. Under 22 St. at Large, p. 128, § 7, providing that before the establishment of a dispensary the board of control must give a notice for 20 days designating the locality where it is proposed to establish it, a notice by a board of control for the location of a dispensary in a county which does not state the particular locality is defective.

3. Citizens having property rights to be injured by the location of a dispensary will be granted an order enjoining the board of control from locating the dispensary, on a notice

which is defective in failing to state the particular locality, as required by statute.

Petition by E. Norton and others, trustees of the Burroughs School, for an injunction against J. H. McCaskill and others, constituting the board of control of Horry county, to restrain respondents from locating a dispensary in the town of Conway. Injunction granted.

Robt. Scarborough, for petitioners. Fred. D. Davis, for appellees.

McIVER, C. J. This is a petition addressed to this court in the exercise of its original jurisdiction, praying that the respondents, as constituting the board of control of Horry county, and their associates and successors in office, may be perpetually restrained and enjoined from establishing a dispensary within one mile of said Burroughs School. The material allegations of the petition may be substantially stated as follows: That by an act entitled "An act to incorporate the Burroughs School, of Conway, Horry county, S. C., and to prohibit the sale of intoxicating liquors within one mile thereof," approved 23d December, 1889 (20 St. at Large, p. 539), the petitioners and their associates were duly created a body corporate by the name and style of "Trustees of Burroughs School"; that soon thereafter the said corporation was duly organized, and a seminary of learning, situated at Conway, Horry county, S. C., was established, which has ever since been conducted and carried on in the said town of Conway, for the instruction of the youth, both male and female, of the said town and surrounding country, under the name and style of "Burroughs School"; that the petitioners named in the title of this case are now the trustees of said school; that the persons named as respondents in the title of this case constitute the board of control for the county of Horry, appointed in pursuance of the provisions of the law known as the "Dispensary Law"; that the third section of the act above referred to expressly prohibits the sale of any intoxicating liquors within a radius of one mile from said school; that the respondents, styling themselves the "Board of Control of Holly County," during the month of January, 1901, caused to be published in the Horry Herald, a newspaper published in the county of Horry, a notice in the following form: "A petition having been circulated asking for the establishment of a dispensary in Conway township, after twenty days' notice from January 9th the board of control will proceed to remove the dispensary from Toddville into Conway township;" that the publishing of this notice was an attempt on the part of the said board of control to comply with the provisions of the dispensary law upon the subject, but that the same was fatally defective in that the notice contained no designation of the locality in Conway township where it was proposed to establish

the dispensary; that it is the avowed and express intention of said board of control to establish a dispensary in the town of Conway, which is embraced within the limits of Conway township, and within less than one mile of Burroughs School, in direct violation of the charter of said school; that by reason of said defective notice the petitioners and other citizens of Conway township were prevented from intelligently contesting the establishment of a dispensary in Conway township, because it could not be known with any definite certainty whether the establishment of the dispensary would infringe upon the rights of the petitioners as trustees of Burroughs School, conferred by their charter, or whether the location of the dispensary would be unsatisfactory to the citizens of said township generally, whereby they were unable to exercise the right accorded to them by the dispensary law of contesting the establishment of such dispensary; that, after the expiration of the time limited in the said notice, no objection having been entered by reason of the vital defect in the notice as above stated, the respondents, as members of the said board of control, have assumed the authority of establishing a dispensary in the town of Conway, contrary to the provisions of the dispensary law, under which they claim to act, as well as contrary to the provisions of the charter of said school hereinabove referred to; that the petitioners have property rights in said Burroughs School, both as to the property owned by the corporation and the rights and privileges vested in them by the said charter, and that they are without adequate remedy at law for the preservation and protection of such rights. For these reasons the petitioners claim their right to the injunction prayed for in their petition. To this petition the respondents filed a demurrer upon the grounds resting upon allegations of fact which appear nowhere else in the record, and of which no testimony has been offered. We cannot consider such allegations, of which there is no evidence whatever, but must treat the paper styled a "demurrer" as being nothing more than a demurrer upon the ground that the facts stated in the petition are not sufficient to constitute a cause of action, which, of course, is an admission of all the facts stated in the petition.

The relief asked for in the petition is demanded upon two grounds: (1) Because of fatal defects in the proceedings taken by the respondents for the purpose of establishing a dispensary in Conway township, to wit, in the notice above copied there is no designation of the particular locality in said township where the board of control proposed to establish a dispensary; (2) because the charter of Burroughs School forbids, in express terms, the sale of any intoxicating liquors of any kind, in any quantity whatsoever, within a radius of one mile from said school,

and "that no license, from any authority whatever, shall warrant such sale."

As to the first ground, it is very obvious—indeed, it is conceded—that under the provisions of section 7 of the act of 1896—(22 St. at Large, p. 128), which, it is admitted, and properly admitted, has never been repealed or altered by any subsequent legislation upon the subject, it is a prerequisite to the establishment of a dispensary that the county board of control must give a notice for 20 days, designating the locality where it is proposed to establish a dispensary. This requirement is absolutely essential in order that the voters of the township in which it is proposed to establish a dispensary may avail themselves of the privilege, accorded to them in the same section of the statute, of petitioning the board of control not to establish a dispensary at the particular locality designated in the notice. Now, it is apparent on the face of the notice set out in the petition that this essential provision of the statute has not been complied with, as the said notice fails to designate any particular locality where it was proposed to establish the dispensary; and as it is alleged in the petition that, owing to this defect in the notice, the voters of Conway township were unable to avail themselves of the privilege accorded them by the statute, as has been hereinbefore referred to, and hence any subsequent step taken by the board of control towards establishing a dispensary within the limits of Conway township under the said notice would be wholly without authority of law, and being, as it is alleged in the petition, injurious to, if not destructive of, the property rights of the petitioners, they are entitled to the injunction as prayed for in their petition. Under this view, the point raised by the second ground cannot arise, and will not, therefore, be considered; for, if the notice under which the respondents are alleged to have been acting is fatally defective, then the respondents would have no legal authority to establish a dispensary anywhere; and hence the question presented by the second ground, to wit, that under the charter of the Burroughs School the respondents are prohibited from establishing a dispensary within a radius of one mile from the Burroughs School, could not arise; for, even if that provision of the charter of said school has been repealed, as contended for by the respondents,—a proposition upon which we are not to be regarded as expressing, or even intimating, any opinion,—the petitioners would still be entitled to the injunction prayed for in their petition.

The judgment of this court is that the prayer of the petition be granted, and that the respondents, now constituting the board of control for Horry county, together with their associates and successors in said office, be, and they are hereby, perpetually restrained and enjoined from taking any further steps towards establishing a dispensary with-

in the limits of Conway township of Horry county, under the notice set forth in the petition.

(129 N. C. 508)

STATE v. JONES.

(Supreme Court of North Carolina. Oct. 22, 1901.)

TEARING DOWN BUILDING—MISDEMEANOR—ELEMENTS OF CRIME.

Code, § 1062, makes it a misdemeanor to willfully and unlawfully demolish or injure any building. Defendant, while still in possession of property which had been sold under a mortgage executed by him, pulled down a dwelling house. The defendant had full knowledge of the sale. *Held*, that defendant was not guilty of an offense under section 1062, as, to constitute such an offense, defendant must have been a trespasser.

Appeal from superior court, Wayne county; Starbuck, Judge.

Primus Jones was convicted of removing and destroying a certain house belonging to another, and he appeals. Reversed.

The evidence, without contradiction or conflict, showed that defendant pulled down the house, which stood on the land which he had mortgaged to Mrs. Exum to secure a debt, and that she had sold the land at public sale under the power contained in the mortgage, and that the prosecutor, G. D. Best, became the purchaser, and she executed a deed to him, all of which took place a day or two prior to the pulling down of the house. Defendant attended the sale under the mortgage, and knew that prosecutor bought the land. When defendant began pulling down the house, the prosecutor forbade his doing so, and offered to show him his deed. Defendant said he did not care to see it, and continued pulling the house down. The deed was not registered till several days after the house was pulled down. The prosecutor was never in the actual possession of the land. Defendant had been in the actual possession for several years prior to the mortgage sale, and remained in possession after the sale, and was in possession at the time of pulling down the house. Upon this evidence defendant requested the court to charge the jury if he was in the actual possession at the time of pulling down the house. Refused. Defendant excepted. Upon the trial defendant offered to testify that Mrs. Exum had told him that he would be permitted to hold possession as long as he kept up a life insurance policy for the benefit of Mrs. Exum as mortgagee. Defendant did not offer to prove that prosecutor had knowledge of this matter. Objection to above-offered testimony sustained, and defendant excepted. Verdict of guilty. Defendant appealed from the judgment.

Brown Shepherd and the Attorney General, for the State.

FURCHES, C. J. This is an indictment under Code, § 1062, for pulling down a house.

The defendant, it seems, was the owner of the house, and mortgaged it to Mrs. Exum, with power of sale. The debt not being paid, Mrs. Exum sold, and the prosecutor, Best, bought, and took a deed therefor from the mortgagee. This sale took place a few days before the alleged offense was committed. The defendant was living in the house at the time he pulled it down, and had been for several years, as the mortgagor of Mrs. Exum. Best, the purchaser, was present when the defendant pulled down the house, offered to show the defendant his deed from the mortgagee, and forbade the defendant's pulling down the house. The defendant, who was present at the mortgage sale, said he did not want to see the deed, and proceeded to pull down the house. Neither had the prosecutor, Best, nor Mrs. Exum ever been in the actual possession of the house. Upon this evidence, which was uncontradicted, the defendant requested the court to charge the jury that the defendant was not guilty. The court refused to charge as requested, and defendant excepted, and, upon a verdict of guilty and judgment, appealed.

If this statute had not been already construed by the court in so many cases, we would be very much disposed to affirm the judgment below, as it seems to us that it was the intention of the statute to prevent the willful pulling down a house, not belonging to the party doing so, to the damage of the owner, and the willful act of pulling down such house constituted the criminal offense. But this court has put a different construction upon the statute, and, being instructed by these decisions, it would seem that we should say the defendant was entitled to the charge asked for,—"that upon the evidence he was not guilty." It is held, to constitute a criminal offense under section 1062 of the Code, there must be a trespass. *State v. Williams*, 44 N. C. 197; *State v. Watson*, 86 N. C. 626; *State v. McCracken*, 118 N. C. 1240, 24 S. E. 530. And a party in actual possession cannot commit a trespass upon the property he is in possession of. *State v. Howell*, 107 N. C. 835, 12 S. E. 569; *State v. Reynolds*, 95 N. C. 616; *Dobbs v. Gullidge*, 20 N. C. 197. Therefore, according to the logic of these decisions, as the defendant is shown to have been in the actual, lawful possession of the house at the time he tore it down, he committed no criminal offense under this statute. We say the lawful possession, to distinguish his possession from that of a mere trespasser, which would not protect him from the penalty of the statute. The prosecutor doubtless was entitled to the possession of the house, but his being entitled to have the possession did not give him the possession. If the house had been vacant, the prosecutor's title would have given him constructive possession of the house. But there is no such thing as a constructive possession as against the actual

adverse possession of another person. *State v. Reynolds and Dobbs v. Gullidge, supra*. We have said, the defendant being in the lawful possession; that is, his possession commenced rightfully, and not tortiously. And while the prosecutor may have been entitled to the possession, the defendant having gone into possession rightfully, his possession was not unlawful, within the criminal meaning of the term. Error.

(129 N. C. 128)

HOLT v. JOHNSON et ux.

(Supreme Court of North Carolina. Oct. 22, 1901.)

REFERENCE—FINDINGS OF FACT—AGENCY—DECLARATIONS OF PRINCIPAL—HEARSAY.

1. Under a reference by consent, the findings of fact are conclusive if there was any evidence to support them.

2. Defendants claimed that testator promised, both before and after they gave the note sued on, to reduce the interest thereon from 8 to 6 per cent. Testator sent word by one of defendants to have K., another debtor, come to see him, and he would reduce the interest on K.'s note to 6 per cent. Held, that K.'s evidence as to conversations wherein defendant had told him of testator's promise to reduce his interest also was not rendered competent on the ground that defendant was testator's agent, since the agency extended only to defendant's informing K. that testator wished to see him, and not to what testator had said about reducing defendant's interest.

3. Declarations, incompetent as hearsay, are not rendered admissible because they may tend to corroborate other testimony.

Appeal from superior court, Wake county; Starbuck, Judge.

Action by T. B. Holt, executor, against Barney Johnson and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

W. J. Peele and A. J. Felld, for appellants. Herbert E. Norris, for appellee.

FURCHES, C. J. This is an action upon a note and to foreclose a mortgage given to secure the same. The execution of the note and mortgage is admitted, and the only question presented by the appeal is whether the defendants shall be charged with 8 per cent. interest or 6 per cent. At April term, 1900, the following order was made: "It is by consent decreed that this case be referred to S. F. Mordecai to find the law and the facts, and that judgment may be entered thereon out of term." This seems to have been a submission to arbitration, rather than a reference for an account; but, as the referee and the parties have treated it as a reference rather than a submission, we will so treat it. But, treating it as a reference, the findings of fact are conclusive, if there was any evidence to base them upon, as the order was by consent; and there is no exception to the finding of any fact upon the ground that there was no evidence to support it. The note, on its face, is for 8 per cent., but it is alleged by the defendant that the testator, before the note was executed, prom-

ised to reduce it to 6 per cent. If the legislature, soon to meet, should reduce the rate of interest to 6 per cent.; and that, after the legislature had reduced the rate of interest to 6 per cent., he again promised to do so, and that he should only be charged with 6 per cent. The note being at 8 per cent., the burden was upon the defendant to show that it should be reduced to 6. The referee found that defendant had failed to show this, and so reported to the court. This being purely a question of fact, the referee's finding must stand, unless he has based his finding on improper evidence. This the defendant alleges he has done, and files numerous exceptions.

The first exception (a) is to the evidence of John Kent, introduced by defendant, and objected to by plaintiff. This objection was overruled, and, of course, the defendant cannot complain of that. But it does not seem to us that this evidence was competent, and, had plaintiff's objection been sustained, the defendant would have had no cause to complain. It was the detailing a conversation with the witness and the defendant Johnson, and was incompetent. It seems that the witness owed the testator a note, and he had sent word by Johnson to the witness Kent to come and see him, and he would reduce Kent's interest to 6 per cent.; and the defendant contends that this made Johnson the agent of the testator, and therefore the evidence was competent. But the error in defendant's contention consists in the fact that, while Johnson was testator's agent to tell Kent to come and see him, and he would reduce the interest on his note to 6 per cent., he was not the testator's agent to tell Kent that testator said he had promised to reduce his (Johnson's) interest to 6 per cent. It is also contended that it corroborated Kent's evidence, and was competent on that account. But we do not understand the rule to extend to the extent of making a party's declarations competent that are otherwise incompetent because they may tend to corroborate the evidence of some other witness. Besides, they do not corroborate Kent, as Kent said: "Johnson came to see me, and told me that Mr. Burns [testator] wanted to see me. He said he wanted to see me about my note. That is all the message he delivered from Burns. This is the only message that Johnson brought me from Burns." So it is seen that Johnson's evidence did not corroborate Kent. Besides, it was incompetent, under section 590 of the Code, as Johnson would not have been allowed, under objection, to have testified to anything Burns said to him about altering the interest from 8 to 6 per cent. This discussion of Kent's testimony is intended to apply to defendant's exceptions "b" and "c," as well as to exception "a." The defendant Johnson was then examined, and testified, under objection, as to his conversation with Kent, which was ruled out by the referee and the court, and defendant excepted as indicated by excep-

tions "d" and "e." We have sufficiently discussed these exceptions in discussing exceptions "b" and "c." Plaintiff's exceptions "f" and "g" were overruled, and defendant has no cause to complain at that. There are a number of other exceptions, all of which have been examined, and carefully considered, and none of which can be sustained. But they do not seem to be of sufficient importance to demand a separate discussion.

We are therefore led to the conclusion that the judgment should be affirmed.

(129 N. C. 141)

KERR et ux. v. HICKS.

(Supreme Court of North Carolina. Oct. 22, 1901.)

ORDER OF REFERENCE—CHARACTER—SUBSEQUENT FINDING—EFFECT—COMPULSORY ORDER—ANSWER NOT FILED—ERROR—FAILURE TO APPEAL—CONSENT ORDER—RIGHT TO JURY TRIAL—WAIVER.

1. Plaintiff in his complaint asked for an order of reference. Defendant also requested a reference, and his counsel drew the order. At a subsequent term the court found, on plaintiff's motion, that the order of reference was not a consent order, but was compulsory. *Held*, that this finding did not constitute a new order or an amendment of the original order, but merely determined that the original order was compulsory when rendered.

2. A compulsory order of reference made in an action in which defendant has not answered is erroneous.

3. Where a compulsory order of reference is erroneously made in an action in which the defendant has not yet answered, but the parties do not appeal therefrom, they thereby waive their right to subsequently question it on appeal of the action.

4. Where a party fails to appeal from a compulsory order erroneously directing a reference, he will be deemed to have consented to such order, so as to waive his right to trial by jury.

Appeal from superior court, Sampson county; Hoke, Judge.

Action by John D. Kerr and wife against R. W. Hicks. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Stevens, Beasley & Weeks, E. K. Bryan, and Frank McNeill, for appellant. J. L. Stewart and F. R. Cooper, for appellees.

FURCHES, C. J. This action was brought by the plaintiffs for an account and settlement with the defendant of transactions between them continuing through a number of years, and for judgment. Owing to the blanks in the pleadings, we are not able to tell just when these transactions commenced or ended. But, from the statement in the record, they must have commenced as early as 1861 or 1862, and continued until 1888. The action was commenced in October, 1891, and at December term, 1891, there was a reference to W. R. Allen to take and state an account. This order was apparently a consent order. The plaintiff had asked for an order of reference in his complaint, and it seems at the same term when the order was made the defendant asked for it, and his counsel drew the order of reference. At this time there had

been neither complaint nor answer filed, and leave was granted to the plaintiff to file his complaint, and to the defendant to file his answer. The plaintiff afterwards filed his complaint, and the defendant filed his answer, and the referee proceeded to take and state the account. The referee's account does not seem to be dated as of any term of court or otherwise. But we suppose it was made to October term, 1893, as we see that an allowance was made to him at that term for taking the account, and 60 days were allowed to each party to file exceptions thereto. Both parties filed exceptions,—the plaintiff's dated as of October term, 1893, amended at October term, 1900. The defendant's exceptions do not show when they were filed, as they should do. And the clerk should note on every paper filed in his office the date when it was filed. This would save much trouble and many disputes between parties and attorneys. At February term, 1894, upon notice of plaintiff, Brown, J., upon affidavits of the plaintiff and others, including that of defendant's attorney, found that the order of reference to Allen, under which the account had been taken, was not a consent order, but was compulsory, and that the plaintiff had the right to have his exceptions tried by a jury, "and ordered that the plaintiff and defendant file with the clerk of the court on or before the next term of court such issues of fact as it is claimed by each party as arise upon said exceptions filed by plaintiff to the report of the referee." To this order the defendant excepted. Under this order both parties filed issues, and the court submitted to the jury a part of those filed by the plaintiff, and rejected those filed by the defendant. In the defendant's answer he pleaded an account stated; that he had furnished the plaintiff with monthly statements of their dealings, showing every item of debit and credit, and, in addition to that, had furnished the plaintiff with a full itemized account of their entire transactions, and the plaintiff had never objected to any one of them, but, after examining them, had assented to their correctness, and had made him a payment of \$75 thereon; that this account as thus stated showed that plaintiff was indebted to defendant more than \$800. And the defendant contends that this was a plea in bar, and should have been disposed of before there could be a reference. There being a verdict and judgment for the plaintiff, the defendant appealed.

The case in some respects is remarkable. The plaintiff brought an action against the defendant, in which he sets out the transactions of several years' dealing with the defendant, amounting in all to seventy or seventy-five thousand dollars, claiming that the defendant is largely indebted to him, and asks for a reference. The reference is made, and the account taken, which shows a balance against him. The report was made to October term, 1893, and at February term, 1894, upon the motion of plaintiff, it is found that

the order of reference was not a consent order, but compulsory, and made against the consent of the plaintiff; and, in the order finding that it was a compulsory order, the court declares that the plaintiff is entitled to a jury trial. The defendant excepts to this order, and says that the court had no right to change the order from a consent order to a compulsory order, and, if it had the right to do this, it had no right to declare that the plaintiff was entitled to a jury trial on his exceptions to the referee's report. We will not say that the court did not have the right to find that the order of reference was not a consent order, but was a compulsory one, and to correct the records of the court so as to make them so speak. But this correction of the record made the order compulsory at the time it was first made. It was not a new order, not an amended order. For, if the order was a consent order when made, it could not be changed to a compulsory order except by consent of both parties. *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451; *Driller Co. v. Worth*, 117 N. C. 518, 23 S. E. 427; *Smith v. Hicks*, 108 N. C. 251, 12 S. E. 1035; *Perry v. Tupper*, 77 N. C. 413. And, if it was a compulsory order, the court had no right to make it, there being a plea in bar. *Bank of Tarboro v. Fidelity & Deposit Co.*, 126 N. C. 320, 35 S. E. 588; *Smith v. City of Goldsboro*, 121 N. C. 350, 28 S. E. 479; *Royster v. Wright*, 118 N. C. 152, 24 S. E. 746; *Collins v. Young*, 118 N. C. 265, 23 S. E. 1005; *Austin v. Stewart*, 126 N. C. 527, 36 S. E. 37. If it is said that the court would not have made the order if the answer had been filed setting up a plea in bar before the order was made, this would not relieve the situation. For, if we take that view of the matter, it would have been the duty of the referee to have declined to take the account, and refer the matter back to the court. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248. Since the correction the order of reference must be treated as a compulsory reference when made in 1891. The plaintiff says he so understood it to be a compulsory reference. And, it being a compulsory reference, the court had no right to make it when there was a plea in bar, and the parties had the right to appeal from said order. *Bank of Tarboro v. Fidelity & Deposit Co.*, 126 N. C. 320, 35 S. E. 588. And, as they did not appeal, did they not lose any right they might have had by objecting to the order? Was it not presumed that they had waived their right by not appealing, and proceeding with the account? And was not the referee justified in so considering the matter, and proceeding with the account? This seems to us to be so. *Grant v. Hughes*, 96 N. C. 191, 2 S. E. 339; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707. If the plaintiff lost his right by not appealing, and by proceeding with the account (that is, if he waived his objection by not appealing, and it seems he did), the order will be treated as if made by consent of the parties. We say the plaintiff, because the de-

endant still treats it as a consent order. And, if made by consent of the parties, or if the objecting party waived his objection by not appealing from the order, he lost his right to have a jury to pass upon his exceptions. *Driller Co. v. Worth* and *Grant v. Hughes*, supra. This, it would seem, disposes of the appeal.

The defendant also contends that the plaintiff has lost his right to a jury trial, for the reason that he has not complied with the rule in *Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427; *Id.*, 118 N. C. 746, 24 S. E. 517. This would be so if the defendant had assigned this as one of his grounds of error, which he does not seem to have done.

There are other exceptions as to the competency of evidence and as to the account, but, as they are not necessary to the determination of the appeal, we do not enter upon a discussion of them.

There is error in the record below, as pointed out in this opinion. Error.

(129 N. C. 101)

PORTER v. ARMSTRONG et al.

(Supreme Court of North Carolina. Oct. 15, 1901.)

DRAINS—ENLARGEMENT—EXPENSE—RECOVERY—EASEMENT—STATUTORY PROCEEDINGS—NATURAL WATER COURSE.

1. Pub. Laws 1899, c. 255, § 1, provides that, where two or more persons have dug a ditch under an agreement to which all have contributed, it shall be unlawful for a servient owner to obstruct such ditch without the higher owner's consent. Section 3 provides that after a ditch has been maintained for a certain time, that fact shall be prima facie evidence of its necessity, and proceedings may be had to apportion among the parties interested the cost of digging the same. A servient owner gave permission to a dominant owner to drain part of the latter's farm in a canal four feet wide, maintained by the servient owner for drainage of his own property. *Held* that, even if this conferred an easement on the dominant owner, it did not give him a right to enter on the servient owner's property, and enlarge the ditch to nine feet, and collect the expense of so doing from the servient owner under the act of 1899.

2. The dominant owner brought proceedings to enlarge the ditch, and did enlarge the same, but the proceedings were dismissed because of failure to make the servient owner a party thereto. *Held*, that such dominant owner could not recover from the servient owner, under such statute, for the enlarging, since, the proceedings under which he acted being void, he was a mere trespasser.

3. The mere fact that the servient owner stood by and witnessed the enlarging of the ditch by the dominant owner under the statutory proceedings was not sufficient to make the servient owner, not otherwise brought into court, a party thereto.

4. The fact that the natural drainway of the dominant owner's land was through the ditch would not make such ditch a natural water course, so as to give the dominant owner a right of entry on the other's property to free the same from obstruction.

Appeal from superior court, Pender county; Hoke, Judge.

Action by Elisha Porter against Thomas J. Armstrong and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Stevens, Beasley & Weeks, for appellant. J. T. Bland and Frank McNeill, for appellees.

DOUGLAS, J. This is a proceeding begun by the plaintiff under chapter 255 of the Public Laws of 1899. It appears that the plaintiff owns 200 acres of land known as the "Pigford Farm," while the defendants own about 450 acres of land known as the "Durham" or "Stanley" lands, and lying between the plaintiff and Mill creek. From time immemorial the owner of the Durham lands has maintained through said lands a ditch, called "Strawberry Canal," draining them into Mill creek. About the year 1859 or 1860, Lane, the then owner of the Durham lands, gave permission to Berry, then owner of the Pigford farm, to connect with Strawberry canal, so as to drain a part of the Pigford farm into said canal. The remainder of said farm seems then to have been drained, if drained at all, in some other direction; but whether into Clayton creek, or through some other channel into Mill creek, does not clearly appear. The petitioner does not appear to rely upon this permission, which seems to have been a mere license. Even if it amounted to an easement, it would extend only to the drainage of the "five or six acres of land on the south side of the Pigford farm next to the Durham land," for which it was originally granted, if granted at all. It cannot be extended by implication to the entire farm, and certainly not to the waters of Jones' swamp. Moreover, the said permission was for only a "four-foot ditch." In *Porter v. Durham*, 74 N. C. 767, this court says (on page 779): "The defendants alleged that there is an ancient ditch running from Branch No. 1 nearly in the direction of the one recently cut by them, and hence claim, as we suppose, a prescriptive right to their ditch. But when the right to an easement is claimed by long enjoyment, from which a grant is presumed, the grant presumed is for the precise right which has been enjoyed, and long enjoyment of one ditch can raise no presumption of a grant of a right to a ditch differing in any appreciable degree from that enjoyed in locality or dimensions." The petitioner, who in the meantime purchased the Pigford farm, testifies that in the year 1874 he filed a petition before the commissioners to open and enlarge Strawberry canal, as "Durham, the ancestor of the defendants, had filled in his Strawberry canal with logs so as to dam the water back on the plaintiff's land, and keep his own ditch open below." What became of said petition we do not know, unless it is one of the petitions referred to in *Porter v. Durham*, 98 N. C. 320, 321, 8 S. E. 832. Again, the plaintiff testified as follows: "The defendant Armstrong also filled this ditch in

with logs in June, 1896, and backed the water up on witness' farm. Under the advice of counsel, witness removed the logs, and wrote the defendant a letter about it. About this time witness applied to the board of commissioners for the privilege of enlarging said canal, and under an order from the board witness did enlarge the canal on the defendant's land to a depth and width of nine feet. The ditch was originally four feet before witness thus contributed to its enlargement. The said improvement cost this plaintiff \$225. That Durham was there when the plaintiff cut and widened this canal, and did not object to it. This proceeding, under which plaintiff enlarged the canal, was dismissed as being irregular, and contrary to law." We presume that the date "1896" in the above quotation should be "1886," as the case appears to have been determined in this court at its September term, 1887. The drainage of these lands has been a fruitful source of litigation, as this is the fourth time it has been before this court in one form or another. *Porter v. Durham*, 74 N. C. 767; *Id.*, 79 N. C. 596; *Id.*, 98 N. C. 320, 3 S. E. 832. The last-named case seems to settle the one at bar, inasmuch as it decided that the defendant Durham was not a party to the proceeding of 1874, which was therefore void as to him, even when collaterally attacked. The court well says that in a summary and special proceeding, which results in appropriating one man's property to the use of another without the assent of the former, the provisions of the statute must be strictly followed, even in its minute and particular directions, and that the presence of the owner does not make him a party, or affect the result. This court says further (on page 323, 98 N. C., page 834, 3 S. E.): "We do not think all these safeguards thus thrown around the exercise of this special power can be thus disregarded, and a legal result reached in so doing." It seems to us to follow conclusively that when the plaintiff enlarged Strawberry canal under a proceeding that was absolutely void he was a mere trespasser, and cannot now claim credit, directly or indirectly, for money spent in the commission of an unlawful act. And yet this would be the result if his petition were sustained. The act of 1899 clearly applies solely to those canals or ditches in which the petitioner has acquired an interest either by agreement with the owner or by due process of law. It could have no other constitutional application, as it is well settled that private property cannot be taken for public use without just compensation, and never for purposes which are purely private. At one time the constitutionality of our drainage laws was seriously questioned, but was finally settled in the case of *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787. The court there says (on page 638, 70 N. C., page 790, 16 Am. Rep.): "The defendant takes higher ground, and contends that the act of 1795 was uncon-

stitutional, because it took his property for a mere private purpose. It is admitted that that cannot be lawfully done, and the only question on this point is as to the character of the purpose,—whether it was to the benefit of one, or of a limited number of individuals only, or of such general and public utility as justifies a state in the exercise of its power of eminent domain. It is well known that in the Atlantic section of this state there are hundreds of thousands of acres of what are called swamp lands, which, from the flatness of their surface, and the filling up of the natural courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the state on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living and so many more in the future, must be deemed one of general and public utility." The court again says (on page 640, 70 N. C., page 791, 16 Am. Rep.): "The canal is the private property of the petitioners, but all may acquire a right to drain into it on just terms, and their reciprocal duties may be regulated from time to time by the courts." By saying that "the canal is the private property of the petitioners" we understand the court to mean that, as in that case the petitioners had acquired the easement and constructed the canal entirely at their own expense, they were entitled to its exclusive use as against those who contributed nothing thereto. A stranger could acquire the right to drain into the canal without the consent of its owners, even as they themselves had acquired the easement, but only upon payment of his just proportion of its entire cost, including the easement, together with its construction and future maintenance, and such enlargement as might be rendered necessary by the increased volume of water thus turned into it. Of course, as all such easements arise *ex necessitate*, such right can be acquired only in favor of those lands which cannot be conveniently drained in any other way. We think these principles are clearly recognized both in the Code and in the act of 1899. In our opinion, the entire scope of the latter act is embodied in its first section, and that it applies only where all the parties have contributed under a valid agreement to the lawful digging of a ditch or canal. Such agreement need not be in writing, but it must have existed, and is an essential condition to the contribution contemplated by the act. The petitioner at bar

has contributed to the cutting of Strawberry canal only in the performance of an unlawful act, which in contemplation of law is no contribution at all. He does not claim to have contributed in any other manner, and there is no evidence, not even a scintilla, tending to prove that he did so. Hence there was no error in the direction of a nonsuit, as the burden rested upon the petitioner of proving every material fact necessary to the granting of his petition.

This brings the case clearly within the rule laid down in *Sprull v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, which is relied on by the petitioner. Much stress seems to be laid upon the fact that the natural drainway of the Pigford farm was through Strawberry canal. This may be so in the sense that it is the most convenient way to drain the said farm, but that fact does not make the canal a natural water course. A water course consists of bed, banks, and water. *Ang. Water Courses*, § 4; *Gould, Waters*, § 41. A natural water course has such characteristics while in a state of nature and without artificial construction. Natural water courses are such as rivers, creeks, and branches. A canal can never come under such a designation unless it is a mere enlargement of a natural water course. It does not appear that the water from Pigford farm, at least in its concentrated form, ever got into Strawberry canal until it was carried there by a ditch, which is itself fed by "lateral ditches running in both directions." Hence this case does not come within the principle affirmed in *Mizell v. McGowan* (at this term) 39 S. E. 729, and the cases therein cited. In that case the defendant's ditches emptied into a natural water course before it left the defendant's land. Here the petitioner is seeking to open a ditch on another man's land. While the question is not now before us, we see no reason, as at present advised, why the petitioner cannot proceed under chapter 80 of the Code. In that event it would seem that he would be compelled to pay, not only his just proportion of the cost of the construction, maintenance, and repair of the canal, but also the value of the easement. All that we now decide is that the petitioner, having, in contemplation of law, contributed nothing to the digging of Strawberry canal, cannot proceed under chapter 255 of the Laws of 1899, which, in our opinion, applies only where the petitioner has a vested interest.

No error.

(120 N. C. 166)

MITCHELL v. RALEIGH ELECTRIC CO.
(Supreme Court of North Carolina. Oct. 29, 1901.)

ELECTRIC COMPANIES—INSULATING WIRES—
NEGLIGENCE.

1. Absence of insulation on a wire of an electric light company is prima facie evidence of negligence, a city ordinance providing that such wires must be insulated.

39 S.E.—51

2. An employé of a telephone company, killed by a wire which he was stringing over a wire of an electric light company coming in contact with the latter at a point where the insulation was off it, is not guilty of contributory negligence in letting the wires come in contact, he having a right to presume that the electric wires were insulated as required by ordinance, and it being his duty to look for patent defects only, and there being no evidence that the abrasion in the insulation, varying in width from that of a pencil to 2 inches, and being 30 feet above the street, was, or by due care could have been, seen by him, or was known of by him.

3. It will be presumed that an electric light company knew, or ought to have known, of an abrasion of the insulation of an electric light wire, it having been seen and known to have existed for two years by at least two persons.

Montgomery, J., dissenting.

Appeal from superior court, Wake county; Starbuck, Judge.

Action by Sallie Mitchell, administratrix, against the Raleigh Electric Company. Judgment for defendant. Plaintiff appeals. Reversed.

This action was brought to recover against defendant company damages on account of the alleged negligent killing of intestate. It was alleged that intestate, while at work upon the line of the Bell Telephone Company in stringing a wire upon its line across and over defendant company's wires, the wire being strung by intestate, came in contact with the wire of defendant company at a point which it had negligently permitted to be and remain uninsulated, and thereby became charged with electricity, which was conveyed into the body of intestate, causing his death. From the evidence of plaintiff's witnesses it appears that intestate was in the employ of the Bell Telephone Company on January 14, 1899. While so employed, he was assisting another employed in stringing a wire upon the poles of the said company, at or near the intersection of Edenton and Blount streets, in the city of Raleigh. The wires of said company were supported upon poles, and were 10 feet higher than the wires of defendant. Intestate was on the north side of Newbern avenue. His fellow employé was upon the pole on the south side. Intestate had the coil of wire on his left arm or shoulder. A rope or hand line had been fastened to the end of the wire, and it passed over a limb and through some trees on the north of the said street, over and across defendant company's wires, and placed in the hands of the employé of the Bell Company's pole, who was drawing it to him for the purpose of stringing the wire, to which it was fastened, upon the pole upon which he had climbed. Intestate was paying out the wire through his hands, and while doing so it came in contact with defendant company's electric wire, and he was "caught" by a current of electricity transmitted to the wire in his hands, and died in a minute,—before the wire was cut. Some two years before this occurrence the witness

McFarland testified that he and another man (Hicks) were putting a phone wire across at the same place, and while doing so (but the wire was then drawn across the arm of a pole) Hicks carelessly permitted it to slack, and fall across the electric company's wire, making an abrasion in the insulation two inches wide, and Hicks got "caught" by a current of electricity, but he immediately cut the wire, and released him. This was at the same place where intestate got "caught." He had noticed the place several times in the same condition between the two accidents. Bonner, the electrician, testified: That about 15 minutes after the occurrence he went to the place where this man was killed by a current from the wire of the defendant company, and saw a place on the defendant company's wire where the insulation had been rubbed off, which was the width of a lead pencil. The Bell line was lying in the place where the insulation was rubbed off. That about two years before he had noticed a place where the insulation was rubbed off. It was within 10 feet of this place. Caused by a phone wire pulling across the electric wire. It was the same size as the place he saw there the day of the accident, and did not notice but one place which was rubbed off on that day. Several witnesses testified that the proper way for a man who knew his business would have been to have passed the rope or hand line and wire over the arm of a tall Bell pole, and then pulled it across, thus avoiding contact with the electric wire, instead of through the trees, as was done. The ordinance of the city, which was in evidence, is as follows: "Sec. 7. All electric light and power wires, excepting trolley wires for electric railways, must be covered with a durable waterproof insulation not less than two coatings." After the close of plaintiff's evidence (defendant having declined to introduce any), plaintiff requested the court to give certain special instructions, which were refused, and plaintiff excepted. Verdict was rendered for defendant, and plaintiff appealed from the judgment.

J. B. Batchelor, for appellant. R. L. Gray, for appellee.

COOK, J. (after stating the case). The plaintiff was clearly entitled to have the instructions hereinafter discussed, and prayed for, given to the jury, if not in the exact language, certainly in substance, which does not appear in the charge as given. The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism—if wire can be classified as such—in common use. In ad-

hering to the wire, it gives no warning or knowledge of its deadly presence. Vision cannot detect it. It is without color, motion, or body. Latently, and without sound, it exists, and, being odorless, the only means of its discovery lies in the sense of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition. Recognizing this peril to those in its use, or who, in the exercise of their liberty, in passing along the streets of the city, might accidentally come in touch or contact with electric wires, or who, in the management of their business affairs, would have other wires suspended over the streets in close proximity to electric wires, the city authorities of Raleigh deemed it proper to require that all such wires should be covered with durable waterproof insulation. The duty imposed under this ordinance was imperative. Its strict observance was necessary for the safety of all. The electric wires must be insulated, and it was no less the duty of defendant company to keep them so at all times and at all places. The nature of the mischief intended to be remedied required it. A failure to comply with this ordinance was *prima facie* evidence of negligence, and, there being no evidence in rebuttal offered by defendant company, and none appearing from the evidence of plaintiff, it was error in his honor in refusing to give instruction No. 1 prayed for by plaintiff, viz.: "If the jury find from the evidence that the defendant left its wires uninsulated, as stated by the witnesses, this was negligence on the part of the defendant and the jury will so find." In *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the court held that, where the statute imposed a duty upon a railroad company to fence its slack pits, its failure to do so was evidence of negligence for which it was liable. In the case of *Clements v. Light Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, it is held by the supreme court of Louisiana that the failure of defendant company to have the splices on its wires perfectly insulated, when so required to do by the ordinance of the city, was negligence on its part. The ordinance being a contract with each and every inhabitant of the city, its standard of duty was fixed by it, and its failure to comply with it was negligence. Also, to the same effect, it is held in *Tobey v. Railway Co.*, 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496, and cases there cited; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410. "A company maintaining electric wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under

the duty of using the necessary care and prudence at places where others might have the right to go either for work, business, or pleasure, to prevent injury. It is the duty of the company under such conditions to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in such condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not excuse the company for failure to keep their wires perfectly insulated. So, one who, in the course of his employment, is brought in close proximity to electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily, or without proper precautions for his safety. And where the wires, if properly insulated, would not be a source of danger, such person is only obliged to look for patent defects, and not for latent defects; and a person who touches an electrical wire from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent." Joyce, *Electric Law*, § 445. The evidence in the case at bar shows that defendant company's wires were strung on poles along the same street with those of the Bell Telephone Company. At places, as in this case, one set of wires diagonally crossed the other at a distance of only about 10 feet. Each had a common right, and it was the duty of each to exercise all reasonable precautions for the prevention of injury to the servants who may be sent there in the performance of duty. Each is bound to know that the servants of the other may come in contact with its wires. The fact that defendant company's wire was insulated was calculated to induce intestate to rely upon its safety, even if the wire he was paying out should come in contact with it. *Power Co. v. Garden*, 23 C. C. A. 649, 78 Fed. 74, 37 L. R. A. 725.

We think his honor also erred in refusing the third instruction prayed for, viz.: "There is no evidence of contributory negligence on part of the intestate of plaintiff, and the jury will therefore find the second issue 'No.'" What is contributory negligence upon a given state of facts, and whether there is any evidence, are questions of law for the decision of the court; and a review of the evidence fails to discover any act done by the intestate which he ought not to have done, or the omission to do any act which he ought to have done. The witnesses testified that the proper way would have been to have conveyed the rope or hand line and wire over the arm of the tall Bell pole not far off (and not through the trees, as was done), which any man who understood his business would have done. But it also appears from the evidence that a similar accident occurred at or near the same place when the arm of a pole was used, and the wire carelessly allowed to slack and fall

upon the electric wire. So, if intestate used a different mode to accomplish his purpose, that act would not necessarily be negligence upon his part. And, having undertaken to use the trees in supporting his wire while conveying it over and across the defendant company's wire, he had a right to presume that the electric wires were properly insulated as required by the ordinance, and it was his duty to look for patent defects only. *Clements v. Light Co.*, supra. There is no evidence to show that intestate so managed or mismanaged his wire as to cut through the insulation of defendant company's wire, nor is there any evidence to show that the abrasion in the insulation was seen, or by due care could have been seen, by him. In extent, the evidence shows that it varied from the width of a pencil to two inches, and was suspended 30 feet above the street. It does appear that his wire came in contact with and rested upon the electric wire, but there is no evidence to show that it caused the abrasion in which it rested; nor was there any evidence to show that he knew of its existence. From the fact that it was there, and had been for two years, and had been seen and known to exist there for two years by at least two people (who were witnesses in this case), the court must presume that it was or ought to have been known by defendant company. So, where an electric light company permitted a live wire to remain on the surface of a street for three weeks, and a traveler was injured by contact with such live wire, it was held that the court would presume, after such a period, that the company had notice of the fact, and was liable for the injury. *Joyce*, supra, § 450.

The fourth instruction asked was: "There is no evidence of any other cause of death of plaintiff's intestate, except from the electricity coming from the wire of the defendant. Therefore, if the jury find from the evidence that the death of the intestate of plaintiff was caused by the current of electricity passing into his body from the charged wire of the defendant, the jury will find the third issue 'Yes.'" The third issue was, "Was the negligence of the defendant the proximate cause of the death of intestate of plaintiff?" The negligence of defendant appearing, and no evidence of contributory negligence by intestate, his honor erred in refusing this instruction. There was evidence tending to show that intestate was killed by the electrical current, which clearly appears, and the jury should have been charged as requested.

As there will have to be a new trial, and the questions raised by the other exceptions may not again arise, we think it unnecessary to discuss them.

New trial.

MONTGOMERY, J., dissents.

(129 N. C. 161)

TRIMMER v. GORMAN et ux.

(Supreme Court of North Carolina. Oct. 29, 1901.)

SALE OF LAND—IMPERFECT TITLE—APPEAL—RECORD—PLEADING AND FINDINGS.

1. A vendor of land, though offering to give an indemnifying bond, cannot require a purchaser to take a defective title.

2. Questions cannot be considered on appeal which are not presented by motion or exception in the case on appeal.

3. A finding that defendant paid plaintiff more than \$600 cannot be sustained,—the contrary being admitted by the answer,—where the complaint alleged that defendant paid plaintiff the first payment of \$600, but has failed to make payment of the \$650, which was the second payment due, or to comply with the terms of the contract, and the answer states that so much of the complaint as alleges that defendant paid plaintiff the first payment of \$600, and has failed to pay the \$650 next due, and to comply with the terms of the contract, is true.

Appeal from superior court, Columbus county; Robinson, Judge.

Action by B. F. Trimmer against J. L. Gorman and wife. From the judgment, plaintiff appeals. Modified.

J. H. Pou and T. B. Womack, for appellant. J. B. Schulken, for appellees.

FURCHES, C. J. It seems from a paper made an exhibit and part of the complaint that in November, 1894, the plaintiff contracted to sell Elizabeth A. Gorman a tract of land estimated to contain 400 acres at the price of \$4,000. This contract is lengthy, not very explicit, and not entirely clear as to what it means. But it seems that we may understand by it that the plaintiff contracted to sell the land to the defendant Elizabeth at the price stated (\$4,000); that said defendant was to pay plaintiff \$600 at the date of the sale, \$650 in December following, and the balance in deferred payments; that a deed was to be executed at the time of the second payment conveying an absolute title in fee simple, and the said Elizabeth was to secure the deferred payment by a mortgage on the land. The defendant made the first payment of \$600, according to the allegations of plaintiff's complaint, and no more, and neither the deed nor mortgage was ever made. This is admitted by the defendant Elizabeth, and she alleges that she was a married woman at the time she bought the land and signed the contract, and is not bound thereby. And she alleges that she was induced to buy the land through the false and fraudulent representations of the plaintiff, by which she was badly cheated and defrauded. She also alleges that the plaintiff represented himself as a single man, and able to make and convey a good title to said land, but that since the date of said contract she has learned that he is not a single man, but has a wife living in the state of Virginia, who is unwilling to join the plaintiff in a deed conveying said land. She also alleges that plaintiff's title is defective,

and for these reasons he is unable to make a clear and indefeasible title to said land, and asks that an account be taken of rents and profits, and of the amount paid on the purchase price, and that she have judgment for the difference in her favor. The contract contains a clause or provision that, unless the second payment provided for is made, the contract shall be utterly void and of no effect; and plaintiff asks that such contract be declared void, for possession of the land, and damages for detention and for waste. It is admitted that the defendant Elizabeth at the date of the contract was a married woman, and that she has so remained ever since, and is so now. The plaintiff admits that he has been a married man, but alleges that his wife left him more than seven years ago, and that he has not heard from her since, and therefore the law presumes her to be dead. He also says that he has a good and valid title to the land, and is willing to indemnify her against the contingency of his wife's not being dead. There was no evidence offered as to defective title, nor to sustain the allegations of fraud. The case was referred to H. L. Moffitt, clerk of the court, to take and state an account of the rents, injury to the land by defendant, and of the amounts paid by her thereon. This account was taken and reported, to which there were exceptions filed, and the case comes before us upon this report and exceptions.

Upon the argument here the ground was taken by plaintiff that, while the contract could not be enforced against defendant Elizabeth on account of her coverture, she could not repudiate it and recover back any money she had paid on the same. This proposition of law is substantially correct,—that, while plaintiff could not enforce it, the defendant could; but we cannot apply it in this case. The defendant is not bound to take a defective title, although the plaintiff may offer to give her an indemnifying bond. The absence of plaintiff's wife only creates a presumption that she is dead. This is a presumption of fact that may be rebutted, and defendant's title rendered imperfect. *Dowd v. Watson*, 105 N. C. 476, 11 S. E. 589, 18 Am. St. Rep. 920; *Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708. But this court is a court of errors, and only reviews such matters as are presented by the appeal; and the question presented for the plaintiff in the argument of his counsel is not presented by any motion or exception in the case on appeal. As the case has been treated by the parties as a matter of account between them, consisting of the amounts the defendant Elizabeth had paid the plaintiff, and the value of rents, profits, and damages on the other side, we will so treat it, and will only consider the account and exceptions thereto.

The court adopts the findings of fact by the referee, and there seems to be some evidence tending to prove all of them. We cannot re-

view these findings, and where they are raised by the pleadings they must be sustained. The payment made by the defendant Elizabeth was by a cashier's check for \$991.50, indorsed by her and collected by the plaintiff. There was evidence offered by defendant tending to show that the whole of this check was paid on the land she bought, while the plaintiff offered evidence tending to show that only \$600 went on this land, and the balance, by agreement, was applied to the purchase of another tract of land bought by James Gorman, husband of defendant Elizabeth. The referee finds that it was all paid on the tract the defendant Elizabeth bought, and charges the plaintiff with the same. In this there is error, for the reason that it is in conflict with the allegations and admissions of the pleadings. It seems singular that the defendant does not allege that she paid the plaintiff anything, and the only allegation as to any payment being made is in the complaint, which is as follows: "(2) That in accordance with said contract the said defendant Elizabeth A. Gorman paid to plaintiff the first payment of six hundred dollars cash, but has failed and neglected to make payment of six hundred and fifty dollars due on the 1st day of December, 1895, or to comply with the terms of said contract, and that the said agreement has become forfeited, null and void, and of no effect." To this the defendant Elizabeth answers as follows: "(2) That so much of article 2 of the complaint as alleges that the defendant Elizabeth A. Gorman paid the plaintiff the first payment of \$600, and has failed and neglected to make the payment of \$650 due December 1, 1895, and to comply with the terms of said contract, is true, and that the other allegation in said article 2 is denied." While we cannot review the findings of fact by the referee, we cannot sustain this finding. This payment is not raised by the defendant's answer, but, as it seems to us, is contradicted by the admission in her answer. The plaintiff alleges that she made the first payment of \$600, and failed to make the next payment of \$650, and she admits that this is true. This was not only a failure to allege that she had paid plaintiff \$991.50, but an admission that she had not.

This exception of plaintiff should have been sustained to the extent of reducing the payment from \$991.50 to \$600, and, the account being thus corrected, it should be affirmed. Error.

(129 N. C. 173)

SMITH v. WILMINGTON & W. R. CO.
(Supreme Court of North Carolina. Oct. 29, 1901.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK.

An employé who, as ordered by the master, proceeds to make an incision in a steel beam by "chipping," instead of "blocking," as he had been doing, assumes the risk of injury from chips of steel striking him in the eye; he

having had experience in chipping castings, where the danger from flying chips is greater than in the case of steel.

Appeal from superior court, Sampson county; Hoke, Judge.

Action by Frank Smith against the Wilmington & Weldon Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Plaintiff alleges that on the 19th day of May, 1896, he was an employé of defendant company, engaged with a fellow workman in cutting a brake beam by blocking, so that it might be bolted to the hangers attached to the saddle; that defendant company, through its representative, Nelms, suddenly commanded them to desist from their usual and ordinary manner of cutting said brake beams, to wit, by blocking, which was a safe and prudent method, and to proceed at once to perform the work in an entirely different manner, to wit, by chipping, which plaintiff now knows was not only unnecessary,—the one method being equally proper and correct as the other,—but likewise unsafe and dangerous; and while so engaged, by the method of chipping, a chip flew off and seriously injured his right eye, on account of which he brings this action to recover damages for the injury sustained pursuant to the negligent order given by Nelms. Upon the close of the plaintiff's evidence, the defendant company moved to dismiss the action under the statute, which was refused, to which it excepted, and introduced its evidence, and at the close of which it renewed its motion, which was again refused. Divers special instructions were prayed to be given, and exceptions taken to the refusal to give such as were refused. Verdict was rendered for the plaintiff, and the defendant appealed from the judgment.

F. R. Cooper, J. D. & E. W. Kerr, and Geo. E. Butler, for appellant. Junius Davis and H. L. Stevens, for appellee.

COOK, J. The motion to dismiss made by defendant company in conformity to the rules of the statute ought to have been allowed. The evidence does not show any breach of duty by the employer. There is no suggestion of defects in the tools employed, place of work, or danger in the performance of the work known (or which ought to have been known) to the employer, and not imparted to the employé; the only contention being that the method was changed. Plaintiff and Hardison, another employé, were engaged in "blocking" a steel brake beam; that is, "it was necessary to cut it down from a width of $\frac{3}{4}$ inch to a depth of $\frac{1}{16}$ inch, to let a hanger come down and fit and join on to a cylinder," from which we understand that an incision was necessary to be made in the beam three-fourths inch long and one-sixteenth inch deep, to let in the hanger, for it to fit in and join to the cylinder. Plaintiff and his co-worker were doing this work in the usual way, by "blocking"; that is, one

would hold the chisel upon the beam, and the other would strike it straight down with a maul, thus driving it into the beam. After cutting down to the right depth, making an incision at each end, the beam was turned over, and the piece was blocked out, and went down. While so working, defendant's representative, Nelms, ordered that the beams be chipped, instead of blocked, saying that the company had ordered these beams chipped, and he wanted them chipped. It was claimed that blocking weakened the beam. In chipping, one held the chisel upon the place to be cut, and the other struck upon the chisel with the maul, forcing off gradually small pieces at a time, until the desired width and depth were reached. Under the mode of blocking, the chips or small pieces went directly downward, while under that of chipping they would "fly off with tremendous force, and you can't tell where they will strike, or which way they will go." Plaintiff had been using the maul, but, when they changed from blocking to chipping, Hardison relieved plaintiff by taking the maul, and let him hold the chisel. Plaintiff was holding the chisel at an angle, and at the third strike a chip flew off, struck the cuff, which projected from the beam close to the chipping, and bounded back and upward, striking plaintiff in the eye, doing the injury complained of. When Nelms ordered that the beams be chipped, Hardison replied: "I don't like to chip them out." He replied, "Well, you must chip them out," and moved right off. Plaintiff said, "Hardison, what are you going to do?" He replied, "I don't like to chip them out. Might be danger getting hurt." Plaintiff said, "Well, we must obey orders or leave." He said, "That's all facts." Plaintiff said, "Let's go to work and chip them out." It does not appear clearly from plaintiff's evidence, as stated in the record, whether he had ever before done any chipping. In his direct examination he says: "This was the first one he had ever done so. Prior to that, had always blocked them." In his cross-examination he said: "Had to handle castings, and sometimes, when rough, chipped some smooth. Chips fly in chipping castings. Some danger in it. Chipped castings, off and on, all time. * * * The steel beams came into use after that." However, it is clear that he had not theretofore chipped any steel beams. Plaintiff also testified that he had no time to reflect or think about it when the order to chip was given. He was told to do it, and he did it; and, if he had, it would have done no good. "It was, obey your orders, or be discharged." There was evidence showing that the chipping of castings was of frequent occurrence, and that chipping them was more dangerous than chipping steel; that castings were more brittle, and would break up into more pieces; while steel was tougher, and more likely to be in one piece at a time. Defendant company claimed that blocking weakened the beam, and there-

fore wanted the incision made by chipping, which, as it claimed, did not. In other words, it was how the work should be done, and not what should be done in doing it. The mode or system in the execution of work lies exclusively within the discretion and will of the master, over which the servant has no control; and the master is not liable to him for personal injuries received, although the master might have adopted a safer method. 3 Elliott, R. R. § 1289. Plaintiff, as it appears, was a man of intelligence, and an experienced workman. For some considerable time he had been employed in the shops of defendant company, where the beams had been chipped as well as blocked. Whether upon castings or steel, it was not material, as the process was the same. The danger and hazard of both modes or systems were apparent to plaintiff, and, when he changed the work from one to the other, he assumed all the ordinary hazards naturally incident to the work. In *Myers v. W. C. De Pauw Co.*, 138 Ind. 590, 33 N. E. 37, it is held that the fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking. The test is not the danger of the employment, but the neglect of the master in the duty which he owes the servant. When the service to be performed is attendant with obvious dangers, there is no duty upon the master to warn the servant against it. And in *Turner v. Lumber Co.*, 119 N. C. 387, 26 S. E. 23, it is held that if a servant has equal knowledge with the master of the dangers incident to the work, and has sufficient discretion to appreciate the peril, his continuance in the employment is at his own risk. Plaintiff contends that he did not have time to reflect: "Hadn't given thought to danger of chipping. Had no time to reflect or think about it." He does not contend that he did not know that the chipping mode was dangerous, and it does not seem to us that he brings himself within the rule of sudden risk, undertaken in response to an order which must be executed speedily, without having time to take in the situation. An order to do a dangerous act in the performance of a duty, as was the case in *Shadd v. Railroad Co.*, 116 N. C. 968, 21 S. E. 554, and also in *Haltom v. Railroad Co.*, 127 N. C. 255, 37 S. E. 262, is not involved in this case. It was an order to change the system of doing the work. In making this change no emergency existed. Plaintiff could foresee the possibility of danger as well as the employer. It was obvious to him that the chips would have to escape, and, being an experienced man, must—indeed, ought to—have known that violent blows by the maul would hurl them off with great force and in various directions. But the real cause of the injury was not by a chip flying from the chisel held by plaintiff, but by one which rebounded from the cuff, which was very near and projected from the

beam. The possibility that a chip would strike the cuff and thence rebound and strike plaintiff's eye depended upon numerous contingencies,—the angle at which the chisel was held with reference to the cuff; the distance of plaintiff's eye from the cuff; the position of his head above the cuff with relation to the position of the chisel upon the beam, whether squarely or diagonally across; the force of the blow by the maul; and the shape of the chip which struck the cuff. It is hardly probable that a similar result under like circumstances could be accomplished again, even by design. Certainly it was not done by either of the two licks first given. From all the evidence in the case, we are unable to see any breach of duty due by defendant company to plaintiff. In accepting the employment in the shops, plaintiff assumed the ordinary risks and dangers incident to the work to be done on the beams, and, being accidentally injured, the burden must be borne by himself.

Error.

(129 N. C. 191)

KNIGHT et al. v. HATFIELD.

(Supreme Court of North Carolina. Nov. 5, 1901.)

ATTACHMENT—CONTRACTS—STATUTE OF FRAUDS—SALE OF REALTY.

1. Where, in an action for breach of an oral contract to sell a manufacturing plant, consisting of realty and personalty, an attachment was levied, it was properly vacated on motion, though the defendant was a nonresident, since the contract, as shown by the pleadings, was void under the statute of frauds, and its validity could be determined on the motion to vacate.

2. In an action against a nonresident for breach of contract, an attachment was properly vacated, though defendant executed no bond, where it appeared on the face of the pleadings that the contract was void under the statute of frauds.

3. In an action for breach of contract for the sale of certain property on which an attachment was levied at the beginning of the action, it was not error for the court, in vacating the attachment, to omit to find that plaintiff had expended money on the property under his alleged contract, and while in possession of it under a lease, the matter not being relevant to the attachment.

Appeal from superior court, Moore county; Moore, Judge.

Action by J. S. Knight & Co. against Asa Hatfield. From a judgment in favor of the defendant, the plaintiffs appeal. Affirmed.

McIver & Spence, for appellants. Black & Adams and Douglass & Simms, for appellee.

MONTGOMERY, J. The contract for the alleged breach of which the plaintiffs brought their action in damages appears (upon the face of the complaint) to have been one for the conveyance of a plant for the manufacturing, drying, and dressing of lumber, not in writing, the plant consisting of necessary machinery, together with the site on which the same was located. The defendant was a

nonresident of the state of North Carolina, and on that ground an attachment was sued out and levied upon the plant, including the real estate and machinery. The defendant, in his motion to vacate and dissolve the attachment, denied that he ever made the contract to convey the plant to the plaintiffs, and averred that the same, as alleged by the plaintiffs, was void under the statute of frauds. His honor found as facts: First, that, if such contract ever existed, it was not reduced to writing, and that no note or memorandum thereof was ever reduced to writing; second, that the property consisted of both real and personal estate. There were other findings of fact not necessary to be mentioned in this opinion. It was admitted that the defendant was a nonresident at the time of the commencement of the action and at the time the warrant of attachment was issued and served. The attachment was vacated and dissolved by his honor, and the attached property ordered to be released.

The plaintiffs contend that, although the complaint, used as an affidavit in the attachment proceedings, alleged damages for the breach of a contract to convey a plant consisting of real estate and the machinery used therewith for the drying, dressing, and manufacturing of lumber, and notwithstanding the fact that the defendant, while denying the contract, also set up the plea of the statute of frauds against its enforcement, if it had been made as stated in the complaint, yet his honor should have refused to vacate the attachment, because it appeared that the defendant was a nonresident of the state, and that that was a sufficient ground for the attachment to issue; the plain meaning of which contention is that the alleged breach of contract, as to whether it was valid or binding or not, was an issue of fact that could not be found by his honor upon the motion to vacate the attachment, but must be submitted to the jury for their finding on the trial of the action. If it be conceded that the property seized under the attachment must be held in custodia legis until the main action shall have been determined, yet that rule must be relaxed and changed in a case like the one before us. The seizure of property under attachment in this state is an extraordinary remedy, and in derogation of the common law. It is also immediate and harsh in its effects, and is liable to be used for purposes of oppression. Such proceedings, therefore, will always demand the closest attention of the courts, and will not be upheld except in cases where it is plainly to be seen that the modes of its procurement are regular, and that the property which is the subject of attachment should be kept under the control of the court until the main action is tried and determined. It is apparent upon the face of the affidavits of both parties and the complaint of the plaintiffs itself that the

plaintiffs cannot recover in this action. In their complaint they declare upon a breach of a contract to convey property embracing land and machinery used as a whole,—a plant,—not in writing; and the defendant in his affidavits simply recites the plaintiffs' statement of their own case, denies the contract as alleged, and pleads the statute of frauds, if it was so made. The findings of fact by his honor are simply a repetition of the facts stated in the plaintiffs' complaint and affidavits. There is no issue joined between the parties as to the contract. If the contract is taken to be admitted by the defendant as set out in the complaint, yet, as the statute of frauds is pleaded against it, the law declares it unenforceable, and there is no issue of fact about it to be tried.

The plaintiffs further excepted to the order of his honor vacating the attachment, because the defendant gave no bond before the order was made. It was not necessary that the bond should have been executed in a case like this. Why execute a bond to provide against a contingency that never could arise, to wit, to pay the plaintiffs the amount of any judgment that the plaintiffs might recover against the defendant in the action? In *Devries v. Summit*, 86 N. C. 126, it was decided that a bond or undertaking would not be necessary when the warrant "on its face appears to have been issued irregularly, or for a cause insufficient in law or false in fact." And the same reasoning would cover this case.

The plaintiffs further excepted to the failure of his honor to find that the plaintiffs had expended various amounts of money on the property under their alleged contract, and while they were in possession of it under a lease of the defendant. That has nothing to do with the attachment proceedings. Whatever bearing it may have on the matter is to be heard and decided by another method.

At the hearing of the motion to vacate the attachment the sheriff made application to his honor for instructions as to his duty in connection with the attached property, and the plaintiffs excepted to the order of his honor directing him to deliver it to the defendant. It is unnecessary to consider that order, and we make no comment on it. Otherwise there was no error.

(129 N. C. 154)

BOGAN et ux. v. CAROLINA CENT. R. CO.
(Supreme Court of North Carolina. Oct. 29, 1901.)

RAILROADS—ACCIDENT TO PERSON ON TRACK
—NEGLIGENCE—LAST CLEAR CHANCE.

Though a person was negligent in going on the trestle of railroad, the company is liable for her injury there by a train, if the engineer, by the exercise of ordinary care, could have discovered her danger, and prevented the accident.

Appeal from superior court, Richmond county; Moore, Judge.

Action by J. S. Bogan and wife against the Carolina Central Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

W. H. Day, for appellant. Jas. A. Lockhart, for appellees.

DOUGLAS, J. This is an action for the recovery of damages for injuries received by the plaintiff by being knocked off a trestle by the defendant's train. The issues and answers thereto were as follows: "(1) Was Della Ann Bogan injured by the negligence of the defendant? A. Yes. (2) Did she, by her own negligence, contribute to her injury? A. Yes. (3) Notwithstanding her negligence, could the defendant, by the exercise of ordinary care, have prevented the injury? A. Yes. (4) What damages, if any, has plaintiff sustained? A. \$1,500." The defendant asked the court to direct a verdict in its favor upon all the issues. As the evidence was conflicting, this request was properly refused. *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39; *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. C. 280, 38 S. E. 894, and cases therein cited. The able counsel for the defendant contended that, as the plaintiff testified that she was walking upon the trestle on Sunday afternoon with a man whom she has since married, and in whom she was then "deeply interested," neither of them was in a mental condition to see or hear anything except each other, and their going upon the trestle in such a frame of mind was negligence per se. The learned counsel for the plaintiff seems to tacitly admit this proposition, but contends that, as the jury have found that the defendant, by the exercise of ordinary care, could have prevented the injury notwithstanding the negligence of the plaintiff, this court should not deny to a young bride expectant the protection which the English court of exchequer extended to a hobbled donkey browsing in the public highway. The court charged the jury that, if they believed the evidence, they would find that the plaintiff was guilty of contributory negligence, and they so found. The plaintiff, having won the case, does not appeal.

The charge was full and explicit, and, as far as we can see, without error. Its essential features are substantially embodied in the following extracts: "That the burden of proving by the greater weight of evidence the first, third, and fourth issues was upon the plaintiff." "That if the jury found from the evidence that the defendant's servants in charge of the engine either discovered, or by exercising ordinary care might have discovered, that the plaintiff was walking upon the trestle, and was so situated that she could not, without peril, owing to her position on the trestle and the length and height

of the trestle, get off the trestle in time to escape the train moving as it was, and that the defendant's servants in charge of the engine could, by the exercise of ordinary care, have stopped the train, and avoided the accident, after seeing the plaintiff in a place of peril on the trestle, or after they should have seen her and failed to do so, and the plaintiff was injured thereby, they should answer the first issue 'Yes.' " "It was not the duty of defendant, through its engineer, to lessen the speed of its train as it approached the trestle, until he had reasonable grounds to believe that the female plaintiff was on the trestle, and not capable of caring for herself; and that if the jury find that as soon as the engineer discovered, or by the exercise of ordinary care could have discovered, that the female plaintiff was upon the trestle, and in a place of danger, he did all in his power to stop the train, they will answer the first issue 'No' and the third issue 'No.' " "If the engineer saw the female plaintiff while upon the track, and not upon the trestle, of defendant, walking in front of the engine, which was moving, he had the right to assume she would get off the track, and take care of herself up to the last moment, and it would not be his duty to slack the speed or stop the train until he had reason to believe she was upon the trestle; and, if the female plaintiff was injured under such circumstances, the law will impute it to her own negligence, and you will answer the first issue 'No' and the third issue 'No.' " "If the plaintiff was guilty of contributory negligence, and if the jury find from the evidence that the defendant could, by the exercise of ordinary and reasonable care, have avoided the injury, and failed to do so, and had the last clear chance to so avoid it, then the jury will answer the third issue 'Yes.' " "You must be governed by the instructions applicable to the third issue, which have already been read, just as though they were now reread." All these instructions were excepted to by the defendant, but we do not see how any of such exceptions can be sustained under our long and unbroken line of authorities from *Gunter v. Wicker*, 85 N. C. 310, to the present time. The principle was fully settled at least as far back as *Pickett v. Railroad Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611, where the doctrine is elaborately discussed. Among the more recent cases may be cited *Fulp v. Railroad Co.*, 120 N. C. 525, 27 S. E. 74; *McLamb v. Railroad Co.*, 122 N. C. 862, 29 S. E. 894; *Cox v. Railroad Co.*, 126 N. C. 103, 35 S. E. 237; *Arrowood v. Railroad Co.*, 126 N. C. 629, 36 S. E. 151. The defendant excepted to the submission of the third issue, but such an issue was necessary for a proper determination of the case. Its form was practically suggested by this court in *Denmark v. Railroad Co.*, 107 N. C. 185, 189, 12 S. E. 54, and has since been repeatedly approved, expressly so in *Cox v. Railroad Co.*,

126 N. C. 103, 35 S. E. 237. It is in almost the exact words used by Lord Campbell in *Dowell v. Navigation Co.*, 5 El. & Bl. 195 (85 E. C. L.), quoted with approval in the leading case of *Tuff v. Warman*, 89 E. C. L. 739, 756, where he says: "In some cases there may have been negligence on the part of the plaintiff remotely connected with the accident, and in those cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff; as in the oft-quoted donkey case, *Davies v. Mann*. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject." The case therein cited (*Davies v. Mann*, 10 Mees. & W. 545) in which the plaintiff's immortal donkey, by its death, established a great principle, and left a world-known name, is regarded as the origin of the rule. The plaintiff fettered the front feet of his donkey, and turned him into a public highway to graze. The defendant's wagon, coming down a slight descent at a "smartish" pace, ran against the donkey, and knocked it down, the wheels of the wagon passing over it. The poor brute meekly closed its wearied eyes and gave up the ghost, an apparently immortal spirit that has long since put *Banquo's* ghost to shame. From such a humble beginning arose the great doctrine of the "last clear chance." In that case Lord Abinger, C. B., says: "The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there. But, even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal might have been improperly there." Again, Parke, B., says: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on the public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." It is impossible to follow this case through its thousands of citations in nearly every jurisdiction subject to Anglo-American jurisprudence. The supreme court of the United States, in *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, thus lays down the doctrine of contributory negligence as modified by that of the last clear chance: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution

the person injured, subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 Mees. & W. 546): that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." The doctrine was distinctly adopted in this state in *Gunter v. Wicker*, 85 N. C. 310, where the court says with approval: "The rule is thus laid down by a recent author: 'Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages;' " citing *Davies v. Mann*. The rule thus laid down has ever since met the uniform approval of this court, and is too well established to be the further subject of controversy. A large majority of text writers sustain the rule. It is true, one or two criticize it with more or less severity, but they are no match for the avenging ghost of *Davies'* donkey.

The origin of the doctrine of contributory negligence is generally ascribed to the case of *Butterfield v. Forrester*, 11 East, 60. There the defendant, for the purpose of making some repairs to his house, which was close by the roadside, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. The plaintiff, about candle light, but while there was yet light enough left to discern the obstruction at 100 yards distance, while riding very rapidly, rode against the pole, and was thrown and badly hurt. The court directed a jury that, "If a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant." This charge was sustained on appeal. Two things are noticeable in this case. The active negligence was that of the plaintiff, who alone had the last clear chance; and in spite of the fact that the testimony was apparently uncontradicted, the question was submitted to the jury. This doctrine, thus first enunciated in a most reasonable form, was soon carried beyond what could ever have been contemplated by the original case. Some courts went so far as to say that the plaintiff could not recover if he was in the slightest degree negligent, no matter how gross might be the negligence of the defendant; and that the plaintiff must not only prove the negligence of the defendant, but must also affirmatively disprove any negligence on his part. Carried to such extremes, the doctrine finally became a burden upon the judicial conscience of the age, especially

where human life was concerned; and hence the prompt and general approval given to the case of *Davies v. Mann*. This latter case, though a modification to a greater or less extent of many cases professedly based upon *Butterfield v. Forrester*, was not in substantial conflict with that case itself, but rather a just extension of its underlying principles.

As we find no error in the charge, which was based on evidence tending to prove every contention of the plaintiff, the judgment is affirmed.

(63 S. C. 57)

BRAY v. CITY COUNCIL OF FLORENCE.
(Supreme Court of South Carolina. Oct. 7, 1901.)

CONSTITUTIONAL AMENDMENT—CONSTRUCTION—MUNICIPAL BONDS—ELECTION—REGISTRATION.

1. February 19, 1900, a joint resolution proposed an amendment to article 8, § 7, of the constitution, and also provided that the limitation in such amendment as to municipal bonds, and in article 4, § 5, should not apply to bonded indebtedness of certain cities. Act Feb. 8, 1901, ratified the amendment as to article 8, § 7, but set forth that the reference to article 4, § 5, of the constitution, was erroneous, in that it did not apply to bonds, but the article in question should have been article 10. *Held*, that the legislature has no power to change the terms of the joint resolution so as to express the evident intent of the lawmakers, and substitute article 10 for article 4, but that the other portion of the amendment is operative without reference to such article.

2. Where one section of the constitution is so amended as to be repugnant to the original section of the constitution, such original section is repealed.

3. Const. art. 2, §§ 12, 13, provide for the registration of voters, and that, at an election in any municipal corporation to determine the question of bonding the same, all electors qualified under section 12 shall be allowed to vote. Act March 5, 1896, provided for the registration of electors of a city, and for the appointment of a register of electors 90 days before the holding of a regular election. Act March 9, 1896, authorized special elections in incorporated cities or towns for the purpose of issuing bonds, and provided that such electors shall be entitled to vote as are qualified under article 2, § 13, of the constitution. *Held*, that it was not intended to require registration for all special municipal elections, but that registration for the general municipal election prior to the special election was sufficient.

4. Act March 9, 1896, § 1, as amended by Acts Feb. 11, 1897, and March 2, 1897, provides that the bonded indebtedness of any city shall never exceed 8 per cent. of the assessed value of the taxable property therein. This limitation is in the exact language of the constitution, and fixes no other constitutional limitation at the time of the passage of the act. *Held* not to prevent the issuing of a bonded indebtedness in excess of such limitation by a city or town, as permitted by the amendment of the constitution under the joint resolution of February 19, 1900.

Petition of Charles D. Bray for a writ of injunction against W. H. Malloy and others, constituting the city council of the city of Florence. Dismissed.

S. W. G. Shipp, for petitioner. Walter H. Wells, Geo. S. Legare, and Mr. Moore, for defendants.

PER CURIAM. This was an application to this court, in the exercise of its original jurisdiction, for an injunction to restrain the city council of Florence from issuing the bonds mentioned in the petition. After due consideration this court has reached the conclusion that the said city council has full power to issue the bonds in question. It is therefore ordered that the temporary injunction heretofore granted be dissolved, and that the petition be dismissed. The reasons for this conclusion will be given in an opinion hereafter to be filed.

(Oct. 25, 1901.)

GARY, A. J. This is a petition addressed to the supreme court, in the exercise of its original jurisdiction, to enjoin the respondents from issuing and delivering the bonds therein mentioned. The facts alleged in the petition and admitted in the return of the respondents are thus briefly stated by the petitioner's attorney: "The petitioner, Chas. D. Bray, is a resident citizen and taxpayer of the city of Florence, as shown by the tax books thereof, and is a qualified elector therein. The city of Florence is a municipal corporation under the laws of the state, and the respondents are the duly qualified mayor and aldermen, constituting the city council. The assessed value of the taxable property in said city, as shown by the tax books, is \$1,136,340, and the present bonded indebtedness of the city is \$53,500, being a fraction less than five per cent. of the assessed value of the taxable property therein. Upon a petition duly filed by a majority of the freeholders of the city, praying for a special election to determine whether the city should issue coupon bonds to the amount of \$40,000 for the purpose of purchasing, owning, and operating a plant for waterworks in said city, the city council, by resolution, ordered an election to be held on June 4, 1901, submitting to the qualified electors of the city the following question: 'Shall the city of Florence issue coupon bonds in the sum of \$40,000, bearing interest from date at a rate not to exceed six per cent. per annum, payable in legal tender money of the United States, forty years after date, with the privilege of redemption after twenty years from date, to meet cost of a plant for waterworks to be owned by the city of Florence?' Due notice of the election was published for the time required by law prior to holding said election. No special registration of the voters was had for this special election, but the registration of voters made for the general election held on May 2, 1901, was used for the special election of June 4th. A majority of those voting at the special election voted in favor of issuing said bonds, and the result of the election was so declared by the city council. The city council were

prepared to issue said bonds, and to deliver the same over to the board of commissioners of public works of the city who were elected at said special election, but were restrained by order of the chief justice. The issuance of \$40,000 in bonds in addition to the present bonded indebtedness of the city would make said bonded indebtedness \$93,500, being over eight per cent. of the assessed value of the taxable property in the city as shown by the tax books." The petition alleges that the city council of the city of Florence was without authority to issue said bonds for the following reasons: "(a) Because the issuance of \$40,000 in bonds of said city in addition to the present bonded indebtedness of said city would make the bonded indebtedness of the city of Florence \$93,500, being more than eight per centum of the present assessed value of the taxable property in said city, as appears from the tax books thereof, and the same thereby contravenes article 8, § 7, and article 10, § 5, of the constitution of this state, and also the proviso of section 1 of an act of the general assembly approved March 9, 1896, entitled 'An act to authorize special elections in any incorporate city or town of this state for the purpose of issuing bonds for corporate purposes' (22 St. at Large, p. 88), and the proviso of acts amended thereto, approved February 11, 1897, and March 2, 1897; the said provisos to said acts being as follows: 'Provided, that the aggregate bonded indebtedness of any city or town shall never exceed eight per centum of the assessed value of the taxable property therein' (22 St. at Large, pp. 411, 453). (b) Because there was no registration of the voters of said city provided for before said election, in accordance with article 2, § 12, of the constitution of this state, but the registration of the voters registered for the general municipal election held on May 2, 1901, was used for the election for bonds held on June 4, 1901."

We will first consider the question whether the issuance of \$40,000 in bonds in addition to the present bonded indebtedness of the city, which would make the said bonded indebtedness more than 8 per cent. of the value of the taxable property therein, would contravene article 8, § 7, and article 10, § 5, of the constitution. Section 7, art. 8, of the constitution, provides that "no city or town in this state shall hereafter incur any bonded debt which including existing bonded indebtedness shall exceed eight per centum of the assessed value of the taxable property therein. * * *" Section 5, art. 10, of the constitution, contains the following provisions: "The bonded debt of any county, township, school district, municipal corporation or political division or subdivision of this state shall never exceed eight per centum of the assessed value of all the taxable property therein. And no county, township, municipal corporation or other political subdivision of this state shall hereafter be authorized to increase its bond-

ed indebtedness if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per centum of the value of all taxable property therein ascertained by the valuation for state taxation." In 1900 the following joint resolution was adopted:

"A joint resolution proposing to amend sec. 7, art. VIII., of the constitution, relating to municipal bonded indebtedness.

"Section 1. Be it enacted by the general assembly of the state of South Carolina, that the following amendment to sec. 7, of art. VIII., of the constitution be agreed to: Add at the end thereof the following words: Provided, that the limitation imposed by this section and by sec. 5, art. IV., of this constitution shall not apply to bonded indebtedness incurred by the cities of Columbia, Rock Hill, Charleston and Florence, where the proceeds of said bonds are applied solely for the purchase, establishment, maintenance or increase of water works plant or sewerage system; and by the city of Georgetown, when the proceeds of said bonds are applied solely for the purchase, establishment, maintenance or increase of water works plant or sewerage system, gas and electric light plants, where the entire revenue arising from the operation of such plants or systems shall be devoted solely and exclusively to the maintenance and operation of the same; and where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality as provided in the constitution upon the question of other bonded indebtedness.

"Approved the 19th day of February, A. D. 1900." 23 St. at Large, p. 570.

In 1901 the following act was passed (23 St. at Large, p. 616):

"An act to ratify the amendment to sec. 7, art. VIII., of the constitution, relating to municipal bonded indebtedness.

"Whereas the general assembly did, by joint resolution, approved February 19, 1900, submit to the qualified electors of the state, at the general election next thereafter, an amendment to sec. 7, of art. VIII., of the constitution of the state of South Carolina, by adding thereto a clause providing that the limitation imposed by said sec. 7, art. VIII., and by sec. 5, art. IV., of said constitution (art. IV. in said joint resolution being inadvertently written for art. X., and hereinafter designated as art. IV., instead of art. X., so as to conform to the amendment as proposed and voted on), should not apply to bonded indebtedness incurred by the cities of Columbia, Rock Hill, Charleston, Florence and Georgetown, when the proceeds of said bonds are applied to certain purposes: And whereas a majority of the electors qualified to vote for members of the general assembly, voting thereon at

the general election next succeeding the passage of the said joint resolution, did vote in favor of said amendment.

"Section 1. Be it enacted by the general assembly of the state of South Carolina, that the amendment to sec. 7, of art. VIII., submitted by the last general assembly to the qualified electors of the state at the general election next thereafter, and upon which a majority of the electors qualified to vote for the members of the general assembly, voting thereon at the last past general election, voted in favor thereof, be, and the same is hereby, ratified and made a part of the constitution of the state of South Carolina: that the said amendment so made a part of the said constitution is as follows:

"Approved the 8th day of February, A. D. 1901."

Section 5, art. 4, of the constitution, only refers to the office of lieutenant governor, and does not relate to bonded indebtedness. While it is manifest that the joint resolution of 1900 did not intend to refer to the last-mentioned section, nevertheless it is beyond the power of the court to declare that the intention was to insert section 5 of article 10, instead of said section. In *State v. Hagood*, 13 S. C. 46, it is said: "It cannot be claimed that the court can restate the language of an act to make it agree with some possible conclusion as to its intention, as affecting the subject-matter of the act. The language declaring the intent of an act is as much beyond our power as the subject to which that declaration relates, and it would violate the principles of law to change the phraseology of a statute to make it conform to the assumed purpose of the lawgiver in any other way than as warranted by the rules of construction." Mr. Cooley, in his *Constitutional Limitations* (page 71), says: "That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from the meaning." As section 5 of article 4 does not impose a limitation upon the power of a municipality to contract a bonded debt, that portion of the joint resolution is inoperative and of no effect. This, however, does not render null and void the other provisions of the joint resolution. It is true, the legislature, in the act of 1901, declares that "art. IV.," mentioned in the joint resolution, was inadvertently written for "art. X.," but the legislature had no greater power than the court to change the language of the joint resolution under which the amendment was submitted to the people, after such election. Section 1, art. 16, of the constitution, is as follows: "Section 1. Any amendment or amendments to this constitution may be proposed in the senate or house of representatives. If the same be agreed to by two-thirds of the members

elected to each house, such amendment or amendments shall be entered on the journals respectively, with the yeas and nays taken thereon, and the same shall be submitted to the qualified electors of the state at the next general election thereafter for representatives; and if a majority of the electors qualified to vote for members of the general assembly, voting thereon, shall vote in favor of such amendment or amendments, and a majority of each branch of the next general assembly shall, after such an election and before another, ratify the same amendment or amendments by yeas and nays, the same shall become part of the constitution: provided, that such amendment or amendments shall have been read three times, on three several days, in each house." After the amendment had been submitted to the people, and a majority of the qualified electors had voted in favor of its adoption, the only action which the general assembly had the power to take in regard to it was to determine whether it should be ratified in the manner provided by the constitution. Section 5 of article 10 must be construed as if it had not been mentioned in the act of 1901.

We are therefore confronted on the one hand with section 5 of article 10, providing that the bonded debt of a municipality shall never exceed 8 per centum of the assessed value of all the taxable property therein, and on the other hand with the amendment as a proviso to section 7 of article 8, that the limitation imposed by the last-mentioned section shall not apply to bonded indebtedness of the city of Florence, where the proceeds of said bonds are applied as therein required. The amendment was adopted subsequently to section 5 of article 10, and, as they are irreconcilably repugnant to each other, section 5 of article 10 must give place to the amendment in so far as it is inconsistent with it. It is by necessary implication repealed to that extent. *People v. Angle*, 109 N. Y. 564, 17 N. E. 413, in which the court says: "It is a primary rule of construction that statutes must be so interpreted as to give effect to every part thereof, and leave each part some office to perform; and any construction which deprives any part of a statute of effect and meaning, when it is susceptible of another interpretation, is wholly without support from any authority. It is also a familiar rule of construction that if there be any repugnancy between an amended statute or law and the original, which cannot be so construed as to leave them both to stand, and each have a legitimate office to perform, the original enactment must be deemed to have been repealed by the later expression of the legislative will. *Railway Co. v. Anderson*, 3 Abb. N. C. 434, 458; *Harrington v. Trustees*, 10 Wend. 547. These rules apply as well to the interpretation of constitutions as of statutes." This case is cited in the note to Co-

ley, Const. Lim. p. 78; also in the note to 6 Am. & Eng. Enc. Law, p. 92.

We will next consider whether the city council was without power to issue the bonds, by reason of the fact that there was no registration of the voters of said city provided for before said election; the registration of the voters registered for the general municipal election held on 2d May, 1901, being used for the election for bonds held on 4th June, 1901. Sections 12, 13, art. 2, of the constitution, are as follows:

"Sec. 12. Electors in municipal elections shall possess the qualifications and be subject to the disqualifications herein prescribed. The production of a certificate of registration from the registration officers of the county as an elector at a precinct included in the incorporated city or town in which the voter desires to vote, is declared a condition prerequisite to his obtaining a certificate of registration for municipal elections; and in addition he must have been a resident within the incorporated limits at least four months before the election, and have paid all taxes due and collectible for the preceding fiscal year. The general assembly shall provide for the registration of all voters before each election in municipalities: provided, that nothing herein contained shall apply to any municipal election which may be held prior to the general election of the year 1896.

"Sec. 13. In authorizing a special election in any incorporated city or town in this state for the purpose of bonding the same, the general assembly shall prescribe as a condition precedent to the holding of said election a petition from a majority of the freeholders of said city or town, as shown by its tax books, and at such elections all electors of such city or town who are duly qualified for voting under sec. 12 of this article, and who have paid all taxes, state, county and municipal, for the previous year, shall be allowed to vote; and the vote of the majority of those voting in said election shall be necessary to authorize the issue of said bonds."

The legislature passed an act (22 St. at Large, p. 33) entitled "An act to provide for the registration of all electors in this state qualified to vote in state, county, municipal, congressional and presidential elections," approved March 5, 1896, the twenty-fourth section of which is as follows:

"Sec. 24. Ninety days before the holding of a regular election in any incorporated city or town in this state after the general election of 1896, the mayor or intendant thereof shall appoint one discreet individual who is a qualified elector of such municipality as supervisor of registration for such city or town, whose duty it shall be to register all qualified electors within the limits of the incorporated city or town. The names of all qualified electors of such municipality shall be entered in a book of registration, which at least one week before the election, and immediately after the holding of the election, shall be filed

in the office of the clerk or recorder of such city or town, and shall be a public record open to the inspection of any citizen at all times. Such registration shall be used for all special elections in the municipality until ninety days preceding the next regular election."

The legislature also passed an act (22 St. at Large, p. 88) entitled "An act to authorize special elections in any incorporated city or town in this state for the purpose of issuing bonds for corporate purposes," which was approved March 9, 1896, and contains the following provisions:

"Section 1. * * * That it shall be the duty of the municipal authorities of any incorporated city or town of this state, upon the petition of a majority of the freeholders of said city or town as shown by its tax books, to order a special election in any such city or town for the purpose of issuing bonds for any corporate purpose set forth in said petition: provided, that the aggregate bonded indebtedness of any city or town shall never exceed eight per centum of the assessed value of the taxable property therein.

"Sec. 2. After the general election of the year 1896, such persons shall be entitled to vote at any such special election as are qualified under sec. 13, art. II., of the constitution of 1895 of this state. * * *

When sections 12 and 13 of article 2 are construed together, it is evident that it was not the intention to require registration of the voters before each special election in municipalities. The foregoing acts show that the legislature did not construe the constitution as requiring registration before a special election could be held, and the construction of the constitution, as shown by the acts, would be entitled to much consideration if the question was doubtful, as many of the members of the legislature that passed those acts were also members of the constitutional convention. *State v. McAllister* (Tex. Sup.) 81 S. W. 187, 28 L. R. A. 523.

We will lastly consider whether the issuance of the bonds would be null and void by reason of the proviso in section 1 of the act of March 9, 1896, hereinbefore mentioned, and the provisos in the acts amendatory thereof, approved February 11, 1897, and March 2, 1897, which is as follows: "Provided, that the aggregate bonded indebtedness of any city or town shall never exceed eight per centum of the assessed value of the taxable property therein." It is contended by the petitioner that the legislature, having the power to limit the right of a municipality to incur a bonded indebtedness to any amount not prohibited by the constitution, has imposed as a limitation that this indebtedness shall not exceed 8 per centum of the assessed value of the taxable property therein; that although the general assembly had the power, after the amendment to the constitution was ratified, to have removed the limitation imposed by the proviso in said acts, it neverthe-

less has not taken such action; and that this limitation is still of force. It will be observed that the proviso is in the exact words of the constitution, and fixes no other limitation than that provided by the constitution at the time said acts were passed. When these acts are construed with reference to the state of facts existing at the time of their passage, it will be seen that they permitted cities and towns to incur bonded debts to the full extent mentioned in the constitution. They did not have the effect of limiting the power of cities and towns to contract such debts, and would have been just as effectual if the provisos had been omitted. They, in effect, declared that the general assembly was then satisfied with the limitation imposed by the constitution, and the provisos were probably inserted, out of abundance of caution, to prevent the acts from conflicting with the constitution, and to impress upon the cities and towns that they must not attempt to contract bonded debts beyond constitutional limits. If, after the amendment was ratified, the general assembly had desired to impose a limitation upon the power of the cities therein mentioned to incur bonded debts, otherwise than therein provided, it was necessary to enact a statute to that effect.

An order dismissing the petition, and stating that the reasons therefor would afterwards be embodied in an opinion, has already been filed.

(129 N. C. 611)

STATE v. COUNCIL.

(Supreme Court of North Carolina. Feb. Term, 1901.)

CRIMINAL LAW — REHEARING — PER CURIAM DECISIONS—JUROR'S OATH—PRESERVATION OF ERRORS—ASSIGNMENTS.

1. Laws 1887, c. 192, § 3, amending Code, § 962, provides that on affirmance of a sentence for a capital felony the clerk of the supreme court, when the decision of the court is certified down, shall send a duplicate thereof to the governor, who shall immediately issue his warrant directing the execution of the prisoner, but this shall not deprive the governor of the power to pardon or repleve the defendant or commute the sentence. Laws 1887, c. 41, and supreme court rule 48 (27 S. E. 'xi.) require opinions of the supreme court to be certified down on the first Monday in each month, provided they shall have been on file 10 days. Held, that the supreme court cannot grant a rehearing of a criminal case of the degree of capital felony after the affirmance of the trial court's judgment has been certified down, the remedy then being by application to the governor.

2. Under Laws 1896, c. 379, § 5, prescribing that the supreme court justices shall not be required to write their opinions except in cases in which they deem it necessary, a person convicted of a capital felony was not prejudiced by the fact that the supreme court rendered a per curiam decision affirming the conviction.

3. A motion for a new trial of a criminal case for newly-discovered evidence cannot be heard in the supreme court.

4. An objection that a juror was not properly sworn in a criminal prosecution, which was not raised until after verdict, will not be consider-

ed, where the oath was administered in the presence of the accused and his attorney.

5. Where the affidavit of the clerk of the court showed that a juror was sworn in the proper manner, and the manner of his oath taken before the judge afterwards indicated the same, a contention that the juror was improperly sworn is without merit.

6. Where there was no finding of fact by the court as to the manner in which a juror's oath was taken, an objection that the juror was improperly sworn cannot be reviewed.

Douglas, J., dissenting.

Louis Council was convicted of a felony, and he appeals. Affirmed.

T. H. Sutton and E. K. Bryan, for appellant. Brown Shepherd, N. A. Sinclair, and the Attorney General, for the State.

PER CURIAM. Judgment affirmed.

On Petition of Prisoner to Rehear.

(Oct. 29, 1901.)

CLARK, J. The attorney general moves to dismiss the petition to rehear on the ground that by the uniform practice of the court, observed from its beginning till now, petitions to rehear are not allowable in criminal actions. An appeal to this court is a right. Not so as to a petition to rehear (*Herndon v. Insurance Co.*, 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; *Solomon v. Bates*, 118 N. C. 321, 24 S. E. 746), which is an appeal from this court to itself, and only allowable *ex necessitate* when there is no other possible relief from its judgment. In criminal actions, there is the fullest power vested in the executive, not only to relieve from a judgment of this court, as could be done by us upon a rehearing, but the facts can be inquired into as the court could not do, and considerations of equity and of mercy may have a weight which cannot be presented on a rehearing in a court. In *State v. Jones*, 69 N. C. 16 (for murder), it was held that this court had no power to rehear a criminal case, Reade, J., saying: "Neither the learned counsel for the prisoner nor the attorney general has been able to cite any authority showing that we have the power to rehear the case." This has been uniformly followed ever since, as it had been up to that time, and this case is cited in *State v. Starnes*, 94 N. C., by Smith, C. J., who says (page 982): "No such proposition in reference to criminal prosecutions has ever been made or entertained, so far as our investigations have gone, in this court. The absence of a precedent (for we cannot but suppose such application would have been made on behalf of convicted offenders if it had been supposed that a power to grant them resided in the appellate court) is strong confirmatory evidence of what the law was understood to be by the profession." The particular point before the court in *State v. Starnes* was the motion for a new trial for newly-discovered evidence in the supreme court on a conviction for rape, which motion

was denied in the language above cited, and this has been cited as authority (*State v. Gooch*, 94 N. C. 1008; *State v. Starnes*, 97 N. C. 423, 2 S. E. 447; *State v. Rowe*, 96 N. C. 630, 4 S. E. 506) and has been observed, without filing an opinion, uniformly since, both as to new trials, for newly-discovered evidence and rehearings, both of which are allowed (but with certain well-defined restrictions) in civil actions, but never on the criminal side of the docket. It would, indeed, be an anomaly if the court cannot grant a new trial in criminal cases for newly-discovered evidence, but could grant a rehearing. That the practice in this matter has been unbroken for nearly 100 years is, of itself, as the court has already observed, speaking through Mr. Justice Reade and Chief Justice Smith, a strong argument why we should follow the precedents. Petitions to rehear were first authorized, in the present terms of the statute at least, by Rev. Code, c. 33, § 18. As, with full knowledge of the construction placed upon that provision by the uniform practice of the court and the decision in *State v. Jones*, supra, it was repeated in the same terms in the Code, § 966, it is clear that the profession and the general assembly and the Code commission acquiesced in that construction. If, however, the court were not bound by a century of legislative acquiescence as well as judicial construction, and viewed as a new question, the court might well pause before assuming a jurisdiction over the strenuous applications of defendants in criminal actions after the highest court has decided against them. It is the concurrent testimony of successive governors that such applications have been the most troublesome matters they have had to deal with; yet they have means of investigation and examination and a leisure which is denied to this court. However, legislation has now clearly deprived us of the power, if we had ever possessed it, of granting rehearings in criminal actions. By Laws 1887, c. 192, § 3, amending Code, § 962, it is provided: "In all cases of affirmance of a sentence for a capital felony the clerk of the supreme court, at the same time that the decision of the supreme court is certified down to the superior court, shall send a duplicate thereof to the governor, who shall immediately issue his warrant under the great seal of the state to the sheriff of the county in which the appellant was sentenced, directing him to execute the death penalty on a day specified in said warrant, not less than thirty days from the date of said warrant; but this shall not deprive the governor of the power to pardon or relieve the defendant or to commute the sentence." By virtue of chapter 41, Laws 1887, and rule 48 (27 S. E. xi.) of this court, opinions are certified down on the first Monday in each month, provided they shall have been on file 10 days. As opinions are usually filed on Tuesdays, they

remain not less than 13 days, and not more than 42 days, in fieri, and, in that time, if there is error (and in criminal cases it should be scrutinized in that time) it can be observed, and the matter called to the attention of the court, which, in such cases, on sufficient cause shown, has more than once called up the opinion for reconsideration. If this is not done, the remedy is by application to the governor. After the opinion is certified to the governor for execution, the matter is out of the jurisdiction of the judicial department, for he is required to issue his warrant immediately to the sheriff. One judge of this court cannot upon an application to rehear issue his mandamus or his injunction to restrain the governor from proceeding as the statute has expressly directed him to do, upon reception by him of the certified opinion of the court. In this very case, the suspension of execution has been by the courtesy of the governor in granting a respite under his prerogative, and not by virtue of the order of a member of this court. That a judge of this court could not issue his order to the governor commanding him not to proceed is conclusive that we have no power over the matter after the certificate of the opinion of this court has gone to him. The matter has then gone into his hands, and the public history of this case shows that the executive has fully and carefully investigated all claims made for leniency. Further action is left by the constitution and laws with him. No criticism is intended upon the action of the member of the court who granted the order for a rehearing, for it was desirable that this point should be squarely presented and finally set at rest, which might as well be done in this case as in another. The same is true as to convictions for lesser offenses, for the same section (section 3, c. 192, Laws 1887) provides: "In criminal cases the clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is of a capital felony) shall forthwith on receipt of the certificate of the opinion of the supreme court notify the sheriff, who shall proceed to execute the sentence appealed from,"—thus showing the evident clearly-expressed intention that the matter should then be in the hands of the executive department, and execution of the judgment proceed without interruption, unless by executive clemency. It is otherwise as to civil matters, as to which by the same statute no action can be taken till a new judgment is rendered by the court below.

Counsel for the prisoner seem to think it a grievance that a per curiam decision, instead of an opinion, was filed in this case. But if the general assembly could still require the court to file opinions, which it cannot do since the constitution of 1868 (*Horton v. Green*, 104 N. C. 400, 10 S. E. 470; *Herndon v. Insurance Co.*, 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547), the same authority has relieved the court of

the former statute by enacting (Laws 1893, c. 379, § 5): "The supreme court justices shall not be required to write their opinions in full except in cases in which they deem it necessary." As the court had already held, in the cases above cited, that the general assembly under the present constitution had no control over such matters, this has only a persuasive effect on us as the opinion of a co-ordinate branch that unnecessary opinions had been filed taxing alike the public treasury and the time of the profession. In deciding what cases shall be disposed of by a per curiam decision without an opinion, we have always been guided, not by the importance or unimportance of the matter at issue, but by considering whether or not the propositions of law presented had not been already frequently decided. Accordingly we find that in other states appeals in capital cases have not infrequently gone off on a per curiam decision without opinion, and in some states it is always done when the judgment is affirmed, and in England no appeal has ever been allowed in criminal cases, the remedy being by application for executive clemency.

When the appeal was heard at last term the point most pressed was the motion for a new trial for newly-discovered evidence. It had been well settled that such motions in criminal cases would not be heard in this court (*State v. Starnes*, supra), and that, even in civil cases, such motions would be disposed of by per curiam order. (*Herndon v. Railroad Co.*, 121 N. C. 499, 28 S. E. 144; *State v. Mitchell*, 102 N. C. 347, 9 S. E. 702; *Ferebee v. Pritchard*, 112 N. C. 83, 16 S. E. 903; and many other cases; and the same course was necessarily pursued in this case.

Another point was made, though properly not much relied on, that one of the jurors had not been properly sworn. This has been more pressed on this argument, but it was presented and considered and decided by us before. It was so well settled that if there was such irregularity it was cured by not objecting in apt time that we deemed no repetition of adjudications necessary. The juror was sworn in the presence of the prisoner and his counsel, and to let him acquiesce in the manner in which the oath was taken, and then object after verdict, would simply make a trial not a decision upon the merits but a series of pitfalls for the state. Not having spoken when he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. *State v. Boon*, 82 N. C. 637; *State v. Patrick*, 48 N. C. 443; *Briggs v. Byrd*, 34 N. C. 377; *State v. Ward*, 9 N. C. 443. Even where a juror is incompetent because a minor (*State v. Lambert*, 93 N. C. 618) or an atheist (*State v. Davis*, 80 N. C. 412) or not a freeholder (*State v. Crawford*, 3 N. C. 298) or a nonresident (*State v. White*, 68 N. C. 158) or related (*Baxter v. Willson*, 95 N. C. 137), and these objections are not discovered till after verdict, setting aside the verdict rests in the discretion of the

trial judge. *State v. Lambert*, supra, and many cases there cited. For a stronger reason this must be so when the objection is merely to the manner in which a competent juror is sworn, when the oath is taken in the prisoner's presence, who makes no objection. This is like the case of incompetent evidence admitted without objection, and the like. In *State v. Gee*, 92 N. C. 756, where a witness was not sworn at all, the court held that this was not ground of objection after verdict. Indeed it appears from the affidavit of the clerk of the court that the juror was sworn in the proper manner, and the manner of his oath taken before the judge afterwards indicates as much. Besides, there is no finding of fact by the judge as to the manner in which the oath was taken (*State v. De Graff*, 118 N. C. 689, 18 S. E. 507), which the appellant should have asked for if he wished the action of the judge reviewed. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360. Though the petition to rehear must be dismissed, we have discussed the objection as has sometimes been done when an appeal is dismissed. *State v. Wylde*, 110 N. C. 500, 15 S. E. 5, and cases there cited.

Petition dismissed.

DOUGLAS, J. (dissenting). I cannot concur in the opinion of the court, because my convictions are to the contrary. I readily concede that this decision settles the question that in no case can a rehearing be had in a criminal action, and I think it better that it should be settled one way or the other. And yet, knowing that rehearings are constantly granted in civil cases, and finding no distinction between civil and criminal actions, either in the statute or the rules of this court, I am unwilling to say, even by implication, that property is more valuable than life and liberty, or entitled to a greater degree of protection. The argument that in criminal cases the pardoning power of the governor fulfills the purpose of a rehearing is purely ab inconvenienti, and to my mind does not meet the ends of justice. Pardon is an act of mercy, and, so far from establishing the innocence of any one, presupposes his guilt. The governor may restore to him his liberty, but not his character. What a defendant asks in a rehearing is that he may have a fair trial; and yet, no matter how clearly his innocence may appear, nor how great the error we ourselves may have committed, we can give him no relief. He must throw himself at the feet of the executive and beg the poor favor of passing the remainder of his life in the penitentiary, or, at best, wandering through the world a social outcast, bearing the brand of a convicted felon. This may become the law, but through no act of mine. As the petition to rehear is dismissed, it is useless for me to discuss the merits of the case. My reasons for directing it to be docketed are given at length in the original order,

which is hereto attached, to wit: "This is a petition made in apt time and proper form to rehear a criminal case wherein the petitioner is under sentence of death. As this case was decided upon a per curiam order while I was absent from the bench, I am ignorant equally of the grounds of the decision and the reasons and authorities influencing the court. However, I have no hesitation in saying that, in my opinion, this is a proper case to be reheard, but I feel great hesitation in ordering it to be docketed in view of the decision of this court in *State v. Jones*, 69 N. C. 16. That case is directly in point and expressly holds that 'the supreme court has no power to entertain a petition to rehear a criminal action.' It is but just to counsel as well as myself to say that that decision does not meet my approval in spite of my respect and admiration for the great court that delivered it. In fact it scarcely seemed to satisfy the court itself, as the learned justice writing the opinion, after deciding this vital point against the petitioner, proceeds to discuss the points raised in the petition as fully as if the petition had been allowed. This case was decided upon no precedents whatever, as there were admittedly none then, and I am able to find none other since. It is true *Jones' Case* is cited in *State v. Starnes*, 94 N. C. 973, 981, and in *State v. Rowe*, 98 N. C. 629, 630, 4 S. E. 506; but these latter cases relate exclusively to motions for new trial for newly-discovered evidence, and have no apparent bearing upon the question of rehearing. The reasons given by the court are as follows: 'Neither the learned counsel for the prisoner nor the attorney general has been able to cite any authority showing that we have the power to rehear the case. In equity cases and in civil actions the practice has been common, but in criminal cases never to our knowledge. In the former cases, this court makes decrees and passes judgments, which may be reviewed. But in criminal cases we do not pass judgment. Such cases are sent up for our opinion only, which we certify to the court below, and there our jurisdiction ends.' Whatever force these reasons might then have had, they have none now to my mind. This court constantly grants rehearings in civil actions where it passes no judgment whatever, and makes no decrees. Rules 52 and 53 (27 S. E. xl., xli.), providing for rehearings, make no distinction between civil and criminal cases, and I see none. If the title to a chicken were involved, I could grant a rehearing; but, as a human life is at stake, I am utterly powerless. To my mind such a distinction finds no just foundation in law, in public policy, or in humanity. The rights of property can never be more sacred than the security of the person, as they have no independent existence, but exist only in relation to the owner. The guilt or innocence of the prisoner is not

for me to decide, nor can I properly consider the facts that the judge who tried the prisoner has grave doubts of his guilt, that the solicitor who prosecuted him does not believe that he is guilty, and that the jury that convicted him rendered a verdict only after a distinct understanding among themselves and with the court that it should be coupled with a recommendation to mercy. These facts, however strong and significant, appeal only to executive clemency, and not to judicial action. However much a justice may dissent from the decisions of the court, and however full his right of dissent when sitting with the court, he is bound by them when acting in his individual capacity. But docketing a case is not overruling any opinion that may be involved. It is simply bringing the matter before the court for such action as it may see fit to take. In no other way whatever can it be brought before the court. Even if the court were in favor of a rehearing, it could not act under its rules unless some individual judge took the responsibility of ordering the case to be docketed. Feeling as I do, I think the court should have an opportunity to pass upon the question, which can never be presented more clearly or more forcibly. I am somewhat influenced in this course by the fact that the governor frankly states that he will relieve the prisoner if I order his petition to be docketed, but not otherwise; and by the further fact that eminent members of the bar think that criminal cases can be reheard, a view in which I understand his excellency to fully concur. Unless his case is docketed, the petitioner will be hanged next Monday, and this court would then be powerless to correct any error that may exist, no matter how great or manifest. The petitioner has been convicted of what is properly regarded as the highest crime known to our law, and if guilty should be punished. But he is entitled to a fair trial, and if innocent his execution would inflict a wrong which eternity alone can repair. Under such circumstances I feel it my duty to act, no matter how great may be my reluctance or the responsibility which it involves. The clerk will docket this case, and file this opinion with the petition. He will also issue the proper notices, including one to the governor. This 8th day of August, 1901. R. M. DOUGLAS, Associate Justice."

(120 N. C. 121)

BLACK et al. v. COMMISSIONERS OF BUNCOMBE COUNTY.

(Supreme Court of North Carolina. Oct. 22, 1901.)

TAXATION—SPECIAL STATUTE—ENACTMENT—COUNTIES—CONSTRUCTION OF COURT HOUSE—AUTHORITY TO BUILD—BONDS—COUNTY EXPENSES—LEVY OF TAX—SUBMISSION TO VOTE—INJUNCTION—PLEADING—ADMISSION.

1. County commissioners may erect a court house and levy taxes to pay for the same, not exceeding the constitutional limit, without be-

ing authorized so to do by special act of legislature.

2. Act March 11, 1901, authorizing a certain county to levy a tax for the erection of a court house, being for a necessary expense, the question of the levy of such tax is not required to be submitted to the qualified voters of the county, under Const. art. 7, § 7, requiring such submission before a county shall contract any debt, pledge its faith or loan its credit, or levy or collect any tax, except for necessary expenses.

3. The ratification by the speakers of such act is conclusive evidence that the bill has passed three several readings in each house.

4. A finding that the first of the three readings in each house were on days separate from the other readings, based on entries on the bill and on the calendars which were not inconsistent with the journals, is sufficiently supported by evidence.

5. Act March 11, 1901, authorizing a certain county to erect a court house, requires that it be ratified by the people of the county. *Held*, that such ratification is merely a condition precedent, and the act is not invalid as a delegation of legislative authority.

6. Act March 11, 1901, authorizing the erection of a court house by a certain county, is not rendered invalid by the fact that it names certain persons to supervise the erection thereof, at a specified compensation per day.

7. The court has no jurisdiction, in a suit to enjoin a county from issuing certain bonds, as authorized by Act March 11, 1901, for the payment of certain indebtedness, to determine an issue raised by the pleadings, as to whether certain notes intended to be paid therewith were given for funds borrowed as necessary county expenses.

8. Plaintiff sought to enjoin a county from issuing bonds to pay certain debts, on the ground that the debts were not for necessary expenses. The county in its answer alleged that such debts were created for necessary county expenses. *Held*, that an admission in the reply that the money received from such notes was used by the county for the purposes and in a manner alleged in the answer was a sufficient admission that the expenses were necessary to authorize a denial of the relief demanded.

9. An injunction suit to restrain a county from issuing certain bonds for the payment of certain county indebtedness will not be advanced for hearing because a certain portion of such indebtedness is due to the board of education for borrowed money.

Appeal from superior court, Buncombe county; Moore, Judge.

Action by W. P. Black and others against the commissioners of Buncombe county to restrain the defendant from issuing certain bonds or levying certain taxes. From a decree in favor of the defendant, the plaintiffs appeal. Affirmed.

H. B. Carter, for appellants. Chas. A. Webb and Locke Craig, for appellee.

FURCHES, C. J. The commissioners of Buncombe county having managed their financial matters so that the county indebtedness for current necessary expenses of the county on the 1st day of January, 1901, was \$59,037.18, and the court house not being suited to the wishes of the people and the business of the county, they wished to dispose of the old court house and build a new one; and, having taxed the people and

property as high as they could under the constitutional restriction, the legislature, on the 11th March, 1901, passed and ratified an act (Laws 1901, c. 598) intended to enable the commissioners to issue \$100,000 coupon bonds, and to levy a special tax to pay the same. Fifty thousand dollars of these bonds were to be used in building a new court house, and \$50,000 in paying said indebtedness of Buncombe county. Before the \$50,000 bonds could be issued to build a new court house, the question of "court house or no court house" had to be submitted to a vote of the county, and approved by a majority of those voting thereon. This has been done, and a decided majority of the votes cast were for the new court house, though a majority of all the qualified voters of the county did not vote for the new court house. Under this act (chapter 598), and the vote of the people thus cast, the commissioners believed they were authorized to issue \$50,000 bonds for the new court house, and \$50,000 for county indebtedness, called "the floating debt of the county"; and, so believing, the commissioners undertook to ascertain, itemize, and declare what was the outstanding "floating indebtedness of the county," and among the list set out by them are such debts as \$17,200 due by notes to the Battery Park Bank, \$4,000 due Mrs. Featherstone by notes, county board of education for borrowed money due by note \$9,921.40, and a number of other notes said to be due by the county. The board, after so ascertaining the indebtedness of the county, proceeded to adopt resolutions providing for the issuance of said bonds, \$50,000 for the court house, and \$50,000 to pay the "floating indebtedness of the county," and to levy a special tax for the payment of the interest thereon, as provided in said act. The plaintiff, believing that the defendant was not authorized to issue said bonds nor to levy said tax, brought this action to restrain and enjoin the defendant from issuing said bonds or levying or collecting said tax, and plaintiff prayed for an injunction, which being disallowed and the order of injunction refused, plaintiff appealed to this court.

The plaintiff puts his prayer for injunction against issuing the court house bonds upon the ground that the act (chapter 598) was not passed according to the constitutional requirement; that it did not pass three times in each house of the general assembly; and, to be more specific, that it did not pass its first reading. He further objects to the validity of said act for the reason that it did not authorize the court house bonds to be issued until it should be approved by a vote of the people; and he also objects for the reason that it did not require a majority of the qualified voters of the county, and that a majority of the qualified voters of the county did not vote for the new court house. He bases his objection to the issuance of

the \$50,000 bonds to pay "the floating debt" upon the ground that "the floating debt," or a large portion thereof, is not for the necessary expenses of the county, and that this so appears by the itemized statement of said indebtedness made by the defendant; and, this being so, the defendant has no right to issue bonds for its payment without first having an act of the legislature authorizing a submission of the question to the majority of the qualified voters of the county, and an approval by a majority of the whole qualified vote of the county.

These questions will be considered separately, and we will first consider the objections to issuing the court house bonds. The courts have the right to say what are necessary expenses of a county, but they have no right to supervise and control the conduct and judgment of the commissioners when they are necessary expenses. *Brodnax v. Groom*, 64 N. C. 244; *Satterthwaite v. Board*, 76 N. C. 153; *Evans v. Commissioners*, 89 N. C. 154; *McKethan v. Board*, 92 N. C. 243; *City of Charlotte v. Shepard*, 120 N. C. 411, 27 S. E. 73; *Rodman v. Town of Washington*, 122 N. C. 39, 30 S. E. 118; *Mayo v. Board*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163. And we have held that the building a court house is a necessary expense. *Vaughan v. Board*, 117 N. C. 434, 23 S. E. 354. But as to the manner in which this expense should be incurred, or as to the cost of the court house, the courts have no power to control the same. This is certainly so, where it is only a matter of judgment, and no mala fides is alleged or shown. It therefore follows that the commissioners of a county have the right to contract for building a court house without any special legislative authority to do so. *Vaughan v. Board*, *supra*; *Halcombe v. Commissioners*, 89 N. C. 346,—exactly in point. And, as the commissioners have the right to contract for building a court house without any special legislative authority, they would have the right to pay for the same, and could be compelled to do so if a sufficient amount of money for that purpose could be raised by taxation within the constitutional limitation. *City of Charlotte v. Shepard*, 122 N. C. 602, 29 S. E. 842. So it is only necessary to have special legislative authority to levy a special tax when the money cannot be raised under the general provisions, owing to the constitutional limitation. When this cannot be done under the general law, owing to the constitutional limitation, there must be special legislative authority to levy a tax for such purpose; but such special act need not be submitted to the people for their ratification. *McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99; *Tate v. Board*, 122 N. C. 812, 30 S. E. 852; *Smathers v. Commissioners*, 125 N. C. 480, 34 S. E. 554. It is therefore seen that Act 1901, c. 598, need not have been submitted to the people for their ratification. As to the manner of its passage, it appears that the

ayes and noes were duly entered on the journals upon the second and third readings on two several days in each house, as required by Const. art. 2, § 14. The ratification is conclusive evidence that it was read three several times in each house. *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. Rep. 801. The judge finds as a fact that the three readings were on three several days, and he finds this fact as to the first reading in each house from the entries on the bill and on the calendar. This is not a matter required by the constitution to be shown by the journals, and the entries on the calendar and bill are both consistent with, not contradictory of, what does appear on the journals, and the finding of fact by the judge is sustained. But as the act itself provided for its submission to the people, and that the commissioners should not be authorized to build the court house, nor to levy the special tax, until it was submitted to the people, and approved by a majority of the votes cast, it was necessary to do this. This submission was a condition precedent, and not a delegation of legislative power, as claimed by the plaintiff. It was to that extent a local option act, the constitutionality of which has many times been sustained by this court. *Cain v. Commissioners*, 86 N. C. 8; *Simpson v. Commissioners*, 84 N. C. 158; *Evans v. Commissioners*, 89 N. C. 154; *Halcombe v. Commissioners*, 89 N. C. 346.

It is contended that the case of *Evans v. Commissioners*, supra, gives the commissioners the right to say what are the necessary expenses of the county, and the courts have no power to review their decision. This case rests on *Brodnax v. Groom*, 64 N. C. 244, and neither of the cases sustains that contention. Where it is said the court has no power to review their decision, the court is speaking of the manner in which they perform or administer the rights given them by virtue of their office, in cases where the expenditure is for necessary expenses. This is clearly stated by the chief justice in *Brodnax v. Groom*; that is, the court has the right to say what are necessary expenses, but no right to say in what manner the commissioners shall exercise their discretion in cases where they have the same. The legality of the act is attacked because it names a number of persons who shall have the supervision of building the court house, and gives them \$2 per day. This may have been unnecessary and expensive, but it does not seem to take from the commissioners any of their constitutional rights. It is in effect making these seven men a building committee, at the price of \$2 per day, and, if this was unnecessary and extravagant, it does not, in our opinion, render the act void. This disposes of the first question,—the validity of the court house bonds,—and the injunction as to them was properly refused.

The other question—the necessary expenses of the county—has to some extent been dis-

cussed in what we have already said. As is contended by the plaintiff in his complaint, many of the items set out by defendant in its resolution and statement of indebtedness do not appear to be for necessary county expenses, such as notes due the bank, notes due Mrs. Featherstone, and due to the board of education and others for borrowed money. These do not appear to have been given for necessary expenses; and, although the defendant says in its answer that it "can prove by an abundance of evidence that they were," this does not make it so. The allegation of the complaint that they were not, and the allegation of the answer that they were, raised an issue of fact, which the judge was not authorized to try. The defendant, probably seeing this trouble in its case, contended that the court would presume that the commissioners acted properly, and that the notes were given for necessary expenses of the county, and cited *McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99, as authority for this contention. But that was where it was not denied but what that indebtedness was based upon the necessary expenses of the county, and, this being so, the court presumed that it was. But where there is an allegation and denial as to whether they were or were not for necessary expenses, the court can presume nothing; and, if the case had stood upon complaint and answer, we would have held that there was error in not granting the injunction until the hearing, as to the indebtedness alleged to have been made for the necessary expenses of the county. But the plaintiff in his replication comes to the relief of the defendant. The defendant in its answer says that "all the money obtained on these notes and overdrafts was used in payment of necessary county expenses," and the plaintiff in his replication to the answer, when it was not necessary that he should reply, says that "it is true that the money received from the notes and overdrafts at the bank was used by the county for the purposes and in the manner therein alleged." This admission, it seems to us, defeats the plaintiff's right to an injunction in this action. But as the matter of injunction turns upon an admission of the plaintiff, and is not a fact found by the jury upon proper instructions, we do not say what effect the judgment in this case would have in another action, brought by other parties not connected with this case. There is one thing presented by the record in this case that we feel called upon to mention, as it is a matter of much public concern. We mention this, as it appears in this case, and from the fact that matters of a similar character have appeared in other cases, and that is the \$9,921.40 due by note to the board of education for borrowed money. This was set forth as one of the reasons in the motion to advance the cause for hearing. But, if this had been the only reason set forth as a ground for the advancement, this case would not have been advanced. This money, it seems, had been collect-

ed and paid to the board of education, where it was subject to the proper use of the schools, and where it should have remained. But the board, in violation of their trust as public officers, have not kept it where it belonged, but have loaned it to the county commissioners, who admit they are not able to repay it without the aid of special legislation for that purpose. As they have violated their trust in lending this money, they are liable for the same in a civil action, if not to criminal prosecution. It seems to us that there is too great a disposition on the part of public officers intrusted with public funds to think of them and treat them as their own. This should be and will be stopped, as we will not doubt that courts and solicitors will do their duty. Fifty-nine thousand dollars "floating debt for necessary expenses" over and above the large amount of taxes annually levied and collected in Buncombe county seems to be large. But that is a matter with which we have nothing to do. If it is too large, if the affairs of the county have not been well and economically managed, that is a matter for the people of the county.

For the reasons given, the judgment of the court below is affirmed.

(129 N. C. 195)

RAYNOR v. WILMINGTON S. C. R. CO.

(Supreme Court of North Carolina. Nov. 5, 1901.)

RAILROADS—EJECTION OF PASSENGERS—AC-TIONS FOR DAMAGES—PLEADINGS—EVI-DENCE—ADMISSIBILITY—OPINIONS.

1. In an action for damages for wrongful ejection from defendant's train while a passenger thereon, the plaintiff alleged that he was willing to pay the proper fare, and was wrongfully put off without being allowed to pay it. The answer simply denied the wrongful ejection. *Held*, that evidence that plaintiff was drunk at the time of his ejection was not admissible in justification.

2. Evidence that a passenger was drunk at 3:45 o'clock in the afternoon is not admissible, in an action for the wrongful ejection, to corroborate testimony that he was drunk at 11 o'clock in the morning, the time of the ejection.

3. In an action by a passenger for wrongful ejection from a train, a question whether any more force was used than was necessary was properly excluded as calling for an opinion.

Appeal from superior court, Cumberland county; Moore, Judge.

Action by J. R. Raynor against the Wilmington Sea Coast Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. M. Rose, for appellant. N. A. Sinclair, for appellee.

COOK, J. This action was brought against defendant company to recover damages on account of an alleged violent, unlawful, and forcible ejection from defendant's train while plaintiff was a passenger thereon from Wilmington to Wrightsville. The only material issue raised by the pleadings (except as to

the amount of damages) is by the denial in the answer of allegation 5 of the complaint, which is as follows: "(5) That the conductor of said defendant's train, some little time after the train had started, came and demanded of plaintiff a ticket, and plaintiff told him that he had no ticket, and plaintiff reached down in his pocket to get the money, and asked said conductor what the fare was, to which the reply was that the fare was 35 cents. The plaintiff remarked that he thought it was 25 cents, but at the time intended to and was getting the money out to pay the conductor, when the conductor rudely, roughly, without cause, and without giving plaintiff an opportunity to pay the 35 cents, with the aid of three other persons, he and they laying violent hands on plaintiff, uncereemoniously, maliciously, and forcibly ejected plaintiff from the train at a point between stations, and plaintiff had to remain where he was so rudely and forcibly put off about three hours and a half,"—upon which the following issue was framed and submitted to the jury: "Was plaintiff wrongfully ejected from defendant's car?" The jury rendered a verdict in favor of plaintiff, and defendant appealed upon exceptions taken to the exclusion of evidence.

There are only two exceptions taken, both of which are without merit. As to the first: The ejection occurred about 11 o'clock in the forenoon, at which time plaintiff testified that he was sober; had only taken two drinks,—one before he left Fayetteville, and one at the second station after leaving,—and took no other drink that day. The conductor of defendant company's train testified that when plaintiff was ejected (11 o'clock a. m.) he was so drunk that he staggered and fell, as he started back to the train. To corroborate the conductor, Hinton, defendant proposed to show the condition of plaintiff at 3:45 o'clock that afternoon, which was excluded upon objection. The second exception was to the exclusion of the question propounded to the conductor, Hinton, "whether any more force was used by the officials of the road than was necessary to eject the plaintiff from the train." In what way the condition of plaintiff, when ejected, can be material to the issue, we are unable to see. There is no suggestion in the pleadings that plaintiff was drunk or bolsterous, or in any way conducted himself in an unseemly manner. Nor does the defendant, in its answer, undertake to justify or excuse the act of ejection under the rights conferred upon it by section 1962 of the Code, which was cited by the learned counsel for defendant, by showing its rules, and the violation thereof by plaintiff, which section is as follows: "If any passenger shall refuse to pay his fare, or violate the rules of the corporation, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at

any usual stopping place, or near any dwelling house, as the conductor shall elect, on stopping the train." The answer simply denies the ejection as stated in the complaint. Plaintiff alleges that he was willing and prepared to pay the proper fare, and was put off the train without being allowed a chance to pay the fare charged by the conductor; but, as there is no exception taken to any matter relating to the payment of fare, that matter is not involved in this appeal. For either of the two causes stated in that section of the Code, defendant would have had the right to eject him, if defendant had relied upon its provisions, and could have established the cause. But defendant did not avail itself of the benefit of that section by a special plea, but relied upon the general issue. From the nature of the exception taken in trying to establish the fact that plaintiff was drunk, it is inferable that the corporation had some rule or rules as to drunkenness upon the train, which defendant claimed plaintiff had violated. But the violation of no such rules is pleaded in justification or excuse for the act, as should have been done if relied upon as a defense. Under the old system of pleading upon the general issue, matter in justification could not be proved; it must be pleaded specially. *Barker v. Barham*, 3 Wils. 368, on pages 370 and 371; *Bush v. Parker*, 1 Bing. N. C. 72; *Brown v. Bennett*, 5 Cow. 181; 1 Chit. Pl. 501. Under our Code practice the principle is not changed. A defense which cannot be maintained by a denial of the allegations in the complaint must be set up as new matter in the answer. *Clark's Code*, §§ 242, 243, and cases there cited. But, if it had been material whether plaintiff was drunk at the time he was put off, his condition nearly four hours thereafter would not have been a circumstance to corroborate the testimony of the conductor as to what it was when ejected. If intoxication, once produced, were a continuing condition, then there would be force in the contention. But it is not. A man may be drunk at 11 o'clock in the forenoon and sober up by 3:45 in the afternoon, or vice versa, he may be sober in the forenoon, and by 3:45 in the afternoon be drunk. Neither drunkenness nor soberness is necessarily a continuing state. Both conditions are liable to rapid and frequent fluctuations. Therefore plaintiff's condition four hours after last seeing him could neither be evidence nor corroborating evidence as to his real condition when seen.

While the other, or second, exception seems to be addressed to the defense which might have been made under the section of the Code above quoted, yet the force actually used was material to the issue as to the quantum of damages, and we will so consider it. But the question asked—"whether any more force was used by the officials of the road than was necessary"—was the matter of fact to be determined by the jury,

and could not be established by his opinion. To have answered it, the witness would have had to find the facts constituting the force actually used, and draw his conclusion from them. In *Phifer v. Railway Co.*, 122 N. C. 940, 29 S. E. 573, it was held that the witness (plaintiff) could not be allowed to testify that he was "careful" at the time of the accident. "Whether the plaintiff was careful was the very question which the jury were impeaneled to determine. * * * The opinion of a witness ought not to be given in evidence upon an occurrence when, from its nature, the whole can be described in such language as will enable persons who were not present to come to a proper conclusion concerning it." So, in this case, it was for the jury to determine whether the force used was excessive, and not for the witness. There is no error.

(129 N. C. 190)

BROOKS v. SULLIVAN et al.

(Supreme Court of North Carolina. Nov. 5, 1901.)

NEGOTIABLE INSTRUMENTS—TRANSFER BEFORE MATURITY—PRE-EXISTING DEBT—BONA FIDE HOLDER.

Where a negotiable note was given prior to Laws 1899, c. 733, §§ 25-27, and was transferred before maturity as collateral security for a pre-existing debt, the assignee is not such a holder for value that he takes free from equities of which he had no notice, though the rule is changed by such act.

Appeal from superior court, Guilford county; Timberlake, Judge.

Action by A. F. Brooks against J. H. Sullivan and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

T. B. Womack, for appellant. J. T. Morehead, for appellees.

CLARK, J. The only question is whether, when a negotiable note is transferred before maturity as collateral security for a pre-existing debt, the assignee is such holder for value that he takes free from equities of which he had no notice. The negotiable instruments statute (Laws 1899, c. 733, §§ 25-27) settles that such is the case now, to the extent of the debt secured, but that is a change of the law which was previously otherwise. *Holderby v. Blum*, 22 N. C. 51; *Harris v. Horner*, 21 N. C. 455, 80 Am. Dec. 182; *Potts v. Blackwell*, 56 N. C. 449. This case is governed by the law as it stood prior to the act of 1899.

Affirmed.

(129 N. C. 194)

LEVIN v. CITY OF BURLINGTON.

(Supreme Court of North Carolina. Nov. 5, 1901.)

MUNICIPAL CORPORATIONS—ENFORCEMENT OF PUBLIC LAW—LIABILITY—DAMAGES WITHOUT INJURY.

A city is not liable in damages to one who was arrested and detained under Laws 1893, c. 214, §§ 14, 15, 25, on the ground of having

been exposed to smallpox, where the officers acted properly and without malice, though the plaintiff may have suffered damage thereby.

Douglas, J., dissenting.

Appeal from superior court, Alamance county; Council, Judge.

Action by Koen Levin against the city of Burlington. From a judgment in favor of the defendant, the plaintiff appeals. Affirmed.

Bynum & Bynum, for appellant. O. E. McLean, for appellee.

FURCHES, C. J. This is an action to recover damages for the wrongful arrest, detention, and ill treatment of plaintiff by the defendant city. The defendant demurred *ore tenus* to plaintiff's complaint, and we know of no better way of stating the case than by inserting the entire complaint, which is as follows: "The plaintiff, for cause of action, alleges: (1) That he is a resident of the city of Burlington, and is a peddler by occupation. (2) That the city of Burlington is a municipal corporation, duly chartered by the legislature of North Carolina, and was managed at the times hereinafter mentioned by a mayor and a board of aldermen or commissioners duly elected by the people within the corporate limits of the said town, and by policemen duly appointed by the said board of aldermen or commissioners. (3) That on or about the * * * day of February, 1899, the plaintiff came to the town of Burlington, and stopped for one night at a boarding house in said town kept by Mrs. Mary Ingle, where he had been stopping when in Burlington, for some months, leaving said town the next morning with his horse and wagon and goods, and went to the factory, known as Altamaha, nine miles distant from said town, for the purpose of selling his goods and wares, as he was licensed to do by the laws of North Carolina. (4) That plaintiff had never in his life been exposed to smallpox up to that time. (5) That after arriving at Altamaha one James Zachary, who was the duly-appointed police officer of said town of Burlington, as plaintiff is advised and believes, followed him from Burlington to said Altamaha, and arrested him, under and by virtue of an alleged warrant issued by the mayor of said town of Burlington. Plaintiff does not know the charge contained in said warrant, and has applied to the mayor for said warrant, who told him it had been destroyed; but he avers, from information and belief, that said mayor issued said warrant, and sent the same to Altamaha by the police officer of the town, and had plaintiff arrested, under special authority of the said city, and under special instruction given by said board of aldermen or commissioners. (6) That the said Zachary, the policeman of the said town of Burlington, professing to act by virtue of said warrant, did arrest this plaintiff at Altamaha, against his earnest protest, and carried him back to the town of Burlington; that when he got

there he was told by the policeman that he had to go in the house of Mrs. Mary Ingle, and stay there fifteen days; that smallpox had broken out in the city, and that this plaintiff had stayed there the night before, and had to go there and stay; that plaintiff protested that he had never been exposed to smallpox in his life; that he had spent the night before there in a room by himself, with no knowledge of any smallpox in the town, and had left in the morning, not being exposed, and he earnestly protested against being put in the house; that he was informed at the time that there was a man in the house who was declared to have smallpox; that he asked for the mayor to be sent for or that he be examined before the mayor, but the mayor refused to come to him or to allow him to be carried before the mayor, but he was told by the said policeman he had to go into said house; that he begged the said policeman, and one of the board of aldermen, one Moore, who, as he is advised and believes, was acting for the said town by the authority of the town, not to confine him in a house where smallpox was, as he had a great dread of the disease, but to put him in another house, and he would pay all the expenses, and pay for a man to watch him, and see that he did not run away; that this request was refused, and he then begged them to put him out in a field, and hire a man to watch him, and he would pay all the expenses, and also for the expense of keeping his horse, but this was also refused, and he was told by said Moore and Zachary he was to go in said house; that he told them that he had been vaccinated several times, and showed the marks, but, in spite of all his protestations, he was forced to go into said house where the man was down with smallpox, and was kept there for twenty-one days; his horse was taken from him, and his goods also put in the house, and kept there, during the whole time plaintiff was. (7) That the said house was not a house of detention, or a pest house, provided by the town for quarantine purposes at all, and the imprisonment of plaintiff was false and illegal. (8) That, against the protest of plaintiff, he was forced to be again vaccinated twice during his confinement, and that neither of them had any effect, and they made this plaintiff pay for said vaccination. (9) That during his confinement in said house the man who was declared to have smallpox died in said house; that before his death the officers in charge tried to force this plaintiff to go into his room and wait on and attend to him, but this he refused positively to do. (10) That when he was released he found that the authorities of the town had been using his horse, and that he had been badly treated, very much reduced in flesh, and depreciated in value, to wit, in the sum of \$25. (11) That he had about \$150 worth of goods, which, by reason of being kept in this house, became almost a total loss to him. Most of them he has never

moved from the house, and by reason of this he was damaged \$150. (12) That his business was stopped during all this time, and he lost all the profits, as well as his time, which was worth reasonably the sum of five dollars per day. (13) That the plaintiff suffered great agony of mind by reason of his exposure during all this time to smallpox, and by the great indignity and false arrest and imprisonment; that, after being released, it was several months before he could do anything at his business, as it became known he had been in the house and exposed to smallpox, and people would not have anything to do with him, and he was damaged by this the sum of five hundred dollars; that by reason of his loss in his business, and his loss of his goods and damage to his wares, and the indignities to his person, and his false arrest and imprisonment, and agony of mind and suffering, he has been damaged in the sum of five thousand dollars. Wherefore plaintiff demands judgment for the sum of five thousand dollars, and his costs of suit, to be taxed by the clerk."

The demurrer admits the facts, and from these facts it must be admitted that the plaintiff received heroic treatment, and was damaged. But it is not every damage that creates a cause of action. This is where there is damage without injury,—*damnum absque injuria*; damage caused by lawful means, as where one is arrested under regular process of law, charged with a violation of the criminal law of the state, but, upon investigation or trial, it appears that he was not guilty of the crime charged, and should not have been arrested. By such arrest and detention he has been damaged, but he has no right of action unless he can show that such arrest was malicious. So, with the plaintiff, if he was arrested and detained by the officers of the law, under the process of the law, and for the purpose of enforcing the law, he has no right of action, unless he can show malice or improper conduct on the part of the officers in its execution. And then his right of action would be against the party or parties maliciously instituting the proceedings, or the officers for improper conduct in making the arrest and detention. That a municipality may be sued and held liable for damages in many cases is held in *Lewis v. City of Raleigh*, 77 N. C. 229; *Moffitt v. City of Asheville*, 103 N. C. 255, 9 S. E. 695, 14 Am. St. Rep. 810; and *Shields v. Town of Durham*, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293. But these and such cases are for the neglect in failing to perform some required duty, such as erecting and keeping in proper condition city prisons, by reason whereof the health of prisoners has been seriously impaired, and the failure to work and keep the public streets in repair and free from obstructions, whereby some person suffers injury. These are distinguishable from the case under consideration, where public officers are in the exercise of a public duty,

and engaged in enforcing a public law for the public good. They seem to have been acting under chapter 214, Laws 1893; and, if there was any doubt as to this, the plaintiff in his brief expressly alleges that the defendant was acting under sections 14, 15, 25, c. 214, Laws 1893.

It seems to be settled in this state that a municipal corporation cannot be held liable in damages for the enforcement of a public law for the public good. But we will not undertake to run anew and mark the dividing line between cases in which municipalities are liable for damages and those in which they are not liable. This has been done in *McIlhenney v. City of Wilmington*, 127 N. C. 149, 37 S. E. 187, and cases there cited. And, if we were to attempt to do so in this case, it would be to repeat the arguments and authorities cited in that case.

We see no error, and the judgment is affirmed.

DOUGLAS, J., dissents.

(129 N. C. 521)

STATE v. ANDERSON.

(Supreme Court of North Carolina. Nov. 5, 1901.)

CRIMINAL LAW—CARRYING CONCEALED WEAPON—NIGHT WATCHMAN.

Under Code, § 1005, making it a criminal offense to carry a pistol concealed on one's person except when on his own premises, and making possession of such weapon not on his own land *prima facie* evidence of concealment, a private night watchman on the premises of his employer, carrying a pistol concealed on his person, is not guilty of violating the statute.

Appeal from superior court, Randolph county; Coble, Judge.

C. Anderson was found not guilty of carrying a concealed weapon, and the state appeals. Affirmed.

The special verdict is as follows: "The jury find that the defendant was an employé of the Randleman Manufacturing Company as a night watchman, and on the 30th of March, 1901, was in discharge of his duty as such, and carried a pistol concealed about his person, on the premises of the company. If the court is of opinion, from these facts, that defendant is guilty, the jury find him guilty; if otherwise, then the jury find him not guilty." His honor held that the defendant was not guilty, and the verdict was so entered. The state excepted, and appealed from the judgment pronounced.

Brown Shepherd, for the State.

FUROHES, C. J. This is an indictment for carrying concealed weapons, under section 1005 of the Code, in which the jury found the following special verdict: "That the defendant was an employé of the Randleman Manufacturing Company, as a night watchman, and on the 30th of March, 1901, was in discharge of his duty as such, and

carried a pistol concealed about his person, on the premises of the company." Upon this verdict the court held that the defendant was not guilty, and the state appealed. The statute makes it a criminal offense to carry a pistol concealed about one's person, "except when on his own premises." "And if any one, not being on his own land, shall have about his person any such deadly weapon, such possession shall be prima facie evidence of concealment thereof." So it is seen that the statute uses the word "premises" when it describes the offense, and the word "land" when it makes the fact of carrying the weapon prima facie evidence of concealment. But it is held in *State v. Terry*, 93 N. C. 585, 53 Am. Rep. 472, that one in possession as "an agent or overseer, or any one else who is vested with the right of dominion, is the owner, within the meaning of the statute." This opinion seems to sustain the opinion and judgment of the court below. And we do not think that the opinion in the case of *State v. Perry*, 120 N. C. 580, 26 S. E. 915, 1008, is in conflict with the definition given in *State v. Terry*, 93 N. C. 585, as above stated.

The judgment must be affirmed.

(129 N. C. 230)

PARRISH et ux. v. GRAHAM et al.
(Supreme Court of North Carolina. Nov. 12, 1901.)

ACTION ON NOTE—TRIAL—SUBMISSION OF ISSUES

Under Code, § 424, providing that judgment may be given for or against one or more of several defendants, and that the ultimate rights of the parties on each side, as between themselves, may be determined, it was error, in an action against the maker and indorsers of a note, to refuse to submit to the jury an issue between the indorsers, as to whether or not they were cosureties, or whether one was a supplemental surety to the other.

Appeal from superior court, Durham county; Council, Judge.

Action by W. T. Parrish and wife against P. C. Graham, receiver, J. W. Smith, and J. S. Carr. From a judgment in favor of plaintiff, defendant Smith appeals. Reversed.

Boone, Bryant & Biggs, for appellant.
Manning & Foushee, for appellee.

FURCHES, C. J. To understand the case, it will be sufficient to state that on the 5th day of June, 1897, the Golden Belt Hosiery Company, a corporation in the city of Durham, J. S. Carr, and J. W. Smith made and executed their promissory note to Mrs. Lilly L. Parrish for \$3,500. The Golden Belt Hosiery Company being in a state of insolvency, P. C. Graham has been appointed and is its receiver. The note not being paid, this action was brought, and Graham, as receiver, filed no answer and made no defense to plaintiff's action. The defendants Carr and Smith both filed answers admitting the

execution of the note, but Smith alleges that he signed it as supplemental surety to the defendant Carr, who agreed and was to hold him harmless. This allegation in defendant Smith's answer the defendant Carr denies, and alleges that he and Smith are equally liable as sureties of the Golden Belt Hosiery Company. When the case was called for trial the defendant Smith tendered an issue for the purpose of determining whether or not he was only supplemental surety to the defendant Carr. The court asked if it was contended that Mrs. Parrish knew that Smith was only supplemental surety to Carr, and, upon being answered that there was no such contention, the court declined to submit such issue, and remarked that it seemed that plaintiff was entitled to judgment against both Carr and Smith, and they could then determine by an action for that purpose their respective liabilities as between themselves. Plaintiff then moved for judgment against all the defendants, which was granted, and the defendant Smith excepted and appealed.

The ruling of the court would have been correct under the old practice, before the Code consolidating the law and equity jurisdictions in the same court. Before then, this would have been an action at law, whose judgments, as we have said at this term, were in solido,—yea, yea, and nay, nay. But, while this was so on the law side of the docket, it was different on the equity side. Its judgments or decrees, as they were called, were modified to suit the equity and justice of the case, and they were made against plaintiffs or defendants, or against one defendant and in favor of other defendants. Under the Code our practice has followed to a large degree that of the courts of equity, "and its tendency has been towards the enlargement of the number of rights that may be adjusted in one action." *Davis v. Manufacturing Co.*, 114 N. C. 821, 19 S. E. 371, 23 L. R. A. 322; *Bobbitt v. Blackwell*, 120 N. C. 253, 26 S. E. 817. But, besides the general tendency to adopt at least the spirit of the equity practice, it seems to us that cases like this have been specially provided for by section 424 of the Code: "(1) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves." This seems to give ample power to the court to submit the issue tendered by the defendant Smith, as this issue has been raised by allegations in the answer of defendant Smith and denials in the answer of defendant Carr. *Hulbert v. Douglas*, 94 N. C. 128.

We do not think *Baugert v. Blades*, 117 N. C. 221, 23 S. E. 179, nor any other authority cited to us, is in conflict with the authorities we have cited; and in refusing to submit the issue tendered by the defendant Smith there was error.

(129 N. C. 200)

McDOUGALD v. TOWN OF LUMBERTON.
(Supreme Court of North Carolina. Nov. 5, 1901.)

PERSONAL INJURIES—ASSUMPTION OF RISK—TRIAL—QUESTION FOR JURY—RECORD ON APPEAL—STATEMENT OF CASE.

1. Plaintiff, in the employ of defendant town, was injured by the caving in of a ditch. The ditch was on made soil, with mud and quicksand at the bottom, and where plaintiff was injured there was no bracing. As the quicksand was baled out with buckets, other quantities of it would come out from under the bank. Plaintiff alleged that the ditch was unsafe, and that he was apprehensive of injury, but that he began the work on the assurance of the persons in charge that it was safe. *Held*, that a nonsuit on the ground that plaintiff had assumed the risk was error.

2. Where the record does not show whether a nonsuit was entered on the plea of contributory negligence or of assumption of risk, and there is no evidence of the former, but some tending to show the latter, ground, it will be presumed that the nonsuit was granted on the plea of assumption of risk.

3. Where evidence is introduced under the pleas of contributory negligence and assumption of risk, it is the better practice to have separate issues submitted to the jury on those questions.

4. The appeal will not be dismissed because of the failure of plaintiff to point out in his assignments of error the relations of one part of the evidence to another, where the evidence on which the nonsuit was granted was direct and simple.

5. On appeal from judgments sustaining demurrers to the evidence or nonsuits for want of evidence, the particular parts of the evidence on which the appellants rely to prove the cause of action must be pointed out.

Appeal from superior court, Robeson county; Moore, Judge.

Action by E. McDougald against the town of Lumberton. From a judgment in favor of the defendant, plaintiff appeals. Reversed.

McLean & McLean, for appellee.

MONTGOMERY, J. The plaintiff was employed by the defendant in the excavation of earth for sewerage purposes in the town of Lumberton, and was injured by the falling in upon him of earth from the top of the ditch. The excavation was about 14 feet deep, 4 feet wide at the bottom, and 20 feet wide at the top, as we understand the dimensions of it from the evidence. The plaintiff was injured while at work at the bottom of the ditch, where there was quicksand. As the quicksand would be baled out with buckets, other quantities of it would come out from under the bank. The plaintiff in his complaint alleges that the ditch or trench was in an unsafe condition, and that he himself was apprehensive of injury if he entered upon the work, and yet that, upon the assurance of the persons in charge that it was safe for him to go in to work, he relied upon their assurance, and entered upon his labors. The defendant in its answer put in the pleas of contributory negligence and assumption of

risk on the part of the plaintiff. Upon an intimation of his honor that the plaintiff could not recover upon the evidence, his counsel submitted to a nonsuit, and appealed.

We cannot tell from the record whether his honor thought, as a matter of law, that the plaintiff had contributed to his own injury (upon evidence of the plaintiff about which there could be no reasonable difference of opinion), or had assumed the risk of employment. We fail to discover any evidence tending to show that the plaintiff was doing his work in a careless or negligent manner, and therefore presume that his honor was of the opinion that he had assumed the risk of his employment, thinking that the evidence on that question was uncontradictory, and so clear that reasonable men could come to no other conclusion about it. An employé assumes, of course, the ordinary risk attendant upon the employment; and, if this excavation had been through and into firm and solid earth, then there would have been no negligence on the part of defendant, and the plaintiff would have assumed the risk attendant upon the employment. But there was evidence going to show that the ditch was cut through alluvial or made soil, with mud and quicksand at the bottom, and that where the plaintiff was hurt there was neither bracing nor walling. If that was not negligence in law on the part of the defendant, it certainly was strong evidence of it. But did the plaintiff from the evidence know or have reasonable ground to believe that the danger and risk were such that as a prudent man he was bound not to assume them, and to refuse to enter upon the work, or to continue it after he had begun it? He was not compelled to quit his work unless such was the case. 14 Am. & Eng. Enc. Law, 845, and authorities there cited.

Upon the assurance made to the plaintiff by those in charge of the work that it was safe for him to enter upon it, it would seem that the danger must have been more than a suspicion of it, and that the chances of safety were fewer than those of injury, before the plaintiff could be said to have assumed the risk. *Hinshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. 426. We cannot say, as a matter of law, that the danger was so apparent and so obvious as to put the plaintiff on his guard, and to show that he not only saw the risk and the danger, but willingly made up his mind to assume it. We think, therefore, that there was error in the ruling of his honor in dismissing the action.

In the consideration of this case, we have concluded that it is better in the trial of causes in which the pleas of contributory negligence and assumption of risk are entered (evidence, of course, under those pleas being introduced) to have separate issues submitted to the jury on those questions.

While it is not necessary to submit separate issues, as we have pointed out in *Rittenhouse v. Railway Co.*, 120 N. C. 544, 26 S. E. 922, yet we have found out from experience, since that decision was made, that it is a better practice.

Defendant made a motion to dismiss this appeal on the ground that the appellant had failed in the statement of the case to point out, in his assignments of error, the relations of one part of the evidence to another, and the special effect and importance of such parts of the evidence, and that that view of the case had been called to the attention of the court below, and citing the case of *Gregory v. Forbes*, 94 N. C. 220, as authority for the motion. The evidence in that case must have been greatly more prolix and complicated than in this. Here the evidence upon which the plaintiff was nonsuited was direct and simple, and related to the questions of contributory negligence and assumption of risk by the plaintiff, and, while there was a good deal of it, we have had no difficulty in finding it.

We shall hereafter, however, require that, in all cases of sustaining demurrer to the evidence or nonsuit for want of evidence, the particular parts of the evidence which the appellant relies upon to prove the cause of action be either pointed out in the case on appeal, or called to the attention of this court by brief or in the oral argument.

Error.

(129 N. C. 213)

CARTER et al. v. WILMINGTON & W. R. CO. et al.

(Supreme Court of North Carolina. Nov. 5, 1901.)

CARRIERS—FREIGHT—REFUSAL TO SHIP—PENALTIES—SEPARATE OFFENSES.

Under Code, § 1964, providing a penalty for a transportation company's refusal to ship freight tendered, and that a separate penalty may be recovered for "each article" refused, a railroad company refusing to transport a car load of cattle is liable to a separate penalty for each animal.

Appeal from superior court, Columbus county; Robinson, Judge.

Action by L. W. Carter and others against the Wilmington & Weldon Railroad Company and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Junius Davis, for appellants. J. B. Schulken, for appellees.

DOUGLAS, J. This case was here before on demurrer, being reported in 126 N. C. 437, 36 S. E. 14. In view of what we then said, the answers of the jury to the first and third issues have reduced the case, as now before us, to narrow limits. Three out of the four exceptions insisted upon by the defendants raised the point that, in order to recover under the statute for separate penalties, it was incumbent upon the plaintiffs to tender the

cattle separately. We think that this question was settled in our former decision, and cannot now be reopened by a second appeal, in the nature of a rehearing. If it were necessary to tender separately each individual article, in contemplation of law such article would be a distinct shipment, and the provision of the statute (Code, § 1964), saying that "each article refused shall constitute a separate offense," would have no meaning. The following extracts from our former opinion sustain our present view. We said, beginning on page 439, 126 N. C., and page 15, 36 S. E.: "The defendant contends, in effect, that the plaintiffs have no cause action;

* * * that but one penalty attaches for the refusal of the entire shipment offered.

* * * The statute provides, in express terms, that each article refused shall constitute a separate offense; that is, a distinct violation of the law. The penalty attaches for such violation, and for each and every violation thereof. * * * To say that 'each article' meant simply the entire shipment offered would be equivalent to saying that it meant nothing, because it would add nothing to the previous part of the section. To say, further, that, even if each article constituted a separate offense, the statute did not intend a separate penalty, would impose upon the statute a construction utterly foreign both to its letter and spirit. The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public, not simply to the abstract public, but to each individual. Penalties are made cumulative so as to make it, under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should, under all circumstances, exactly equal the injury; while punishment, to be effective, must exceed the injury, or, at least, be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment, it might be cheaper for the carrier to pay a penalty of \$50 than to go to any extra expense and trouble to obtain the necessary cars. Moreover, the usual and primary meaning of the word 'article' is opposed to the idea that it means the entire shipment. * * * As we are of opinion that each head of cattle was a separate article in contemplation of the statute, the refusal of which was a separate offense, it follows that a separate penalty attached thereto. As there were thirty head of cattle refused, thirty separate penalties were incurred by the defendant." This seems to us to settle the present case.

Again, we say that this decision refers to the shipment of cattle, where each "article" is necessarily separate, and does not refer, directly or by analogy, to the innumerable small articles that may be inclosed in one

package, where they can be neither seen nor counted. Such a case is not now before us, but we have no hesitation in saying that there is an essential difference between one nail in a keg of nails and one ox in a drove of cattle.

The shipment appears to have been made in entire good faith, and there is neither proof nor allegation of any fraudulent intent. The main defense seems to have been that all the defendant's available stock cars were then required for the transportation of two regiments of cavalry, but this issue the jury found against the defendant. Whether the instruction upon that issue can be sustained we are not called on to decide, as it was favorable to the defendant, and therefore not now under exception.

The defendant contends that it had no facilities for taking care of cattle, but it appears that it had the ordinary pens into which the cattle were driven by the plaintiffs. The law placed upon the defendant the imperative duty of receiving these cattle, and its refusal to receive is the gist of this action. It had five days after receipt in which to ship the cattle, and did ship them within that time. If, in the interval, the cattle had suffered from exposure and want of feed through no fault of the defendant, that would have been a defense to be pleaded in an action for damage to the cattle, which would have been essentially different from the one at bar.

We have carefully considered the defendant's exception to the exclusion of the letter of Richardson to Divine, and, after some hesitation, have come to the conclusion that there is no error in such exclusion, under the circumstances of this case. This letter was written by the station agent at Whiteville after the beginning of this suit, the sole foundation of which was his own unlawful conduct. While not a party to the suit, he was something more than a witness, and was deeply interested in defending the company from any loss arising from his own conduct, as well as in placing such conduct before his superiors in the light most favorable to himself. We are not passing upon the credibility of the witness, which is for the jury alone, but upon the natural bias which, consciously or unconsciously, is liable to affect all men under such circumstances. In any event, we do not see how the defendant has been injured by the exclusion of the letter. The jury found that the plaintiffs did not tender the cattle on August 8th, and that finding destroyed half the case. They also found that the defendant was not prevented from furnishing the cattle car by the exigencies of governmental service. Of this fact Richardson does not appear to have had any personal knowledge, and we do not see how his letter could be used to corroborate Borden, for which purpose, indeed, it does not seem to have been offered. In some respects the letter tends to corroborate the plaintiffs. It says, in part: "These parties were informed

of our inability to get car. They insisted on shipping, and drove their cattle into the stock pen here after I had informed them that it was impossible to get car that day. They demanded a bill of lading, which, of course, I refused to issue, as we have no place to keep stock here." Is not that a practical admission of tender and refusal?

Another significant statement is that made by Borden, a witness for the defendant, who testified as follows: "I am now, and was in August, 1898, superintendent of transportation of the defendant companies. I had charge of the car supply and train service. A telegram came to me in my office in Wilmington from Mr. Lynch at Florence on the 9th of August, 1898, and one from Mr. A. S. Richardson, dated the 10th, asking for a stock car to be sent to Whiteville station. I sent the stock car to Whiteville on the 11th, by the first train, after I was notified of its importance."

In the absence of substantial error, the judgment is affirmed.

(129 N. C. 288)

CARTER v. CAPE FEAR LUMBER CO.

(Supreme Court of North Carolina. Nov. 5, 1901.)

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES.

Where planks were slid down an inclined plane, and stopped at the bottom by a bumper, and everything connected with the transfer of the lumber was in good shape, except that there was half an inch play of the bumper under the collar, and a piece of lumber 16 feet long struck the bumper with such force as to drive from its position a loaded truck weighing thousands of pounds, over chocks, which were underneath the wheels, of the right size and of the proper shape, the owner of the appliances was not liable for injuries caused to an employee by the use of the truck, as he cannot be required in such case to have been informed and guard against an accident which could not reasonably have been anticipated.

Appeal from superior court, New Hanover county; Hoke, Judge.

Action by Charles Carter against the Cape Fear Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Iredell Meares, for appellant. Bellamy & Peschau, for appellee.

MONTGOMERY, J. The plaintiff was injured while employed by the defendant in the receiving of lumber from a slide, and placing the lumber upon a truck for transfer to a car, and thence to a dry kiln. The slide was at an angle of about 33°, and about 6 feet in width. There was a platform at the base of the slide about 15 inches wide, according to the testimony of the plaintiff. At each outer edge of the platform there was a "bumper" (a square piece of timber) protruding above the platform, for the purpose of stopping and holding in position the pieces of plank, raised singly to the top

of the slide by automatic machinery, as they descended on the slide to the platform. These bumpers were fastened and held by iron clamps or bands bolted to the beams. Alongside of the platform, and touching it, according to the testimony of the plaintiff, a truck was placed to receive the planks, and which, when loaded, was moved laterally on an inclined track to another track, and from that other track placed on a car and carried thence to the dry kiln. On the other side of the truck in its first position were placed two upright standards to hold in place the loaded truck and keep it from rolling off. These standards rested on a platform on a level with the truck, and in front of them was an inch scantling nailed to the platform, which acted as a check or mortise to hold the standards at the bottom. The top of the standards were placed in a mortise in a board nailed to the top of the frame. To prevent the loaded truck from moving when the standards are removed, "chocks" (wooden blocks) of the right shape and dimensions were furnished by the defendant to be placed underneath the wheels, and they were used at the time of the plaintiff's injury. These chocks were removed by hand—an employé standing or stooping at each end of the truck for that purpose—after the standards have been removed, in order that the loaded truck may roll to the transfer track. The plaintiff in his complaint alleges negligence on the part of the defendant: First, in that the "defendant recklessly, negligently, and wantonly permitted lumber to be thrown down the slide against a bumper which was insecurely and negligently and defectively erected, and by the force and weight of the lumber, in its fall, striking against the said defective bumper, caused a car, placed in its regular and customary position, which, on account of the defective condition and construction of the bumper, rested against the bumper, to turn over and throw the load of lumber and car on the body of the plaintiff, crushing him beneath its weight and breaking both legs of the plaintiff,—the left leg in two places, and the right leg near the thigh,—inflicting serious, permanent, and bodily injury to the plaintiff, and causing him great suffering and pain, prostrating and confining him to a hospital for a period of nearly six months, and seriously affecting his nervous system"; and, second, "that the defendant company was further negligent in not providing proper and sufficient appliances to prevent the said car from moving and turning over when struck; as hereinbefore alleged, whereby the plaintiff suffered the injury complained of."

The alleged negligence in the construction of the frame or stall may be eliminated from the case, for, although the plaintiff said that the frame was insecure, yet he also said that, if he had not pulled the standard out at the bottom, it would not have been broken. The

injury, then, did not result from want of strength or security in the frame or stall. It is true, the plaintiff testified that at other places there was in use a method of fixing standards securely, but, as we have said, the insecurity of the standard was not the cause of the injury to the plaintiff. The standards had been removed by the plaintiff, and, as he says, if they had not been pulled up at the bottom they would not have been broken. And also the plaintiff further said that at the Angola Lumber Company's mill, at Wilmington, there was a latch that held the car until the laborers could get away to a secure place. But that testimony was in reference to the use of a latch to hold the truck, instead of holding it by the method of chocks, and not to the security or insecurity of the method of holding the car by standards and frame. There was no evidence on the part of the plaintiff that the plan of holding the trucks by chocks was not safe and secure. The real matter for consideration, then, is the alleged negligence of the defendant in reference to the construction and condition of the bumpers at the time of the plaintiff's injury; and about that matter was made the main argument of the plaintiff's counsel in this court. The plaintiff testified that: "The lumber that came down the slide came in the usual way, and in the same way as it had been coming ever since I had been working there. The platforms were in good condition. The framework was substantial. The trucks upon which the lumber is loaded are made of iron. They did not break. The iron tracks did not give way. There was nothing the matter with the slides or stalls, except the bumper was loose. It is an iron collar or band around the top of the bumper, that is fastened to the beams on the slide or platform. The iron collar did not break or wrench out. The bumper had a loose play within the collar." A safe place in which to work had been furnished to the plaintiff, and every appliance that was necessary to conduct the operations of the mill was furnished, and all in good condition, except that under the iron collar of one of the bumpers there was a play of half an inch, caused by the wearing of the timber, and not by decay or rot. The plaintiff did not know at the time of his injury of the loose collar around the bumper, but he saw it several months thereafter when he was at the mill, and it had not been changed; but a witness for the plaintiff said that the collar had a play of half an inch on the day of the injury. The plaintiff gave the following description of the manner in which he was hurt: "We have to lift the standard above the chocks below about one and one-fourth inch out of the groove, and then, pulling the bottom ends out, lower them until the top end slips out of the mortise above. We have to take out the standards before moving the loaded trucks of lumber out of the frame. I had taken out one standard. I was raising the last standard. Just

as I did so, and while in a stooping position, lifting it up, a plank of lumber 16 feet long and 1 inch thick came down the slide by automatic machinery and struck the bumper on the side of the truck opposite to me. The plank struck the bumper and jarred the car, and the car and the lumber came right over on me. The standard which I was raising broke out of the mortise above, in which it was fastened. I could not stop the car. The bumper was loose. It had a play of one-half inch or more. The loaded trucks were tight in between the standards and the bumper."

At the conclusion of the plaintiff's evidence the defendant made a motion to dismiss as of nonsuit, and, upon the same having been overruled, introduced evidence. Upon the close of the evidence on both sides the defendant renewed its motion to dismiss the action, —a proceeding which amounts to a demurrer to the evidence under the old system of pleading. *Means v. Railroad Co.*, 128 N. C. 424, 35 S. E. 813. There was nothing in the evidence offered by the defendant helpful to the plaintiff. In fact, a number of the witnesses testified that the lumber plant was in excellent condition; that there was no worn place under the collar around the bumper; that there was plenty of room between the standards and the bumper; and two of them said that the plaintiff told them at the time of the accident that the chocks must not have been under the wheels of the truck. But with the defendant's evidence we are not concerned, no part of it being of aid to the plaintiff; being confined, under the motion to dismiss, to the plaintiff's evidence, and that, too, in the light most favorable to him. According to his evidence, then, at the time of the accident this was the situation: Chocks of right size and shape were under the wheels of the truck; the platforms, tracks, trucks, and cars were in good condition, and the planks were descending on the slide in the usual way; but the truck was close in between the bumpers and the standards, and there was a play of half an inch underneath the band or collar around the bumper. The plaintiff was hurt by the falling of a plank 16 feet long, a foot wide, and an inch thick, and striking the bumpers with such force as to cause the bumpers to work in the loose place under the collar, and by sudden impact upon the truck to start it in motion, and in its course to harm the plaintiff. To be more specific still: The bumpers and the standards and the half-inch play under the band around the bumper constitute the negligence alleged by the plaintiff against the defendant; the alleged faulty construction of the standard having been already disposed of in this opinion. The question then is, was the omission of the defendant to notice the play of the bumper and to repair it, and also to provide a greater place for the truck,—the plaintiff having been damaged thereby,—actionable negligence? Was the plaintiff's evidence of such a character as that it should have been submitted to

the jury on the question of defendant's negligence? Or, to put it in another form, was the defendant guilty of negligence in failing to foresee and provide against what occurred? After the most careful consideration we have arrived at the conclusion that there was no evidence on the first issue—as to the defendant's negligence—that ought to have gone to the jury, and the motion to dismiss the action should have been allowed. *Railway Co. v. Jackson* (1877) 3 App. Cas. 193; *Shear. & R. Neg.* § 56; *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39. The most frequently cited definition of negligence (that of *Alderson, B.*, in *Blyth v. Waterworks Co.*, Law J. 25 Exch. 213) is as follows: "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a provident and reasonable man would not do; and an action may be brought if thereby mischief is caused to a third party not intentionally." Negligence in law cannot exist except in cases where there has been a want of ordinary care upon the part of the person charged with the act of omission or commission, and, though damage has resulted from the act or omission, there is no *injuria* if there has been no want of ordinary care. No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could by the exercise of ordinary care, under all the circumstances, have foreseen that it might result in damage to some one. 16 Am. & Eng. Enc. Law, p. 439; *Pol. Torts*, 36, 37; *Shear. & R. Neg.* § 10. There must be, before a recovery can be had in actions for negligence, a breach of duty on the part of the defendant; and the act or omission producing the breach of duty, culpable in itself, must be such as a reasonably careful man would foresee might be productive of injury, and one is not liable for an injury which he could not foresee. *Smith, Neg.* 24; *Blyth v. Waterworks Co.*, 11 Exch. 781. In actionable negligence there must be on the part of the defendant not only an act or omission constituting the proximate cause of the injury, but there must be also a want of ordinary care on his part. There may be damage resulting proximately from an act or omission to act, even in cases where a duty is obligatory, and yet if there has been no want of ordinary care there can be no recovery on account of the damage, because there has been no negligence. There is some confusion in the decisions of the courts in the definitions of "ordinary care" and "proximate cause," but in every case of actionable negligence they must be found together. Mr. Horace Smith, in his work on the Law of Negligence distinguishes between the two clearly. He writes (page 13): "The word 'proximately' is to be distinguished from the word 'culpable.' An act, to be culpable (that is, to be a breach of legal duty), must, as we have seen, be such as a reasonably careful man

would foresee would be productive of injury, and the person is not liable for an injury which he could not foresee; but a breach of duty, to be proximately producing injury, must be such that, whether defendant could foresee the injury to be probable or not, the breach of duty is in fact the probable cause of the injury." The same distinction is also well drawn in *Wiley v. Railroad Co.*, 44 N. J. Law, 247, where the court said: "The law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effect of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen,—such as occur in an ordinary state of things. The term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss." Ordinary care is reasonable care,—“that care which a person of ordinary prudence and capacity would take under like circumstances.” A good test of ordinary care may be found in 16 Am. & Eng. Enc. Law, p. 402, deduced from the numerous and most respectable authorities cited in the note: “Where a person in the observance or performance of a duty to another has neither done nor omitted to do anything which an ordinarily careful and prudent person in the same relation, and under the same conditions and circumstances, would not have done or omitted to do, he has not failed to use ordinary care, and is therefore not guilty of negligence, even though damage may have resulted from his action or want of action. And, conversely, there has been a want of ordinary care where a person, in the observance or performance of a legal duty to another, has done or omitted to do something which an ordinarily careful and prudent person, in the same relation, and under similar circumstances and conditions, would not have done or omitted; such act or omission being the proximate cause of injury to the other party to the relation.” It is right that one should be required to anticipate and guard against consequences that may be reasonably expected to occur, but it would be violative of every principle of law or justice if he should be compelled to foresee and provide against that which no reasonable man would expect to happen. The business affairs of life would come to a standstill if employers had to busy themselves for their own and their employé's safety in the study of ingenious devices to meet every case of possible damage and hurt. There would soon be neither capitalists nor laborers, from the modern view. “The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.” Pol. Torts, 86.

Now, from the facts of this case, as they

appear from the plaintiff's evidence, can it be inferred that a reasonable man, engaged in the same or like business, would have anticipated and provided against the accident which happened? If such an inference could not have been naturally drawn, then there was no injury, though there was damage. The defendant was not negligent, and there is no liability. As we have said, everything connected with the transfer of the lumber was in good shape,—tracks, trucks, platforms, lifting power, and chocks. There was nothing complained of but a half of an inch play of the bumper under the collar, and the restricted space in which the truck stood. If these defects had been seen by the defendant, it could not have been required of it, in reason, to anticipate and provide against such an accident as occurred. No reasonable person could have anticipated that the falling of a piece of lumber 16 feet long, 12 inches wide, and 1 inch thick, 5 or 6 feet on a descending slide at an angle of 33°, could strike those bumpers with such force as to drive from its position the loaded truck, weighing thousands of pounds, over the chocks which were underneath the wheels; the chocks being of sufficient size and of the proper shape.

Error.

(120 N. C. 222)

CARR v. SMITH.

(Supreme Court of North Carolina. Nov. 12, 1901.)

WITNESS—CROSS-EXAMINATION—COSURETIES —LIABILITIES—EVIDENCE.

1. In an action against an alleged cosurety to recover money paid in settlement of their joint liability, the only issue was whether defendant was plaintiff's co-surety. The defendant testified on cross-examination that he did not tell C. not to take into the business a certain partner, as he would “lie down” on them if they got into trouble. Held error to permit plaintiff's witnesses to contradict this testimony, as the same was collateral to the issue.

2. The rule that a witness may be cross-examined as to collateral matters, to show his temper, disposition, or bias, does not apply where the witness is a party.

3. Where, in an action against an alleged cosurety to recover money paid in his behalf, the defendant admitted signing with plaintiff, but denied the relationship, alleging that he was a supplemental surety by a special agreement with plaintiff, the burden of proof was on defendant to show such special agreement.

4. Where, in an action against a cosurety to recover money paid in settlement of their joint liability, the amount paid was \$685.42, and it was shown that plaintiff had received \$420 as interest on collaterals deposited to secure the obligation, it was error for the court to refuse to instruct that, if the jury believed all the evidence, the amount of recovery should be reduced by \$420.

Appeal from superior court, Durham county; Council, Judge.

Action by J. S. Carr against J. W. Smith. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Boone, Bryant & Biggs, for appellant.
Manning & Foushee, for appellee.

MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant certain amounts of money which he alleged he had paid for the defendant as a cosurety, the Golden Belt Hosiery Company being the principal debtor. The questions raised on the trial were: First, whether or not the defendant, Smith, was a supplemental surety or indorser to the plaintiff; and, if not such, then what amount did he owe to the plaintiff? On the cross-examination the defendant, Smith, a witness in his own behalf, was asked by plaintiff's counsel if he did not tell Carr not to take into the business Carrington; that, if they got into trouble, he would "lie down" on them,—and he answered that he did not tell him so. Afterwards T. M. Gorman was introduced by the plaintiff, and allowed to testify, over the objection of the defendant, that "the defendant had stated to him that Carr wishes to associate Carrington in the business, and that he [Smith] objected to Carrington, saying that he [Smith] was afraid that Carrington would lay down on them if they got into any trouble." The evidence ought not to have been allowed, because it was collateral to the issue. It was not substantive evidence, and did not tend to prove or disprove the main issue as to the defendant's indebtedness to the plaintiff. The rule of evidence is thus stated in 1 Greenl. Ev. § 440: "But it is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony. And, if a question is put to a witness which is collateral and irrelevant to the issue, his answer cannot be contradicted, but is conclusive against him." It is said that the rule is relaxed in cases when the cross-examination relates to collateral matters that tend to show the temper, disposition, or bias of the witness cross-examined. But in this instance the rule cannot be said to be relaxed, for the witness is one of the parties to the suit himself, and might naturally be expected to have feeling in the suit and its results, though the question put to him on cross-examination really had no tendency to prove it. The purpose of that part of the cross-examination was to discredit the witness, and the plaintiff was concluded by his answer. *Kramer v. Light Co.*, 95 N. C. 277; *State v. Patterson*, 74 N. C. 157; *Burnett v. Railway Co.*, 120 N. C. 517, 26 S. E. 819.

It was admitted by the defendant that he signed and indorsed the obligations of the Golden Belt Hosiery Company with the plaintiff, and that the company made default in the payment of the balances which the plaintiff paid after the default; but the defendant denied that he was cosurety upon these obligations with the plaintiff, but said that he

stood as a supplemental surety or indorser, by reason of a special agreement and understanding with the plaintiff that the plaintiff would protect and save him harmless against loss on account of such signing and indorsement. His honor properly told the jury that the Golden Belt Hosiery Company was the principal debtor, and the defendant, in order to rebut the presumption of suretyship, must prove by the greater weight of the evidence to the jury that he was supplemental surety; that is, that he signed the obligations for the accommodation of the plaintiff, and by agreement with Carr that he would be protected from liability or loss in the matter.

It was admitted that the amount paid by the plaintiff to the bank was \$685. The defendant pleaded in the way of a counterclaim the amount of \$420, which he averred that the plaintiff had received from Manning, trustee; the same being the semiannual interest due on certain collaterals in the hands of Manning as a security for the debt due by the Golden Belt Hosiery Company to the First National Bank, and for which the plaintiff and defendant were sureties. The plaintiff admitted that he had received the \$420, but said that Paul C. Graham, the duly-appointed receiver of the Golden Belt Hosiery Company, had instituted a suit against the plaintiff and Manning, trustee, wherein the \$420 was inquired into before the referee, Zollicoffer, and that a report of the referee had been filed. On the trial no evidence was introduced in reference to the matter, and it seems clear that his honor should have instructed the jury, as requested by the defendant, that, if they believed all the evidence on that point, the \$685.22 paid by Carr to the bank should be reduced by the amount of \$420. It makes no difference whether or not the stock in Manning's hands as collateral reached the bank after the maturity of the semiannual interest on the same fell due. The plaintiff got that amount as the interest, and it was intended for the benefit of both the plaintiff and the defendant when the collateral was put up; the interest then being not due, and the coupons unclipped.

New trial.

(129 N. C. 179)

CHEEK v. SUPREME LODGE KNIGHTS OF HONOR.

(Supreme Court of North Carolina. Nov. 5, 1901.)

INSURANCE—FRATERNAL SOCIETIES—PLEADING—DEMURRER.

1. Facts not alleged in the complaint, but relied on by defendant as a defense, cannot be considered on a demurrer to the complaint.

2. A complaint alleged that plaintiff's decedent was insured in a fraternal insurance company; that the local lodge of which decedent was a member forfeited its charter in June; that in September a defunct lodge member's card was issued by defendant, the grand lodge, to decedent; that in May decedent was stricken with paralysis, and was confined to his bed.

and did not know of the forfeiture of the lodge, because of such sickness; that when said certificate was issued by the grand lodge decedent could not, because of such illness, pass a good examination, as provided when such certificate is issued more than 60 days after forfeiture of charter. *Held* that, as it was not shown by the complaint that it was the fault of the insured that he did not receive his card earlier than he did, and as the grand lodge seems to have been responsible for the delay, the complaint was sufficient against general demurrer.

Appeal from superior court, Alamance county; Council, Judge.

Action by Pena C. Cheek against the Supreme Lodge Knights of Honor. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Watson, Buxton & Watson and Shepherd & Shepherd, for appellant. Charles E. McLean, for appellee.

FURCHES, C. J. In 1881, Henry A. Cheek became a member of Alamance Lodge Knights of Honor, and received a certificate of insurance of \$2,000, for the benefit of his wife, who is the plaintiff in this action. The husband is dead, and the plaintiff brings this action, and files the following complaint, in which she makes the card called "certificate of membership" in a "defunct" lodge a part thereof:

"The plaintiff alleges: (1) That she is the widow of the late Henry A. Cheek, of Alamance county, North Carolina. (2) That her said deceased husband was in his lifetime a member of Alamance Lodge, No. 2,595, Knights of Honor, and that he received the degree of manhood on the 2d day of November, 1881, at the age of fifty-three years. (3) That on the 16th day of December, 1881, her said husband had issued to him by the defendant benefit certificate No. 117,129, for two thousand dollars, plaintiff then being his wife, a copy of which certificate is hereto attached, marked 'Exhibit A,' and asked to be taken as part of this article of complaint, just as if here set out. (4) That the statements made by her said husband for membership, and the statements made by him to the medical examiner, are true, and that he complied with the laws, rules, and regulations governing the order at the time when said certificate was issued, and with those subsequently enacted for its government, and was in good standing at his death. (5) That said Alamance Lodge, No. 2,595, Knights of Honor, on the 10th day of June, 1896, forfeited its charter, and that on the 24th day of September, 1896, a defunct lodge member's card was issued by defendant to plaintiff's said husband, a copy of which is hereto attached, marked 'Exhibit B,' and asked to be taken as part of this article of complaint, as fully as if here set out at length. (6) That on May 28, 1896, the said husband of plaintiff was stricken with paralysis, from which he never recovered, and until long after the said 10th day of

June, 1896, he was confined to his house in almost a helpless condition, and never did he recover so as to be able to walk, so that the requirement that he pass a medical examination, indorsed upon the margin of said card, was impossible of fulfillment. (7) That plaintiff's husband paid his assessments and dues regularly until his affliction, and afterwards his family continued to pay them just as he had done, and he never changed his rate of assessment. (8) That plaintiff's husband did not learn of the forfeiture of its charter by said Alamance Lodge, No. 2,595, until in September, 1896, and only a few days before the date of said defunct lodge member's card. His condition forbade his sooner learning of it, or informing himself; and even then the knowledge came to him through the kindness of a friend. (9) That the total amount of assessments paid for and on account of aforesaid benefit certificate is more than one thousand three hundred dollars, to wit, one thousand three hundred and nine dollars, as plaintiff is informed and verily believes. (10) That said husband of plaintiff departed this life in the summer or early fall in the year 1899. (11) That the plaintiff, before commencing this action, demanded payment of defendant for and on account of said benefit certificate of the amount thereof. (12) That said defendant is a corporation authorized by law, and organized in pursuance thereof. (13) That said benefit certificate was never surrendered or canceled at his request, and another certificate issued therefor, but it remained in his possession till his death, and is now in possession of plaintiff. Wherefore, plaintiff demands judgment: (1) That she recover of defendant the sum of two thousand dollars, less the assessments unpaid at his death, which amount to less than one hundred and fifty dollars, to wit, one hundred and forty dollars. (2) For such other relief as plaintiff may be entitled to."

To this complaint the defendant demurs, and, as the demurrer admits the facts stated in the complaint, the only question presented for our consideration is whether the complaint states a cause of action. The defendant is therefore deprived of the benefit of any fact presented in its brief that does not appear in the complaint; and from the brief and argument of defendant it seems to us that it is a case that should have been tried upon answer, and not upon demurrer. We understand from the defendant's brief that the plaintiff's defense is resisted upon the ground that Alamance Lodge had been suspended, and was "defunct," as it is termed in the brief; and that the insured (Henry) had failed and neglected to apply to any other lodge for admission, as defendant alleges he should have done; and that there were unpaid assessments due at the time of his death. But the complaint does not show these facts, and therefore we cannot

and do not pass upon their sufficiency or insufficiency, if they were presented.

It appears from the complaint that the insured had a stroke of paralysis in May, 1896; that Alamance Lodge was suspended on the 10th of June, 1896, but the insured had no information as to said suspension until September, 1896; and that very soon after he learned of the suspension of Alamance Lodge he received the following certificate, dated September 24, 1896:

"Knights of Honor. Defunct Lodge Member's Card. This is to certify, that Henry A. Cheek was a member of Alamance Lodge, No. 2,595, Knights of Honor, and in good standing, on the 10th day of June, 1896, the date said lodge forfeited its charter, and that said lodge is now defunct. Said Henry A. Cheek received the degree of manhood on the 2nd day of November, 1881, at the age of fifty-three years. Rate of his assessment, \$3.50. He has paid 374 assessments, beginning with No. 93, and has paid to No. 466, inclusive. Total amount paid, \$1,309, and is a full-rate member. Witness my hand and the seal of the supreme lodge, this 24th day of September, 1896, at St. Louis, state of Missouri. B. F. Nelson, Supreme Reporter. [Seal of Supreme Lodge Knights of Honor.]

"Note. This certificate may be deposited in any lodge, in accordance with the provisions of article VI., section 3, supreme lodge constitution.

"Note. The lodge accepting this card must collect all assessments, commencing with No. 467, if less than sixty days have elapsed between June 10th, 1896, and the date the member is balloted on by the lodge accepting this card. If more than sixty days, then the member must pass a medical examination, and pay assessments No. 467 to 473, inclusive, and the assessments to be paid by members for the month in which the member is elected. The holder of this card must pass a medical examination."

It is seen from this card, and the card so states, that the 60 days from the suspension of Alamance Lodge in which the insured might have been transferred to another lodge without re-examination had expired, and it appears from the complaint that the insured at that time could not have passed an examination; that he had been in this condition from the time he was stricken with paralysis, in May, 1896, and so remained until his death, in 1899. It is not shown by the complaint that it was the fault of the insured that he did not receive this "defunct" card earlier than he did. But the effect of not receiving it until after the 24th September was to effectually deprive the assured of his right to be transferred to another lodge without having to undergo a physical examination, which he could not do, and thereby to deprive him of his membership in the association. It is held in *Bragaw v. Lodge*, 128 N. C. 354, 38 S. E. 905, that

the secretary and treasurer of that lodge was the agent of the grand lodge, although the by-laws provided that he should be deemed to be the agent of the local lodge; and, if the secretary and treasurer is the agent of the grand lodge, we see no reason why the other officers of the local lodge are not the officers of the grand lodge, and why the grand lodge is not responsible for the delay in giving the assured the "defunct" card. It may be that it is not, but, if so, it does not appear by the facts stated in the complaint. We therefore see no error in overruling the demurrer.

No error.

(129 N. C. 246)

WOOTEN et al. v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. Nov. 12, 1901.)

Petition for rehearing. Dismissed.

For former opinion, see 88 S. E. 298.

Junius Davis, Rountree & Carr, and H. L. Stevens, for appellant. Bellamy & Peschan, for appellees.

MONTGOMERY, J. This case has been considered again by the court upon a petition to rehear granted to the defendant. We have carefully gone over the former opinion, and considered the arguments of counsel, and, in the end, are not disposed to recede from the positions taken in the former decision. Every phase of the case was there discussed at length, except the matter of the effect of the assent by the executors to the legacy of the remainder-man upon the plaintiffs' rights. If we were to reduce to writing the reasons which have induced us to make no change in the former opinion, the writing would be but a repetition of what was there said. We there carefully examined the authorities relied upon by the defendant, after weighing well the arguments and briefs of the counsel of the defendant, and we came to the conclusion that the other view of the law presented by plaintiffs' counsel was the correct one. As to the matter of the assent of the executors to the remainder-man's legacy, it is only necessary to say that the plaintiffs' admit the position of the defendant that the assent of the executors to the life tenant's legacy included their assent to the remainder-man; but they say they are finding no fault with the executors or with the defendant on that account, but are insisting that after the assent the executors, together with the defendants who were charged with the duty, failed to protect the remainder-man in the transfer of the legacy,—the stock,—thereby causing loss to the plaintiffs; and we are of the opinion that the plaintiffs' contention must be sustained.

Petition dismissed.

(129 N. C. 242)

JERMAN v. GULLEDGE.

(Supreme Court of North Carolina. Nov. 12, 1901.)

JUSTICES OF THE PEACE—APPEAL—WHEN RETURNABLE—AGREEMENT OF ATTORNEYS—DISMISSAL.

1. Where the opposing attorneys agree that plaintiff's attorney shall make up the transcript of appeal with the justice of the peace, and submit it to defendant's attorney, the justice is relieved of the duty imposed by Code, § 878, requiring him to make return to the appellate court within 10 days, and the case need not be docketed at the ensuing term of the appellate court, as required by section 880; and, therefore, plaintiff's attorney having failed to conform to the agreement, the appeal will not be dismissed at his instance on the ground that the case was not docketed at the term next ensuing after the appeal was taken.

2. Acts 1897, c. 256, § 2, gives jurisdiction to the January term of the superior court of all civil matters, as well as criminal, so that an appeal from a judgment of a justice of the peace is properly returnable to such term.

Appeal from superior court, Anson county; Moore, Judge.

Action by Martin Jerman against J. W. Gullledge to recover personal property. From an order of the superior court dismissing defendant's appeal, he appeals. Reversed.

H. H. McLendon, for appellant. Robinson & Caudle, for appellee.

COOK, J. This action was tried in a court of a justice of the peace on the 7th of December, 1899. Judgment was rendered in favor of the plaintiff, and defendant took an appeal to the superior court. The case was returned to and docketed in the superior court (not to the January term, 1900, which was the next ensuing term) on the 5th of April, 1900, which was 10 days prior to the April term of said court. It was continued by consent from term to term until the April term, 1901; and, while then being heard before his honor at chambers, the attorney for plaintiff moved to dismiss the appeal upon the ground that the case was not docketed at the January term, 1900 (the term next ensuing after the appeal was taken), which motion his honor allowed, and dismissed the appeal, and defendant excepted and appealed to this court.

In the record it appears from the uncontradicted affidavit of H. H. McLendon, attorney of defendant, that when the justice of the peace rendered judgment against defendant he appealed in open court in the presence of the plaintiff, "and paid him his costs as required by law, and asked said justice to send up the transcript at once; that it was understood and agreed that T. L. Caudle, Esq., attorney for the plaintiff, would make up the transcript with the justice, and submit same to counsel for defendant; * * * that by reason of the agreement entered into by said affiant with said J. S. Myers, J. P., and T. L. Caudle, attorney as aforesaid, and relying upon said agreement, the appeal was not sent

up to the superior court till after the said January term, 1900; that said justice of the peace told this affiant on two or three occasions, when asked if he had sent up the appeal, that he had been to the office of said T. L. Caudle several times to make out said transcript, and that he failed to find him. The said justice lives about 8 or 9 miles from Wadesboro." It further appears from said affidavit: "That on Friday of said April term, 1901, said T. L. Caudle, attorney for plaintiff, agreed with said affiant, attorney for defendant, that they would submit the question of law raised in said answer of defendant to the complaint of plaintiff, * * * and said question was to be passed upon by his honor Fred Moore, judge presiding, and, if adverse to plaintiff, then it was agreed that said case would be submitted to John C. McLaughlin, clerk, to arbitrate the question of the defendant's damages. That said affiant and T. L. Caudle, Esq., attorney for plaintiff as aforesaid, appeared before his honor at chambers to hear said question of law and the facts in the case. * * * While doing so, said attorney for plaintiff interrupted said affiant and said, 'In this connection, your honor, I desire to make a motion to dismiss the appeal.' * * * That no motion was made to dismiss said appeal till the time the parties went before the judge at chambers as aforesaid, and no notice of motion was given at any time." Upon the facts stated in the affidavit of defendant's attorney, which are uncontradicted, we think his honor erred in dismissing the appeal. Under section 878 of the Code, the justice is required to make a return to the appellate court, and file with the clerk thereof the papers, proceedings, etc., within 10 days after the service of notice of appeal; and, under section 880, "when the return is made, the clerk of the appellate court shall docket the case on his trial docket, for a new trial of the whole matter at the ensuing term of said court." But in this case the justice was relieved of the duty to make return thereof within 10 days as required by the agreement of the attorneys for both parties. We know of no statute which requires that the appeal shall be docketed at the ensuing term if the attorneys on both sides shall desire otherwise. While it does not here appear that it was the purpose of the attorneys not to docket the case at the January term, yet it was not done, and no laches can be imputed to the justice or attorney for defendant. By agreement the attorney of plaintiff was to make out the return for the justice, and submit the same to the attorney of the defendant. The justice upon several occasions went to the office of plaintiff's attorney to look after the matter, but could not find him, of which he informed the attorney of defendant. The delay was therefore caused by plaintiff's attorney, which he seems to have recognized by not making his motion at the April term, 1900, and by consenting to the continuances thereafter, and the court ought not to allow

a party to take advantage of his own wrong. The facts in this case differ from those in *Pants Co. v. Smith*, 125 N. C. 598, 34 S. E. 552, and cases there cited, in that the failure to docket in these cases was on account of laches, while in this case it was caused by an agreement of the parties.

It was insisted by the defendant's counsel in this court that the return should not, in any event, have been made to the January term, because that term was created for the trial of criminal actions (Acts 1897, c. 256); but a careful review of the statute leads us to a different construction. By section 2 that term is given jurisdiction of all civil matters, on account of which the appeal was properly returnable to that term.

There is error.

DOUGLAS, J. (concurring). I concur in the judgment of the court, as well as in its opinion, except in so far as it holds that the appeal was properly returnable to the criminal term of the superior court. Of this I doubt, as section 880 of the Code provides that, "when the return is made, the clerk of the appellate court shall docket the case on his trial docket, for a new trial of the whole matter at the ensuing term of said court." This could be done at the criminal term only by consent of parties.

(129 N. C. 236)

JEFFRIES v. SEABOARD A. L. R. CO.

(Supreme Court of North Carolina. Nov. 12, 1901.)

RAILROADS—CHILD ON TRACK—INJURY—EARNING CAPACITY—CARE TO PREVENT INJURY—EVIDENCE—ADMISSIBILITY—DUTY TO CHECK TRAIN—TIME OF ACCRUAL.

1. In an action against a railroad company for injuries received by a female child on the track, evidence that the child had no property and no source of income, in connection with proof of the wages current in the locality for women employed at manual labor, is relevant and admissible on the question of impairment of the child's earning capacity.

2. In an action against a railroad company for injury to a child on the track, a question asked the engineer as to whether, after he saw the child, anything was omitted which could have been done to save it, was properly excluded, as it required the witness to answer a question which was for the jury.

3. The duty of an engineer to check the speed of his train in order to avoid injuring a child on the track arises when, in the exercise of reasonable care, the engineer should have first perceived the child, and not at the time when he actually saw it, though his attention was distracted by his duties, as in that event it is incumbent on the railroad company to employ sufficient assistants to maintain a proper lookout.

Appeal from superior court, Franklin county; Coble, Judge.

Action by Carrie Jeffries, by her next friend, against the Seaboard Air Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. M. Cooke, W. H. Day, J. B. Batchelor, and Battle & Mordecai, for appellant. F. S. Spruill and B. B. Massenburg, for appellee.

OLARK, J. Carrie Jeffries, three years old, while straying upon defendant's track, was injured by its locomotive, causing the loss of her right arm at the shoulder. Some of the defendant's exceptions, taken out of abundant caution on the trial, were properly abandoned here, and we will only discuss those insisted on in the argument, though we have examined them all.

The first exception was to the admission of evidence that the child had no property and no source of income. This, standing alone, might have been irrelevant testimony, and the admission of such is no error, unless it is injurious to the party excepting. *Waggoner v. Ball*, 95 N. C. 323; *Deming v. Gainey*, 95 N. C. 528; *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341. But the next question elicited the fact that a cook was worth, in that section, \$2 to \$3 per month and board, and 10 cents per day was allowed for board; that a woman field hand was worth 35 to 40 cents per day and board. The object and pertinency of the evidence were to show what this child, with no source of income and no means of education, would have been worth to herself later in life, if uninjured, in the humble vocations of cook or field hand, which are occupations within the probable reach of the illiterates of her sex. The defendant certainly has no cause to complain. In *Railroad Co. v. Shipley*, 81 Md., at page 874, the court, holding that evidence was competent that plaintiff was the son of a laboring man and a mechanic, well says: "If, in fixing the amount of damages, the jury are to estimate to what extent the injury has disabled the plaintiff from engaging in such mechanical or other laborious employments or pursuits as but for the injury he would have been qualified for, we do not see why they should not be informed by evidence that his position and reasonable expectations in life were such as would render such pursuits probable and necessary for a livelihood." The court go on to say that if it had been attempted to use this evidence merely to show poverty, and appeal to the prejudices of the jury, exceptions should be made to any argument on that line, and a special instruction might also be asked confining the testimony to its legitimate purpose. Nothing of that kind appears in the present case, and the evidence was clearly competent for the purpose just stated.

Many other cases hold that evidence of the condition in life of the party injured may be shown as one of the factors in determining how much money loss has been caused him by the jury. *Winters v. Railroad Co.*, 39 Mo. 468; *Railroad Co. v. Martin*, 41 Mich. 671, 8 N. W. 173; *Express Co. v. Nichols*, 33 N. J. Law, 437, 97 Am. Dec. 722, in which the court says: "The plaintiff

was an architect,—a business depending on his personal services as much as that of a common laborer, a clerk, or a mechanic,—and his emoluments were the result of his own earnings. By reason of the injuries he received, he was for a time incapacitated from pursuing his occupation, and sustained damages by reason thereof. These damages resulted proximately from the wrongful act of the defendant's servants, and obviously should be included in the compensation to be awarded to him. To what extent he had sustained pecuniary injury in that respect must depend upon the nature and extent of his business, and the jury would not be in a condition to reach any correct conclusion on that subject, unless they had before them some evidence of the value of the services to himself." In *Stafford v. City of Oskaloosa*, 64 Iowa, 258, 20 N. W. 174, it was held that where a physician was disabled by an injury to earn a livelihood, it was competent to show his earning capacity in the practice of his profession. In *Simonsen v. Railroad Co.*, 49 Iowa, 94, it was held competent to show that an unskilled laborer had no other source of income than his earnings as such. In *Railway v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908, it is said the jury may consider as an element of damages "the professional occupation, if any, of the plaintiff, and her ability to earn money, and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries." It is a truism that, whether it is a professional man or skilled laborer who is prevented by an injury from pursuing his calling, that calling and his earnings thereby are matters to be put in evidence in awarding him compensation. The defendant has no ground to complain that here it is in evidence that the child, who as yet has no vocation, was in humble circumstances, and had not suffered any pecuniary injury by the loss of her arm, other than the earnings which might have come to her later from manual labor. Counsel for defendant say in their brief: "The child of Barabbas would be entitled to as much damages, the injuries being equal, as the child of Herod." This is true as to compensation for physical suffering. It would not be true as to compensation for loss of earning capacity as between two individuals earning different incomes, for in that aspect their injuries are not equal. When, however, by reason of immaturity, neither has yet acquired a vocation, whether one with means to obtain an education has not suffered greater loss by being disabled to profit thereby than one who has no expectations in life, except of earning a livelihood by manual labor, is a matter we need not discuss; for here the compensation asked is on the lowest possible basis,—that of manual, unskilled labor.

The next exception is that the following question to the engineer was ruled out on

plaintiff's objection: "After you saw the child, was anything not done that could have been done to save the child?" This, if a proper matter of proof, was to ask the witness to answer a question that the jury were to pass upon. This has been fully discussed by Cook, J., in *Raynor v. Railroad Co.* (at this term) 89 S. E. 821, and needs no further citation of authority. The question, however, is further objectionable; for the proof should be directed to the inquiry whether the injury could have been avoided by reasonable care on the part of the defendant after the engineer, with a proper outlook, should have seen the child. This view was expressed in the following instruction to the jury, to which the defendant also excepted. "It was the duty of the engineer to have made an effort to check the speed of his engine as soon as the train reached a point on the track when by looking he could have seen the child. It is not material in this case whether the engineer actually saw the child on the track or not. If in the exercise of ordinary care, by looking ahead, he could have seen the child in time, without injury to his passengers, to have stopped the train before he ran over it, and failed to do so, the defendant company was negligent. Therefore, if the jury shall find as a fact from the evidence that the engineer, in the exercise of ordinary care, by looking ahead, could have seen the child, and, without injury to his passengers, stopped the train before he struck it, and that he failed to stop the train, thinking that the child would get off the track, or be taken off before he got to it, and so ran over it, the company would be negligent, and the jury should answer the first issue 'Yes.'" This instruction was fully warranted by an unbroken line of cases, from *Pickett v. Railroad Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611, down to the present term, and is based upon every consideration of humanity and due regard to the rights of common carriers by rail and those injured by the dangerous machines which they must necessarily use in their rapid conveyance of freight and passengers. Among many such cases are *Pharr v. Railway Co.*, 119 N. C. 751, 26 S. E. 149; *Fulp v. Railroad Co.*, 120 N. C. 529, 27 S. E. 74; and many others cited in *Munroe's Notes to Pickett's Case*; and there are others later than the publication of those notes.

The defendant's counsel rest their exception upon an expression in the opinion in *Bottoms v. Railroad Co.*, 114 N. C. 704, 19 S. E. 730, 25 L. R. A. 784, 41 Am. St. Rep. 799, which in general terms approved a charge of the judge below containing the sentence that, if the engineer was so occupied about his engine that he did not see the helpless person on the track in time to avoid the injury, the defendant would not be liable. But that identical point was an issue and reviewed in *Arrowood v. Railroad*

Co., 126 N. C. 629, 36 S. E. 151. In that case the court said: "The duty of keeping a lookout is on the defendant. If it can keep a proper lookout by means of the engineer alone, well and good. If for any reason a proper lookout cannot be kept without the aid of the fireman, he also should be used. If, by reason of their duties, either the fireman or the engineer, or both, are so hindered that a proper lookout cannot be kept, then it is the duty of the defendant, at such places on its road, to have a third man employed for that indispensable duty. In *Pickett v. Railroad Co.*, 117 N. C. 634, 23 S. E. 264, 80 L. R. A. 257, 53 Am. St. Rep. 611, *Lloyd v. Railroad Co.*, 118 N. C. 1012, 24 S. E. 805, 54 Am. St. Rep. 764, and a long line of similar cases, it is held that it is the duty of the defendant to keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give will relieve the company, if that lookout is not a proper outlook."

The request to instruct the jury to answer the first issue "No" was properly refused. There was ample evidence, if believed by the jury, that the train could have been stopped in time to have avoided the injury after the engineer, with ordinary care, could have seen the child on or in dangerous proximity to the track.

For the same reason it was not error to add the modification made in the second instruction asked by the defendant.

Affirmed.

(129 N. C. 230)

CLEMENT et al. v. IRELAND et al.

(Supreme Court of North Carolina. Nov. 12, 1901.)

FORECLOSURE SALE—CONFIRMATION—EXCUSABLE NEGLIGENCE.

1. A final judgment may be set aside by motion where such judgment was obtained by mistake, surprise, or excusable neglect.

2. Because of smallpox in a town, notice had been given by order of the judge that no civil cases would be tried at the term of court. At a sale on foreclosure at the court house door on the second day of the term, the only bids were made by the attorney of the assignee of the judgment and the assignee himself, who became the purchaser. The sale was not for an adequate price, and was immediately confirmed, without opportunity to file affidavits opposing such confirmation. Held, that the judgment of confirmation was properly set aside for irregularity, surprise, and excusable neglect.

3. Where a foreclosure sale was confirmed in the afternoon of the day on which the sale was held, such irregularity was sufficient cause for setting aside the order of confirmation.

Appeal from superior court, Davie county; Timberlake, Judge.

Action by H. B. Ireland and others against W. R. Clement and others. From an order setting aside a decree confirming a foreclosure sale, defendants appeal. Affirmed.

Watson, Buxton & Watson, for appellants. A. H. Eller and E. E. Raper, for appellees.

CLARK, J. Motion in the superior court of Davie county, at fall term, 1900, to set aside judgment of confirmation, obtained at spring term, of sale of land under a decree of foreclosure. The court found the facts to be that the decree of foreclosure was made at fall term, 1899, and the land was sold by the commissioner named in said decree, at the court house door, on April 3, 1901, being the second day of that term; that, owing to smallpox epidemic in the town of Mocksville, notice had been given by authority of the judge that the term would only be held long enough to dispose of jail cases, but no civil causes would be tried; that, except a nominal bid at request of the commissioner, the only bids were made by the attorney of the assignee of the judgment and the assignee himself, who became the purchaser, and the sum bid was not a fair and adequate price; that the sale was made at noon recess of the court, and was immediately reported to the court and confirmed that afternoon, though opposed by the defendant, who was precluded by the promptness of confirmation and the adjournment of the term, which took place immediately afterwards, from filing affidavits to oppose confirmation, or securing an increased bid of 10 per cent. upon the amount bid, which he has since done, and deposited said 10 per cent. with the clerk of the court; that when the sale was confirmed as aforesaid the defendants gave notice that they would move at the next term to set aside the judgment for irregularity, surprise, and excusable neglect. His honor's judgment setting aside the decree of confirmation should be sustained on both grounds. We are cited to numerous cases that a final judgment cannot be set aside by a motion in the cause, and that the judgment of one superior court judge cannot be reversed by another, they being of co-ordinate power. Both these propositions are sound, subject, however, to the rule that a judgment obtained by mistake, inadvertence, surprise, or excusable neglect may be set aside upon motion at any time within a year (Code 1883, § 274), and that an irregular judgment may, upon motion, be set aside at any time (*Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; 1 *Freem. Judgm.* § 100). In *Pickens v. Fox*, 90 N. C. 369, it was held, as one ground of excusable neglect to set aside a judgment, that the judge had informed counsel that no civil business would be disposed of at that term, and he left a civil cause unrepresented on his departure from the court before its adjournment, whereupon the judgment was taken therein. The facts found in the present instance make out a clear case of excusable neglect, and, such being the fact, the exercise of his honor's discretionary power to set aside or refuse to set aside a judgment is not reviewable. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Manning v. Railroad Co.*, 122 N. C. 824, 28 S. E. 963; *Stith v. Jones*, 119 N. C. 423, 25 S. E. 1022.

The judgment was also irregular because it is contrary to the regular course of the courts to confirm a judicial sale at the very term during which the sale had taken place. Of course, this could be done by consent, but in its absence there should always be some lapse of time between the date of the sale and its confirmation, that the mortgagor, or other person whose land has been sold by decree of court, may have opportunity to file exceptions based upon affidavits, and to procure an increased bid of 10 per cent., and deposit the same in court. *Ex parte White*, 82 N. C. 377. In analogy to the provision as to sales for partition, this should be at least 20 days. Code 1883, § 1918. The purchaser at a judicial sale is simply a mere preferred proposer, and has no independent rights before the sale is confirmed. *Atty. Gen. v. Roanoke Nav. Co.*, 86 N. C. 408; *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549. A confirmation should not be made, as here, immediately upon the sale, and without opportunity to defendant, either when he has no notice, or when, as in this case, he has no time allowed, to show cause against confirmation. No harm can be worked by setting aside the confirmation when, as here, the purchaser not only procured the speedy confirmation, but was himself the creditor, being assignee of the judgment under which the property was sold. The lien of his judgment remains unimpaired.

No error.

(129 N. C. 217)

VANDERFORD et al. v. FOREMAN et al.
(Supreme Court of North Carolina. Nov. 12, 1901.)

LANDLORD AND TENANT—TERMINATION OF LEASE—SUIT FOR POSSESSION—SUBSEQUENT RENT—TENANCY FROM YEAR TO YEAR—TENDER—EFFECT.

1. Code, § 573, provides that a defendant may serve a written offer of judgment, and, if plaintiff accepts, judgment shall be accordingly entered, but if not, and plaintiff does not recover more, he cannot have costs. Section 1773 provides that if in an action for possession of demised premises, brought "on a forfeiture for nonpayment of rent," the tenant shall pay or tender the rent due, with costs, all further proceedings shall cease, or if plaintiff shall further prosecute his action, and defendant pays into court the amount found to be due, the defendant shall recover costs, and the proceedings shall be stayed. A landlord sued for possession, alleging that the lease had expired, and that subsequently a large amount of rent had accrued. The tenant paid a certain sum into court in full of rent, demanding that on its acceptance the action "be dismissed under section 1773." *Held*, that as the action was not brought on a forfeiture of the lease for nonpayment of rent, but because of the expiration of the term, section 1773 did not apply, and in the absence of a contention to that effect section 573 did not apply, and hence the landlord's acceptance of the tender, though concluding him as to the amount due for rent, did not affect his count for recovery of possession.

2. The acceptance of the tender did not convert the tenancy into one from year to year, so as to preclude the landlord's recovery

of possession, in view of the fact that the tenant had been served in proper time with a notice to vacate.

Appeal from superior court, Rowan county; Brown, Judge.

Action by T. H. Vanderford and others against John Q. Foreman and David Foreman, trading as Foreman Bros. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

R. Lee Wright, for appellants. Overman & Gregory and T. F. Kluttz, for appellees.

MONTGOMERY, J. The tender in writing made by the defendants and accepted by the plaintiffs, and in which there was an offer made to pay a certain amount, less than that mentioned in the complaint, in full of rent claimed and the costs, contained the following words in its conclusion: "and ask and demand that the same be accepted, and this action and proceeding cease and be dismissed, under said section [1773] of the Code." Upon the further prosecution of the case by the plaintiffs, his honor, upon the motion of the defendants, made both at the call of the case and at the end of the evidence, refused to dismiss the action. The plaintiffs alleged in their complaint that the lease had expired on the 31st of December, 1899, and that demand for possession and notice to vacate on that date had been properly given, and that since the expiration of the lease a large amount was due as rent for the occupation of the premises. The defendants contend that the plaintiffs cannot further prosecute their action for recovery of possession, for the reason that the tender contained a condition to that effect, and, as the plaintiffs received the amount tendered, they are bound by the condition, and also that if it be taken as true that the lease expired on the 31st of December, 1899, yet, when the plaintiffs received under the tender the amount offered in settlement of the rent claimed for occupation after the expiration of the lease, the tenancy became one from year to year. We think the defendants' contention cannot be made good. The tender was avowedly made under section 1773 of the Code, but the action was brought for the recovery of the possession of the premises, not upon a forfeiture of the lease for the nonpayment of rent, but because of the expiration of the term; and therefore, under that section of the Code, the attempted condition contained in the tender could only apply to the settlement of the dispute about the amount of rent due. It was not contended by the defendants that the tender was made under section 573 of the Code. It stands, then, disconnected with either section of the Code above referred to; and the request made that the suit be dismissed is no more than what it purports to be,—a simple request, which the plaintiffs could comply with or not, as they saw fit to do. It was merely the defendants' view of the

effect, in law, of the acceptance of the money under section 1773 of the Code. It concluded the plaintiffs as to the amount of the rent due for the time mentioned, but could not affect the count in the plaintiffs' complaint for the recovery of possession of the premises.

As to the other phase of the defendants' contention, i. e. that the acceptance of the rent for the time after the expiration of the term converted the tenancy into one from year to year, it may be said that there would be force in it if there had not been served in proper time a notice upon the defendants to vacate the premises and deliver possession at the end of the term. In an action to recover the possession of leased premises the plaintiff can recover damages for the occupation of the premises since the cessation of the estate of the lessee; and surely the plaintiff could receive it, by voluntary payment, without the effect of continuing the lease.

The defendants were not entitled to have their 14 prayers for instructions given, or either one of them, for they all covered the two points above discussed, except the seventh and the fourteenth; and the seventh was too general, and the fourteenth correct in part and incorrect in part.

No error.

(129 N. C. 522)

STATE v. McDOWELL.

(Supreme Court of North Carolina. Nov. 12, 1901.)

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—CONFESSIONS—WITNESSES—INTEREST—INSTRUCTION.

1. A question as to whether it was light enough for defendant to have seen deceased, and known who he was, is not objectionable, as asking for the expression of an opinion.

2. Evidence as to what defendant, on trial for murder, said to a party after the shooting, is not admissible on its appearing that what was said was not a part of the *res gestæ*, nor concerning a conversation between such party and the witness as to which such party had testified.

3. Where, at the time of arresting a person on the charge of murder, he denies all knowledge of the killing, his statements are not inadmissible as confessions obtained through fear.

4. Where the court states to the jury in its general charge every reasonable contention of the state, it is error to give an entirely new charge, at the state's request, commencing, "The prisoner is charged with murder in the first degree," and then follow it with a powerful summing up for the state, as it is calculated to prejudice the minds of the jurors.

5. Under Code, § 413, providing that the court, in charging a jury, must not give an opinion whether a fact is fully or sufficiently proven, an instruction on a trial for murder, given in summing up, "The evidence of D., who was with deceased at the time he was shot; J., who was with the prisoner at the time he fired his pistol," etc., is erroneous.

6. Where defendant, on trial for murder, testifies that he and a party with him went home some out of their way, an instruction, in giving the grounds relied on by the state, reciting "the fact that he admitted going home

by an unusual and different route," is error, as being incorrect and calculated to prejudice defendant in his defense.

7. An instruction that in passing on the evidence of the defendant's near relations, who testified for him, to scrutinize the same with great caution, considering their interest in the result of the verdict, and then to give it such weight as is deemed proper, is erroneous, in the absence of a further charge that, if such witnesses were found to be credible, their testimony should be given full credit.

Appeal from superior court, Robeson county; McNeill, Judge.

James McDowell was convicted of murder in the second degree, and he appeals. Reversed.

Wade Wishart, W. D. Blizzell, and R. E. Lee, for appellant. McLean & McLean and The Attorney General, for the State.

FURCHES, C. J. The prisoner was indicted for the murder of one Harlee Leak, convicted of murder in the second degree, sentenced to 10 years in the penitentiary, and appealed; and, this being a court of errors, we can only consider the errors of law presented by the record.

There are several exceptions to the ruling of the court upon the evidence, none of which can be sustained.

The witness James Jenkins was asked by the state: "Was it light enough for defendant to have seen deceased as he passed out of the house, and know who he was?" To the question the prisoner objected, and, upon his objection being overruled, excepted. This exception is put upon the ground that the question "involved the expression of an opinion by the witness," and *State v. McLaughlin*, 126 N. C. 1080, 35 S. E. 1087, is cited as authority for this contention. But we do not think *McLaughlin's Case* sustains the exception. In that case two statements of the evidence were made, and the witness was asked and allowed to testify that in his opinion they were substantially the same. This was purely a matter of opinion, and invaded the province of the jury. Not so in this case, which was a statement of what he knew by sight, and not what he believed by the exercise of his mind and powers of reasoning.

The next exception is to the exclusion of what the prisoner said to James Jenkins after the shooting. This exception cannot be sustained, as it does not appear to be a part of the *res gestæ*, nor does it appear to be as to a conversation between the witness and Jenkins, about which Jenkins had testified.

Another exception is to the evidence of Sheriff McLeod at the time he arrested the prisoner. It appears that the sheriff and three other men went to the house of the prisoner about 11 o'clock the night the deceased was killed, for the purpose of arresting him. The door was closed, and the sheriff pushed it open, and he and the three persons with him, acting as his deputies, went in, and

found the prisoner standing near the foot of the bed. They drew their pistols, and told him that he was their prisoner, and to throw up his hands, which he did, and asked what was the matter. The sheriff replied: "You know what is the matter. You have killed Harlee Leak." To this the prisoner replied "that he had not done anything of the kind. He said he had not had his pistol. It had been home with his wife. He didn't seem to know much about the shooting." The evidence was received over the objection of the prisoner, upon the ground that it was not a confession obtained through fear. But the prisoner contended that it should not have been admitted, under the rulings of this court in the cases of *State v. Dildy*, 72 N. O. 323, and *State v. Davis*, 125 N. C. 612, 34 S. E. 198. It does not seem to us that either of these cases sustains the exception. In the case of *State v. Davis* the defendant was arrested by one Conrad, and while under arrest Conrad said to him "that he had worked up the case, and he had as well tell all about it." At first the defendant denied any knowledge of the alleged stolen articles, but afterwards said that another person had brought them to his house, and this evidence was held to be incompetent. But *Davis' Case* differs from this in two respects. In that case the defendant was induced to make the confession by being told by the officer that he "had worked up the case, and he had better tell all about it," while in this case nothing of the kind was said to the prisoner, but he volunteered to say what he did. But a greater distinction is that in this case there was no confession. The prisoner denied all knowledge of the killing, and it is difficult to see how this could be considered a confession of the crime.

There are other matters shown by the record which have given us trouble. It appears from the evidence offered by the prisoner that other shots were fired than those fired by the prisoner, and from different directions. There is also evidence tending to show that, if the deceased was killed by the prisoner, he would have been shot in the back, while the evidence is that he was killed by a shot from the front. It is also in evidence from the sheriff and others with him at the time of the arrest that the prisoner's pistol, freshly fired, was a 32 Iver & Johnson pistol. This evidence was undisputed and uncontradicted. G. W. Waddell took the witness stand, with his scales, and, in the presence of the court and jury, proceeded to weigh the bullet that killed the deceased, and to weigh one taken from the prisoner's pistol by the sheriff. The bullet that killed the deceased weighed 105 grains, and the bullet taken from the prisoner's pistol by the sheriff when he arrested the prisoner weighed but 85 grains; and the witness Waddell testified that the bullet which killed the deceased could not have been shot

out of a 32 Iver & Johnson pistol. This evidence was uncontradicted. And we find that at the request of the prisoner the court charged the jury "that, if you find from the evidence that the deceased came to his death by a bullet which could not have been fired from an Iver & Johnson 32 cal. pistol, you should acquit the prisoner." But they found him guilty. We suppose they did not believe this undisputed testimony of the witness Waddell. The prisoner asked several instructions, all of which were given but one, and that one should not have been given. The state asked several special instructions, all of which were given and excepted to by the prisoner; and the "case" states: "His honor, after having stated to the jury in his general charge every reasonable contention of the state, gave the following special instructions asked by the state: '(1) The prisoner, Jim McDowell, is charged in the indictment with murder in the first degree. Under the indictment the jury may find a verdict of murder in the first degree or the second degree or manslaughter, or not guilty, accordingly as the jury may find the facts to be from the evidence produced upon the trial. If the state has satisfied you beyond a reasonable doubt that the prisoner slew the deceased with a pistol, as contended for by the state, then the law presumes that the prisoner is guilty of murder in the second degree, and the burden shifts to the prisoner to satisfy the jury, not beyond a reasonable doubt, but simply to satisfy the jury of such mitigating circumstances as are sufficient in law to mitigate and reduce the murder in the second degree to manslaughter.' This instruction was given, and prisoner excepted. '(2) If you find beyond a reasonable doubt from the evidence in this case that the prisoner slew deceased with a pistol, and if the prisoner has failed to show to the satisfaction of the jury such mitigating circumstances as in law would reduce the killing to manslaughter, then the jury should find a verdict of murder in the second degree.' Given. Prisoner excepted. '(3) The first thing for you to decide is, did the prisoner slay the deceased, as is alleged by the state? And the state relies on the following testimony to sustain its contention that the prisoner actually slew the deceased: The evidence of Dave Sammons, who was with the deceased at the time he was shot; Jim Jenkins, who was with the prisoner at the time he fired the pistol; John Leak, who testified as to threats on the afternoon before the killing; of Mary Faulk, who testified as to hearing three shots in the direction of Jim Jenkins' house; of Dave Love, who heard three shots in the direction of Jim Jenkins' house, and who also testified that he examined pistol found in possession of prisoner after the killing, and which had been recently shot; of Sheriff McLeod, who examined the pistol found in the possession of prisoner; of Jim

French, who was immediately behind the prisoner when he fired the pistol; and other evidence tending to show that the shot which struck Harlee was fired from the direction of Jim Jenkins' house, in which direction the prisoner was at the time of the shooting. The state also relies upon what it claims were contradictory statements made by the prisoner immediately after the killing, and to the fact that he admitted going home by an unusual and different route, and by his denying any knowledge of the death of Harlee Leak at the time he was arrested, and also upon the evidence of Jay Barnes and Frank Barnes, who swore that three shots were fired, and that they were in the direction of Jim Jenkins' house. If you are satisfied beyond a reasonable doubt that the prisoner killed the deceased, then you will proceed to determine whether the crime be murder in the first degree, second degree, or manslaughter. If you find from the evidence, beyond a reasonable doubt, that he did the killing, as alleged, with a pistol, nothing else appearing, you should render a verdict of murder in the second degree. Before you can render a verdict in the first degree, the state must prove to you, further, beyond a reasonable doubt, that the killing was willful, deliberate, and premeditated. It is not necessary that the purpose or design to kill should exist for any particular length of time, but that it must have existed before the killing; otherwise it would not be murder in the first degree. The testimony relied on by the state to show murder in the first degree is that of John Leak, that, on the afternoon of the day on which Harlee Leak was killed, the prisoner and deceased had a quarrel in the barber shop in the town of Lumberton; that prisoner told deceased on leaving that he would get him, the exact language which you will find in the testimony of John Leak, and also upon evidence of Jim Jenkins, in which he testified as to the alleged statement of the prisoner that he went to Jim Jenkins' house that night to kill some damned son of a bitch, and also upon the evidence of Jim Jenkins to the effect that, at the time the prisoner shot, Harlee Leak was about 21 steps in front of him, in the lane, and that the prisoner had walked some distance after leaving Jim Jenkins' house behind Harlee Leak, in the lane, before the killing took place. You will remember the evidence as to these matters according to the testimony of the witnesses as produced upon the trial. It is your duty to decide these facts; to pass upon the weight of the testimony; to say whether it is to be believed or not; to say that it established certain facts, or it does not. In weighing the testimony, it will be your duty to consider the interest of any witness, if you find there is any; to consider the conflicting statements, if there are any; to consider the demeanor of the witnesses upon the stand;

and to consider any facts or circumstances which tend to uphold or discredit any of the testimony of any of the witnesses. As before stated, if you find beyond a reasonable doubt that the prisoner slew deceased with a pistol, and if you find further that the killing was willful, deliberate, and premeditated, and if you find these facts beyond a reasonable doubt, then you will render a verdict of murder in the first degree. On the other hand, if you find beyond a reasonable doubt that the prisoner slew deceased with a pistol, and the killing was not deliberate or premeditated, then you will render a verdict of murder in the second degree, unless you find that the prisoner was guilty of manslaughter, or that the killing was the result of an accident. *State v. Booker*, 123 N. C. 713, 31 S. E. 378.' This instruction was given, and defendant excepted. '(4) If you find from the evidence, beyond a reasonable doubt, that the prisoner slew deceased as alleged by the state, and if you find that the killing was without deliberation and premeditation, and if you find that the prisoner did not intend to kill deceased, but if you go further and find from the evidence that the prisoner discharged his pistol down the lane, as alleged by the state, towards the crowd of people in the lane, without regard to the consequences of his act, then he will be guilty of manslaughter. *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466.' This instruction was given, and prisoner excepted. '(5) If you find from the evidence, beyond a reasonable doubt, that the prisoner discharged his pistol carelessly and recklessly and unlawfully, and that he killed deceased in such manner accidentally, still it would be manslaughter; and, if you so find from the evidence, you will return a verdict of manslaughter. In such cases the test of responsibility depends upon whether the conduct of the party accused was unlawful, or, even if it was not unlawful, if it was so grossly negligent, reckless, or violent as necessarily to imply moral impropriety or turpitude. *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466.' This instruction was given, and prisoner excepted. '(6) The court charges you that if you find, beyond a reasonable doubt, that the prisoner discharged his pistol among a crowd of people in the lane near Jim Jenkins' house, knowing at the time that there were people in front of him, and if you find further, beyond a reasonable doubt, that the pistol was discharged, causing the death of Harlee Leak, then the prisoner would be guilty of manslaughter, even if he did not intend to do any harm to any particular person, or even if he intended it only in sport or to frighten some one. *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466.' This instruction was given, and prisoner excepted. '(7) It is the duty of the jury, in passing upon the evidence of the prisoner himself, and of his near relatives who testi-

fled for him, to scrutinize their evidence with great caution, considering their interest in the result of the verdict; and, after so considering, the jury will give to it such weight as they may deem proper.' This instruction was given, and prisoner excepted. [Signed by] C. M. McLean, Solicitor, McLean & McLean, Proctor & McIntyre, and John D. Shaw, Jr., Associate Counsel for State."

The case on appeal states that the whole evidence in the case has been sent up, and we have read the whole of it; and, from the view we have taken of the case, we thought it proper to insert in full the prayers of the state for special instructions. We cannot think the manner in which this trial was conducted is the ordinary practice in the courts of this state; that, after his honor "had stated to the jury in his general charge every reasonable contention of the state," he should, at the request of the state, give an entirely new charge, commencing, "The prisoner, Jim McDowell, is charged in the bill of indictment with murder in the first degree," etc. This charge, written by the attorneys for the prosecution, is a powerful summing up for the state. It does not pursue the usual course in asking special instructions, by asking the court to charge some proposition of law predicated upon some fact the evidence tends to prove, but, as we have said, it is a powerful summing up of the whole argument for the state, after the judge had "stated to the jury in his general charge every reasonable contention of the state." This, we think, was calculated to prejudice the prisoner's case with the jury, if every word of this charge was correct. But there are some expressions in this charge that are objectionable as matters of law. In the third prayer the court says in summing up: "The evidence of Dave Sammons, who was with the deceased at the time he was shot; Jim Jenkins, who was with the prisoner at the time he fired the pistol; Jim French, who was immediately behind the prisoner when he fired the pistol." The prisoner on cross-examination testified: "I went home by the old bridge. Jim McQueen was with me. We went some out of our way." And the court, in this summing up, in giving the grounds relied on by the state, says: "The fact that he admitted going home by an unusual and different route." This reads like the argument of counsel to a jury. But it is not a correct, and, as we think, not a fair, statement of the prisoner's evidence. It seems to us that the statements as to Dave Sammons, Jim Jenkins, and Jim French were a violation of section 413 of the Code, and the statement as to the admission of the prisoner is incorrect, and calculated to prejudice him in his defense.

In the seventh prayer, which was given,

the court, after instructing the jury to "scrutinize the evidence of the prisoner's relations with great caution, considering their interest in the result of the verdict; and, after so considering, the jury will give to it such weight as they may deem proper." This charge is a very common one, and when applied to witnesses on both sides, and properly applied by the jury, may do no harm. But the scrutiny referred to is for the purpose of aiding the jury in determining the credit of the witnesses, as the jury are to pass upon that, whether the witness is interested or not. If they find the witness to be credible and that he has sworn the truth, his testimony should have the same weight as if he was not interested; and it was error in the court, when charging the jury upon the subject of interest, not to so have charged the jury. This, as all the other special prayers of the state, was excepted to, and the exception must be sustained. *State v. Collins*, 118 N. C. 1203, 24 S. E. 118; *State v. Hollowell*, 117 N. C. 730, 23 S. E. 168; *State v. Lee*, 121 N. C. 544, 28 S. E. 552; *State v. Apple*, 121 N. C. 584, 28 S. E. 469.

Error. New trial.

CLARK, J. (concurring). Though a judge may think he has fully charged the contentions of both sides, when correct prayers for instruction are asked by either it must rest in his sound discretion whether to give them, or take the risk of their having been substantially given already in the charge. If the charges in themselves are correct, he is not forced to refuse them because he may think they have been already given, and thus subject the public to the expense of a new trial, if, as precedents show, ingenious counsel can find that every point therein made was not given in the main charge. Here the judge gave every charge asked by defendant, save one, which was properly refused, though he had given substantially his prayers in the main charge. The fact that the state could not appeal from errors against the state, properly, did not prevent him from showing equal liberality in giving instructions asked by its representative. I think, however, there was error in those instructions in the two particulars pointed out in the opinion of the court, and concur in the result on that ground alone.

MONTGOMERY, J., concurring, thinks that the defendant was prejudiced in his trial, as set out in the opinion in chief, by the second charge of his honor,—the giving of the special instructions of the solicitor and his associate counsel; but he further thinks that the harm that may have been done cannot be corrected by this court as an error in law. He concurs in the result.

(114 Ga. 230)

HAWKINSVILLE & F. S. RY. CO. v. WAYCROSS AIR LINE R. CO.

(Supreme Court of Georgia. Nov. 16, 1901.)

RAILROADS—SPECIAL CHARTERS—CONNECTING LINES.

1. Construing together all the provisions of the constitution of this state, as it stood prior to 1892, with reference to the granting of charters to railroad companies, the passage of what is known as the "General Railroad Law," for the incorporation of railroad companies, did not deprive the general assembly of the power to thereafter grant special charters to such companies, upon the ground that so doing would be enacting special laws in cases already provided for by an existing general law.

2. Even if section 2176 of the Civil Code is in any case restrictive of the powers of a railroad company chartered by a special act of the general assembly, it has application only when the two railroad companies involved connect by their lines the same terminal points.

(Syllabus by the Court.)

Error from superior court, Irwin county; D. M. Roberts, Judge.

Action by the Hawkinsville & Florida Southern Railway Company against the Waycross Air Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Ellis & Ellis and Candler & Thomson, for plaintiff in error. J. L. Sweat, for defendant in error.

SIMMONS, C. J. In 1887 the legislature incorporated the Waycross Air Line Railroad Company, and amended the charter in 1889 and 1891. Prior to that time the legislature had passed what is commonly known as a "general law" for the incorporation of railroad companies. This law was amended from time to time, and finally placed in the Code of 1895. In 1896 the Hawkinsville & Florida Southern Railway Company was incorporated under this general law. In speaking of these two corporations in this opinion they will hereafter be designated as the "Waycross Company" and the "Hawkinsville Company." The Waycross Company was given by the general assembly very broad powers in selecting its route, and the original charter and the amendments thereto designated several places to which the road might be built. The company finally determined to build from Waycross, in Ware county, to Cordele, in Dooly county. The charter of the Hawkinsville Company authorized it to be built from Worth, in Worth county, to Pitts, in Wilcox county, and also to build a branch road from some point on its main line to the city of Fitzgerald. Davisville was selected as the point on the main line, making the proposed branch to Fitzgerald run almost at right angles to the main line. By an amendment to the charter the company was also authorized to extend its main line from Pitts to Hawkinsville. The original main line and the extension to Hawkinsville were built, so

that the main line now runs from Worth to Hawkinsville. The branch from Davisville was built about 10 miles out toward Fitzgerald, but has never been completed to Fitzgerald. The Waycross Company had completed its road from Waycross to Fitzgerald, and, desiring to extend it to Cordele, cut timber and made grades along the proposed route. This route came within 10 miles of the Hawkinsville Company's branch road. The Hawkinsville Company thereupon filed an equitable petition against the Waycross Company to enjoin it from building its proposed road. The petition alleged that the Waycross Company had no valid charter which would authorize it to condemn land for its right of way or to cut timber, and that it was therefore a trespasser when it undertook to cut timber belonging to the plaintiff. It also alleged that under section 2176 of the Civil Code the defendant was forbidden, even if it had a valid charter, to run its road parallel with that of the plaintiff, and within less than 10 miles of it. There were other points made in the petition, but these are the main and controlling ones. The defendant demurred to the petition and also filed an answer. The court, after hearing argument, refused the injunction, and the plaintiff excepted. The court decided that the Waycross Company had a valid charter, and that section 2176 of the Civil Code did not apply under the facts of the case.

1. It was contended by the able and learned counsel for the plaintiff in error that the court was wrong in holding that the charter of the Waycross Company was valid. He contended that, as in 1881 the legislature had passed a general law for the incorporation of all railroads in the state, and as paragraph 1 of section 4 of the bill of rights (article 1 of the constitution) declares that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law," the legislature had no power to pass a special act incorporating the Waycross Company, or to pass acts amending its charter. He cites many decisions of this court in which it has been held that, where the legislature has enacted a general law upon a particular subject, it could not afterwards pass a special law upon the same subject, and that acts attempting to do so are unconstitutional and void. We entertain no doubt of the correctness of the rulings relied upon by counsel, but these decisions were made with reference to special acts passed in direct conflict with that part of the constitution above cited. When the legislature passed a general law as to the manner of working public roads, as to fences, or as to the sale of liquor, it exhausted its power, and could not pass special road, fence, or liquor laws for particular localities without first repealing the general law. The constitution is as binding upon the

legislature as upon the courts; but, when the constitution gives to the legislature special power to incorporate railroad companies, we think that, although it may have passed a general law for the incorporation of railroad companies, its power to grant special charters to such companies was not, under the constitution as it existed from 1877 to 1892, thereby exhausted. Many applications for railroad charters were made to the legislature at each session, and, in order to save time and expense, it passed a general law for the incorporation of railroad companies, and by so doing said to the public: "We tender you this law, which you can accept or not at your pleasure. A charter obtained thereunder will be as valid and binding as though granted by a special act of this body." In our opinion, if persons interested did not desire a charter under the general law, but desired privileges and immunities different from those granted under the general law, they could apply to the legislature, and it could not constitutionally refuse to act upon the application because of the passage of the general law. The enactment of the general law did not divest the legislature of the power which the constitution had given. The constitution of 1877 declared that "the general assembly shall have no power to grant corporate powers and privileges to private companies, except banking, insurance, railroad," etc., companies. Article 3, § 7, par. 18. It was clearly the meaning and intention of the framers of the constitution to give the legislature the power to grant charters to railroad companies. While the constitution restrained the legislature generally from passing special laws after having enacted a general law covering the particular matter, it still reserved to the legislature the right to grant special charters to these companies. Construing the two sections together, we are of opinion that the legislature had the right, after having passed a general law for the incorporation of railroad companies, to enact a special law incorporating a particular railroad company. This seems to have been the contemporaneous construction put upon these sections by every legislature which has met in Georgia from 1881, when the general railroad law was passed, down to 1892, when a constitutional amendment was passed taking from the legislature the power to grant special charters. As far as we are informed, no governor, during this period, ever refused to approve a railroad charter on the ground that the legislature had no power to pass it. The books containing the laws of the state from 1881 to 1892 are full of charters granted by the legislature to railroad companies. While contemporaneous construction by the members of the legislature is not and should not be controlling with the courts, it is entitled to great weight upon constitutional questions, especially when we know that some of our ablest lawyers were members of the legislature

when these charters were granted. See, upon this subject, *Pulaski Co. v. Thompson*, 88 Ga. 270, 9 S. E. 1065. Besides this contemporaneous construction by the legislature, we have a constitutional amendment in which the power of the legislature to grant charters to railroad companies is expressly recognized. In December, 1890, the legislature proposed this amendment in an act the title of which was as follows: "An act to amend article 3, section 7, paragraph 7 of the constitution of the state, by adding thereto the following words: 'But the first and second reading of each local bill and bank and railroad charters, in each house, shall consist of the reading of the title only, unless said bill is ordered to be engrossed.'" Laws 1890-91, vol. 1, p. 57. This was passed by a constitutional majority, submitted to the people of the state, and by them ratified at the general election in 1892. It is now a part of the constitution of the state, and can be found therein. Civ. Code, § 5770. This is not only a legislative construction, but a construction by the people of the state; for this amendment expressly recognized the right of the legislature in 1890 to grant railroad charters. This, to our minds, is conclusive of the fact that the legislature had power to grant railroad charters after the passage of the general law of 1881. It is true that in 1891 the legislature submitted to the people a constitutional amendment revoking this power, and that in 1892 this amendment was ratified by the people; but that does not, in our opinion, change the construction put upon the power of the legislature to grant railroad charters. What we have said in this opinion applies, of course, to the constitution as it stood prior to the ratification of the last-mentioned amendment revoking the power of the legislature to grant special railroad charters. The very fact that the legislature proposed the amendment to the constitution which revoked the power to grant special charters to railroad companies, and that it was adopted by the people, is also conclusive, to our minds, that the legislature and the people construed the constitution as we have done. If, after the passage of the act of 1881, the legislature did not have this power, the two amendments just referred to would have been superfluous and nugatory, for both of them recognized the previous power of the legislature to grant such charters, when, under the contentions of the plaintiff in error, it had already deprived itself of the power of so doing. Courts will not presume that the people in their sovereign capacity would do a foolish and unnecessary thing.

2. It was contended by the counsel for the plaintiff in error that, even if the Waycross Company had a valid charter, it was forbidden by section 2176 of the Civil Code from running its line within 10 miles of the branch road from Davisville to Fitzgerald; that the record discloses that the Hawkinsville Com-

pany had built 10 miles from Davisville in the direction of Fitzgerald, and that the proposed extension of the Waycross road would parallel this branch line, and be within 10 miles of it; and that the proposed extension was laid out so close to the Hawkinsville line as to be almost upon its right of way. We agree with the trial judge that, under the facts of this case, section 2176 is inapplicable. In our opinion, that section applies only when the termini of the two roads are the same. For instance, if both roads had charters from Waycross to Cordele, the road last built or proposed to be built could not run within 10 miles of the road already built, or with the route already "selected and chartered," save in the exceptional cases provided for in the section. Here, however, the termini of the two main roads were entirely different and widely separated. The southern terminus of the Hawkinsville Company's main road is at Worth, in Worth county, and the other terminus is Hawkinsville, in Pulaski county. The Waycross road runs from Waycross, in the county of Ware, about 100 miles from Worth, to Cordele, in Dooly county, and fully 30 miles from Hawkinsville. The general direction of the Hawkinsville road is north and south, and that of the Waycross road is east and west, the two main lines crossing each other nearly at right angles. Under the charter of the Hawkinsville Company, it had authority to build a branch from Davisville, on its main line, to Fitzgerald, which would be a branch 15 or 20 miles in length. The Waycross road was already built to Fitzgerald, and the proposed extension of the main line would nearly parallel the branch of the Hawkinsville road, and be within 10 miles of it. It could not have been the intention of the legislature to compel the Waycross Company to deflect its main line so as not to come within 10 miles of the branch road. If both companies were, under proper charter authority, building branch roads between Davisville and Fitzgerald, this section might apply; but it does not render it necessary to deflect a main through line so as not to come within 10 miles of a branch road one of whose termini was on the main line of the other road, and the other of whose termini was neither a terminus of such other road nor on its line. Fitzgerald is the proposed terminus of the branch from Davisville. Davisville is not on the line of the Waycross road. Fitzgerald is on such road, and is the only point common to that road and the main or branch line of the Hawkinsville Company. For these reasons section 2176 is inapplicable to the present facts, even if it in any case applies to a company chartered by a special act of the legislature.

Counsel for the plaintiff in error argued with great ability and much learning upon the subject of de facto corporations. In much of what he said we fully concur, but,

as the Waycross Company was a de jure and not a de facto, corporation, we have not gone into that question, and find it unnecessary to review the case of Georgia, S. & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153.

Judgment affirmed. All the justices concurring.

DIXON v. STATE.

(113 Ga. 1039)

(Supreme Court of Georgia. July 22, 1901.)

CRIMINAL LAW—CONFESSIONS—INSTRUCTIONS.

1. To render a confession of guilt admissible as evidence, it must have been made voluntarily, without being induced by another by the slightest hope of benefit. Hence any advice to a prisoner under arrest, by the officer having her in custody, to the effect that if she knew anything she had better tell it, vitiates a confession induced thereby. Green v. State, 15 S. E. 10, 88 Ga. 516, 30 Am. St. Rep. 167.

2. When, in the trial of a criminal case, it becomes a question whether or not the accused made a confession, a charge assuming that he did so is erroneous. Under such circumstances the court should, in the proper connection, distinctly instruct the jury to ascertain from the evidence whether a confession has been in fact made.

3. Other than as above indicated, there was at the trial now under review no material error a repetition of which will probably occur on the next hearing.

(Syllabus by the Court.)

Error from superior court, Johnson county; Evans, Judge.

One Dixon was convicted of murder, and brings error. Reversed.

James K. Hines, Kent & Hatcher, and John R. Cooper, for plaintiff in error. J. M. Terrell, Atty. Gen., and B. T. Rawlings, Sol. Gen., for the State.

LITTLE, J. Judgment reversed. All the justices concurring.

(114 Ga. 189)

SMITH v. GEORGIA LOAN & TRUST CO.

(Supreme Court of Georgia. Nov. 9, 1901.)

EXECUTION SALE—SETTING ASIDE—FRAUD—INADEQUACY OF PRICE.

1. While inadequacy of price at a sheriff's sale will not of itself be a sufficient ground to set aside the sale, yet when it is grossly inadequate, and is connected with fraud, mistake, misapprehension, surprise, or other circumstances which tend to bring about such inadequacy, to the injury of parties interested, the sale will be set aside by a court of equity.

2. When, therefore, upon a day of sale, counsel for the plaintiff in execution, and also the defendant therein, requested the sheriff not to expose the property for sale until a certain agreement had been executed by the plaintiff and the defendant, and the sheriff assented to the request, but subsequently, through mistake or misapprehension, sold the property, worth from \$2,000 to \$3,000, before the agreement was executed, and before the parties arrived at the place of sale, for the sum of \$40, the inadequacy was so gross as

to authorize a court of equity, under the circumstances, to set it aside. This is true although the purchaser at such sale was not in fault, and had no notice of any irregularity; for by purchasing he subjected himself to the power of the court, upon a proper showing, to set aside the sale upon equitable terms.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by the Georgia Loan & Trust Company against Halsted Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

Halsted Smith, in pro. per. Nat Harris and Dean & Dean, for defendant in error.

SIMMONS, C. J. From the plaintiff's petition it appears that Ayer borrowed from the Georgia Loan & Trust Company a certain sum of money, and gave it a security deed. Ayer being unable to pay the money when the debt became due, the company brought its action on his note, and obtained judgment for \$1,700. It filed in the clerk's office a deed conveying the land back to Ayer, as provided by the Code, and had the sheriff to levy upon the same as Ayer's property. This land was worth about \$1,500, and had on it a growing crop worth nearly as much. On the day the property was to be sold by the sheriff, Ayer made to the attorneys for the company a proposition which they, after telephoning to their client, whose residence was 200 miles away, accepted. It seems to have been necessary for them to go to the telephone exchange to converse with the proper parties. Before leaving for the exchange they notified the sheriff of their purpose in going, and requested and instructed him not to sell the property until their return. Their client agreeing to the proposition made by Ayer, they returned to the court house, in front of which the sale was to be had, and commenced to reduce the agreement to writing. The sheriff entered the room and inquired if they were ready for the sale to proceed. They informed him that they were not quite ready, and to hold the sale off until he had finished selling all the other property advertised for sale on that day. This he agreed to do. A few minutes later, and unknown to plaintiff's counsel, Ayer went out and said to the sheriff: "When you get ready to sell, get through as quick as possible. They are going to buy it in, and I will get it, and I don't want the commissions run up on me." The agreement, by which the company was to bid in the property and allow Ayer to hold it on certain terms, was reduced to writing and executed. Counsel for the company then, within 15 or 20 minutes from the time the sheriff had last agreed to hold the sale, went to the court house door, and were informed that the sheriff had sold the property to Mr. Smith for \$40. At this time the sheriff had not finished making his other sales, but was

proceeding with them. Counsel for the company would, if the property had not been sold before their arrival, have bid for it the amount of their judgment. They immediately proposed to the purchaser that the sale be opened, but he declined to consent to this. They then requested the sheriff to open the sale, so as to give them an opportunity to bid, but this he declined to do without the consent of the purchaser. The trust company thereupon filed its equitable petition, reciting the above facts, and praying that the sale be set aside on the ground of gross inadequacy of price and of the mistake or misapprehension of the sheriff, and for the appointment of a receiver to take charge of the land and of the growing crops until the further order of the court. To this petition the purchaser demurred. The demurrer contained 27 grounds. These grounds, boiled down to their last analysis, amounted to but two,—that there was no equity in the petition, because the facts set out were not such as to authorize a court of equity to set the sale aside, mere inadequacy of price being the only ground for such action; and that, even if there was sufficient cause shown for setting aside a sale as among the parties, the defendant was without knowledge or notice of any irregularity, and himself free from fault, and equity would not interfere with his rights. The demurrer was overruled, and the purchaser excepted.

Our Civil Code (section 3549) declares that "inadequacy of price is no ground for rescission of a contract of sale, unless it is so gross as combined with other circumstances to amount to a fraud." Any one who will read the facts above recited will declare without hesitation that the price paid for this property was grossly inadequate. A tract of land worth, according to the allegations of the petition, \$1,500, with a crop upon it worth as much, was bid in by the plaintiff in error for \$40,—about one-seventieth of its real value. The inadequacy is such as to shock the moral sense. If the sale stands, it deprives the plaintiff in execution of \$1,700, less \$40, the price paid by the purchaser; and it deprives the defendant in execution of all of his property, and leaves the execution still standing against him, with a credit of only \$40 thereon. A majority of the courts hold that mere inadequacy of price is not, alone, sufficient ground for setting aside a sale, though all seem to hold that where the inadequacy is gross they will take hold of any fraud, irregularity, misapprehension, or surprise to hold the sale void. While the Code section cited above does not declare what are the "other circumstances," or give any illustrations as to what such circumstances might be, we are satisfied from a careful reading of the authorities upon this subject that this section means what we have stated other courts have held to be the law. It

merely announces the abstract principle, and we must resort to decided cases and text-books to ascertain the meaning of the words "other circumstances." We think the authorities are uniform that, where there is gross inadequacy of price, any circumstances, such as fraud, mistake, misapprehension, surprise, or anything else which conduces to the inadequacy of price, will be held to invalidate the sale. Thus, in *Littell v. Zuntz*, 2 Ala. 256, 36 Am. Dec. 415, the court held that an epidemic of yellow fever in the city where the sale was held, which had caused the defendant to leave the city and be absent from the sale, was sufficient cause for setting the sale aside, when the price was grossly inadequate. Other courts have held that a violent storm which prevented bidders from attending the sale was sufficient cause for setting aside a sale at which the amount bid was grossly inadequate. Sales have been set aside because of a grossly inadequate price, in connection with misapprehension as to the time when the sale was to take place, with fraud on the part of the plaintiff, who dissuaded persons from bidding, or violated his agreement to postpone the sale, or by himself or through his attorneys misrepresents the defendant's title, with accident, with mistake, or with other irregularity which is shown to have operated injuriously against the complainant's interest. For these and other illustrations, see 2 Freem. Ex'ns (3d Ed.) § 208. Of course, in all these cases it must appear that the party moving to set the sale aside did nothing to produce the irregularity. In the case now under consideration the plaintiff in the equitable petition seems to have been entirely free from fault. Its counsel directed the sheriff not to sell at the time he did sell. Counsel had the right to give this direction; and the sheriff should have obeyed it. The sheriff was given good and sufficient reasons why the request was preferred. Counsel for the plaintiff were attempting to make an arrangement whereby the defendant in execution could pay a part of the judgment, and yet remain in possession of the premises if the plaintiff in execution bought in the property at the sale. The sheriff, through mistake,—perhaps induced by what Ayer said (that, when he got ready to sell, to sell quickly),—misapprehension, or inadvertence, sold the property at a time he was directed not to sell, and when the plaintiff's counsel were not present; and for this reason, the plaintiff asserts, it

was possible for the purchaser to bid in the property for so small an amount. As before remarked, the action of the sheriff injuriously affected not only the plaintiff in execution, but the defendant in execution also. In *Publishing Co. v. Bennett*, 34 Fla. 302, 16 South. 185, it appeared that the plaintiff's counsel had directed the sheriff not to sell. The sheriff left the county on a visit, leaving the execution in the hands of his deputy, without telling the latter of the instructions he had received, and the deputy sold the property for a grossly inadequate price. The court set the sale aside, although the purchaser was a stranger and free from fault. This case seems to be cited approvingly in 1 Freem. Ex'ns, § 108. It may be argued that the section of the Code which is cited above applies only to contracts for private sales; but in *Parker v. Glenn*, 72 Ga. 637, this court held that there was no reason why the Code section under discussion should not be applied to execution sales as well. Taking all the facts together, it is manifest to us that the judge did not err in overruling the demurrers based on this ground. See, generally, as to inadequacy of price as affecting judicial sales, 12 Enc. Pl. & Prac. p. 98 et seq.

But it was argued by counsel for the plaintiff in error that the court should not set aside the sale in the present case, because the purchaser had no knowledge or notice of any irregularity, and was not in any way connected with the mistake, misapprehension, or inadvertence of the sheriff. Our Civil Code (section 5427) declares that "courts have full power over their officers making execution sales, and whenever satisfied that a sale made under process is infected with fraud, irregularity, or error to the injury of either party, the sale will be set aside." This section might have been properly cited in the preceding argument, but we cite it now for the purpose of showing that whoever purchases at an execution sale does so with a knowledge of this law, and when he bids a grossly inadequate price he takes the risk of having the matter brought before the court, and the sale set aside for fraud, irregularity, mistake, surprise, or other cause mentioned above. *Kirkpatrick v. Corning*, 48 N. J. Eq. 302, 24 Atl. 441. If on the final trial the sale should be set aside, the decree should provide for the repayment to the purchaser of the amount paid by him for the land.

Judgment affirmed. All the justices concurring.

(114 Ga. 171)

HOLTZCLAW v. EDMONDSON.

(Supreme Court of Georgia. Nov. 9, 1901.)

EVIDENCE—CERTIFIED COPY OF DEED—ADVERSE POSSESSION.

1. A certified copy of a deed, taken from the proper records, is, when the loss or destruction of the original has been shown, admissible in evidence to prove the existence, genuineness, and contents of the original. *Hayden v. Mitchell*, 30 S. E. 287, 103 Ga. 431.

2. There was sufficient evidence to authorize the jury to find that the defendant had acquired a good prescriptive title to the land in dispute, and a verdict in his favor was not contrary to law.

(Syllabus by the Court.)

Error from superior court, Murray county; A. W. Fite, Judge.

Action by J. T. Holtzclaw, administrator, against J. L. Edmondson. Judgment for defendant, and plaintiff brings error. Affirmed.

R. J. & J. McCamy, for plaintiff in error. Jones & Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 183)

LACEWELL v. DOWNEY.

(Supreme Court of Georgia. Nov. 9, 1901.)

ERROR—REVIEW—NEW TRIAL.

There was no error in admitting evidence. The evidence authorized the verdict, and the court did not abuse its discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action between J. F. Lacewell and G. T. Downey. From the judgment, Lacewell brings error. Affirmed.

Wm. E. Mann and J. B. Terry, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 189)

MAXWELL v. BROWN.

(Supreme Court of Georgia. Nov. 9, 1901.)

JUDGMENT—VACATING.

Under the facts shown in the record, and the explanatory note of the judge, it cannot be ruled that the latter abused the discretion with which he is invested, in refusing to set aside the judgment on the application of the defendant.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by M. E. Brown against Leonard Maxwell. Judgment for plaintiff. From an order refusing to set it aside, defendant brings error. Affirmed.

39 S.E.—54

G. A. H. Harris & Son and R. L. Chamlee, for plaintiff in error. Rowell & Rowell, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 186)

SOUTHERN RY. CO. v. JAMES.

(Supreme Court of Georgia. Nov. 9, 1901.)

NONSUIT—REINSTATEMENT.

Whether a case will be reinstated after nonsuit is a matter within the discretion of the trial judge, and, where he reinstates the case, his discretion will not be interfered with, unless manifestly abused. *Railroad Co. v. Folds*, 12 S. E. 216, 86 Ga. 42.

(Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by Hope James against the Southern Railway Company. Judgment of nonsuit. From an order reinstating the case, defendant brings error. Affirmed.

Shumate & Maddox, Geo. A. H. Harris & Son, and R. L. Chamlee, for plaintiff in error. Dean & Dean, W. H. Ennis, and Seaborn Wright, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 234)

TINDALL v. NISBET.

(Supreme Court of Georgia. Nov. 9, 1901.)

CONTEMPT—RECEIVERS—CONVERSION—CONSTITUTIONAL LAW.

1. A receiver who disobeys an order of court, and thereby converts to his own use property in his possession as receiver, may be imprisoned for contempt of court,—both for the direct contempt of disobeying the order, and for the refusal to restore the property so converted by him.

2. When a receiver has been imprisoned for a refusal to pay to the court money which has been adjudged to be in his possession, the court may at any time, in its discretion, either upon its own motion or upon the application of the receiver, inquire into the question of his ability to comply with the order of the court.

3. It does not appear in the present case that the court abused its discretion in refusing to institute an inquiry, on the application of the receiver, on the question of his present ability to comply with the order of the court requiring him to pay over the money adjudged to be in his possession.

4. It not appearing from anything in the record that the question of the constitutionality of the proceeding under which the receiver was imprisoned was raised in the application now under review, this court will not undertake to pass on such question, notwithstanding it is directly raised on the assignment of error in the bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. S. Candler, Judge.

Action between H. C. Tindall and R. A. Nisbet. From the judgment, Tindall brings error. Affirmed.

John P. Ross, for plaintiff in error. N. B. Harris, Jno. I. Hall, O. P. Steed, O. J. Wimberly, and Anderson & Grace, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 176)

KEITH v. BREWSTER.

(Supreme Court of Georgia. Nov. 9, 1901.)

EQUITY—MISTAKE OF FACT—LACHES—FRAUD—MORTGAGE FORECLOSURE.

1. While equity will, on reasonable application, and under proper circumstances, relieve a party from the injurious consequences of an act done under a mistake of fact, it will not do so if such party could, by reasonable diligence, have ascertained the truth as to the fact concerning which the mistake was made. (a) In the absence of misrepresentation or fraud, ignorance of a fact known to the opposite party will not justify the interposition of equity, unless there be some reason why the injured party should have relied on the former for information, and, so relying, was deceived, either by conduct or words.

2. When it appears that a plaintiff, who held title to several distinct lots of land as security for a debt, having obtained judgment by proper proceeding, caused all of said lots to be levied on, and by mistake one of such lots was neither advertised to be sold nor sold, and the plaintiff became the purchaser at the sale of those lots which were sold, bidding the amount of his judgment, equity will not set aside such sale on the application of the purchaser on the ground of a mistake of fact, in that he thought all the lots so levied on were included in the advertisement and sale. (a) Whether they were or not could have been readily ascertained by reasonable diligence.

3. The evidence in the present case did not warrant the charge complained of on the subject of fraud, and was not sufficient to support a verdict setting aside the sale.

(Syllabus by the Court.)

Error from superior court, Forsyth county; Geo. F. Gober, Judge.

Action by J. F. F. Brewster, for use, etc., against A. L. Keith and one Tinsley. Decree for plaintiff, and defendant Keith brings error. Reversed.

H. H. Perry, for plaintiff in error. Geo. L. Bell, for defendant in error.

LITTLE, J. Brewster, the defendant in error, filed an equitable petition against Keith, the plaintiff in error, and Tinsley, a former sheriff of the county of Forsyth. He alleged in his petition that he sued for the use of the New England Mortgage Security Company, a duly-incorporated body. The prayers of the petition, under the allegations made therein, were that a certain deed made by Tinsley, the then sheriff, to petitioner, dated October 3, 1892, and duly recorded, be reformed so as to include in the description of the land conveyed thereby 34 acres of

lot No. 1,410 in a named district of Forsyth county, and to expunge 7 acres of another lot of land contained in the deed as made. He asked that the sale of the land referred to in the deed be set aside, and declared null and void; that it be canceled; and that the land mentioned in that deed, together with the 34 acres above mentioned, be readvertised and sold in pursuance of the judgment and execution under which the land described was sold, in the event that such reformation could not be had. Petitioner also asked that Keith be enjoined from selling or disposing of the 34 acres of lot No. 1,410 until a final hearing could be had under the petition. The evidence had on the trial made substantially the following case: Keith conveyed title to the land described to Flint as security for a loan of \$800. Flint transferred the note and conveyed the title given him as security to the mortgage company. That company obtained a judgment against Keith, and filed a deed conveying the land to him for the purpose of having it levied on and sold to satisfy the judgment. The execution was levied on the lands described in the deed as separate lots, including the 34 acres. The advertisement of the sale describes all the lands levied on except the 34 acres. At the sale the land advertised was bid off by Brewster at an amount sufficient to cover the amount of the judgment, and he received a conveyance of the land so sold. Brewster then, by quitclaim deed, conveyed the land to the mortgage company. The attorney for the mortgage company testified that he sued the claim to judgment, directed a levy, which was shown to have been made on all the lands embraced in the original deed from Keith to Flint; that the levy was stopped by an affidavit of illegality; that the land was subsequently readvertised by the sheriff; that he had removed from the county before the sale, and did not know of the mistake in the advertisement, but believed that it followed the levy. When the sheriff made the deed it was forwarded to the mortgage company, and the tenant of that company was put in possession of the land advertised and sold. Subsequently it was found that the deed did not cover the 34 acres above mentioned. It was in evidence from another witness that on the day of the sale, which was made in 1893, Keith went to the clerk's office, and examined the security deed, and ascertained by a calculation the amount required to cover the debt; and witness understood that it was his purpose to raise the money and pay off the debt. Keith did not put witness on notice of the defect in the advertisement. This witness had been requested by the attorney of the mortgage company to see that an amount sufficient to cover the debt was bid for the land at the sale, and it was the belief of the witness that the whole property levied on was being sold. Witness procured the services of another to bid on the

property. At the sale one Roland bid on the land. The illegality referred to, which had been previously interposed by Keith, was on the ground that the security deed was void because it was infected with usury. Brewster, the plaintiff, who was president of the mortgage company, testified that he did not know that there was a mistake in the advertisement of the land, and never discovered it until the reception of the deed from the sheriff, which deed bore date October 17, 1893. This was sent to him at Boston, where he resides, by his attorney. The deed was returned, and the attention of the attorney called to the omission. The land was bid in by his (Brewster's) direction, and he would not have so directed had he known of the omission. The company expected to make its money out of the land it had as security. On receiving the deed, in December, 1893, petitioner conveyed the title to the company. The company had actually received as rent for the land conveyed \$46 in 1894 and \$25.50 in 1895, and nothing since. All the land originally conveyed by Keith was barely security for the loan, and without the 34 acres was not at all a sufficient security. It appeared from an inspection of the execution that following the levy named on the execution, which levy included the 34 acres, there was an entry to the effect that the above levy "was this day sold" to petitioner for \$850, leaving net \$821.13 to be applied to the *fl. fa.*; but it was conceded that the 34 acres of land, while levied on, had been neither advertised nor sold. The trial resulted in a verdict that the deed referred to be set aside, and that the levy be readvertised and sold, and a decree was had in accordance therewith. Keith made a motion for a new trial, which was overruled, and he excepted.

It is complained in the motion that the verdict was contrary to law, and without evidence to support it, and that the court erred in charging as follows: "Fraud may be actual or constructive. Actual fraud consists in any kind of artifice by which another is deceived. Constructive fraud consists in any act of omission or commission contrary to legal or equitable usage, trust, or confidence justly reposed, which is contrary to good conscience, and operates to the injury of another. The former implies moral guilt; the latter may be consistent with innocence." The exception made to this charge is that there was no evidence to warrant it. This charge is good law, but, so far as this record shows, there was nothing in the evidence which called for a charge in relation to fraud. The part of the evidence upon which petitioner must rely to support fraud must rest in the proven conduct of Keith as to the concealment of his knowledge that the 34 acres of lot No. 1,410 were not included in the advertisement of the land sold. He cannot be guilty of fraud in this regard, unless he was

under some legal or moral duty to disclose to the petitioner or his agent the fact that this particular tract of land was not contained in the advertisement. In other words, as stated by the judge in the charge complained of, fraud consists in any act of omission or commission contrary to legal and equitable duty, trust, or confidence justly reposed, which is contrary to good conscience, and operates to the injury of another. Now, what is there in the evidence which shows any act committed by Keith which was contrary to his legal or equitable duty, or to the trust and confidence which petitioner reposed in him? He knew, as he admitted in his answer, that the particular tract of land, although levied on, was not embraced in the advertisement. But certainly the purchaser at that sale did not rely on Keith to tell him what land was advertised, or what land was about to be sold. The advertisement by the sheriff under the compulsory process against Keith designated the one, and the sheriff's act demonstrated the other. Nor can it be said that Keith committed any acts which were contrary to his legal or equitable duty. The acts shown were that he filed an illegality to the first levy. This may or may not have been made in good faith. The evidence is silent as to that. But the act of interposing an illegality and arresting the execution does not, as it seems to us, in any way show or tend to show that Keith was guilty of fraud in concealing the fact that the advertisement did not describe all the land levied on. While it is alleged in the petition that at the sale Keith bid or caused to be offered for the land which was sold an amount of money approximating his debt, that allegation is not borne out by the evidence, which discloses that one Roland bid for the land in competition with petitioner, and it does not appear that Roland was the agent of Keith. But suppose that he had been, and that the land had been sold to him. He would have had to pay the amount bid for the land which was being sold, or the sheriff would have resold it at his risk. However this may be, there is nothing in these acts sufficient to charge him with either a legal or a moral fraud. We, of course, deal with this case under the facts as they appear in the record, and we think that under the evidence the charge complained of was unauthorized. Again, we are of opinion that the verdict rendered was not supported by any evidence found in the record. It may be remarked that the particular land conveyed to the mortgage company as described in the security deed was described as separate lots and parcels of land, and not as an aggregation of lots of land; that the levy followed that description, and the process was being enforced against particular parcels of land. It was the duty, then, of the sheriff to sell

so much of the property levied on as would realize to the plaintiff the amount of his debt, besides all costs. It was not his duty, even, in the enforcement of the debt against the property which by contract had been conveyed to secure it, to sell more than would pay the debt, nor was it the absolute duty of the sheriff to sell the aggregate number of lots as a whole. They could have as well been sold separately, the one after another, until an amount sufficient to pay the debt had been realized. This, of course, it was his duty to do only after the advertisement which the laws prescribe had been made; and while, as to an innocent purchaser, irregularities in the advertisement may not affect the sale, no question of this sort can arise here, because that particular 34 acres was neither advertised nor sold. But the petitioner, as a cause for setting aside this sale, alleges that he acted through a mistake of facts; and, had he not believed that the 34 acres had been advertised and was being sold, he would not have become the purchaser at the sale. But whose fault was it that he did not know? The fact that he lived in Boston presents no excuse. The process which was being enforced against the land was at his instance. The advertisement spoke for itself. The sheriff's announcement at the sale indicated what the purchaser would get, and, if he failed to see the one or hear the other, it must have been so because he did not look or inquire. If he trusted these matters to agents, their want of diligence was his. While section 3963 of the Civil Code declares that in all cases of a mistake of fact material to a contract or other matter affected by it, if the party complaining applies within a reasonable time, equity will relieve, yet, as explanatory of this general principle, the next section states the rule under which equity will not relieve thus: "If the party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve; nor will the ignorance of a fact, known to the opposite party, justify an interference, if there has been no misplaced confidence nor misrepresentation, nor other fraudulent act." It is not contended here that the land which was sold was not advertised. It is not complained that the sale was not fair and regular. It is not disputed that there was another bidder. Then, although Keith knew the fact that the 34 acres of land were not included in the advertisement, and were not sold, under this plain provision of our law, equity, in the absence of a breach of duty on the part of Keith, would not relieve. The law prescribes that the property of a defendant shall not be sold under process without due and ample notice. This notice is accessible to all, and certainly diligence on the part of Brewster demanded that he should see that the process which issued at his instance was

being properly enforced. If he did not exercise that diligence, it could have been the fault of no one but himself. In a well-considered case, the principle of law which we are now considering, and which is universally applicable, was applied by the court of chancery of New Jersey (*Parkhurst v. Cory*, 11 N. J. Eq. 233), where it was held that "the fact that a party to a suit, who is entitled to the surplus money on a sale of the mortgaged premises, is so far deprived of his eyesight as not to be able to read a newspaper, and alleges that on this account he did not see the advertisement of the sale, and that in consequence of his absence from the sale the property was sold at a sacrifice, is not a ground for the court's ordering a resale of the property." In the case of *Alexander v. Herring*, 54 Ga. 200, in applying this principle, this court ruled that "a purchaser of property at administrator's sale, who has failed to comply with the terms of sale, and who is sued for the 'deficiency of the proceeds of a second sale,' cannot set up as a reason for his noncompliance that the property [a city lot] was sold by the front foot, and that he made a mental mistake as to what his bid would amount to"; and in the case of *Abbott v. Dermott*, 34 Ga. 227, it was tersely ruled that "ignorance of fact is no cause for rescinding a contract." Chief Justice Lumpkin in the opinion declared, "And such was the doctrine of the law before the Code." In the case of *Redwine v. McAfee*, 101 Ga. 704, 29 S. E. 429, this court, in the application of this principle, said, through Mr. Justice Atkinson: "Courts of equity grant relief only in favor of the diligent; and this court has uniformly held that equity does not relieve from a judgment which could have been prevented but for the negligence of the complaining party,"—for which proposition he cites a number of the prior decisions of this court. It is not, however, necessary to multiply authorities to sustain the correctness of the fundamental rule declared in our Code as above set out. Does not the petitioner, by his own allegations and proof, come under this rule? As we have endeavored to show, there was, under the evidence in this case, no fraud, either of the sheriff or of Keith, which caused the petitioner's mistake. That mistake was one of fact; that is, that the particular parcel of land was not advertised and sold with the other parcel. Whether it was or was not could readily have been seen and ascertained by him on an examination of the advertisement and by the announcement at the sale. As a prospective purchaser, he could have ascertained the fact by reading the advertisement or attending to the reading of it, or by the announcement of the sheriff when the property was offered for sale. His failure to do so is attributable to himself alone, and, having been negligent, he

cannot invoke the aid of a court of equity to counteract the effect of his own want of diligence. If his mistake occasioned loss, he has only himself to blame; and it is our opinion that the verdict was not authorized by the evidence.

Judgment reversed. All the justices concurring.

(114 Ga. 203)

SIMPSON et al. v. ENNIS.

(Supreme Court of Georgia. Nov. 9, 1901.)

SUBROGATION—PAYMENT OF DECEDENT'S DEBT—PURCHASER FROM HEIRS.

1. One who purchases land from the heirs at law of a deceased person, and, in order to remove an incumbrance from the property, pays a debt made by such person in his lifetime, to secure which a deed to the land was given, is subrogated to all the rights of the creditor whose debt he has extinguished.

2. Where such a purchaser sells to various persons the land thus acquired, and afterwards the administrator of the deceased person, appointed subsequently to the conveyance made by the heirs at law, brings suits in ejectment to recover, as the property of his decedent, the land thus sold, in order to subject it to judgments which have been obtained against him as administrator, the purchaser from the heirs at law is entitled to be reimbursed the amount paid by him in extinguishment of the security deed, before the administrator can proceed with the suits in ejectment.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by W. P. Simpson and others against W. H. Ennis. Judgment for defendant, and plaintiffs bring error. Reversed.

McHenry & Madox, Dean & Dean, W. J. Neel, and Halsted Smith, for plaintiff in error. W. T. Kelly and Harris, Chamlee & Harris, for defendants in error.

LEWIS, J. The plaintiffs in error filed their equitable petition in Floyd superior court, making substantially the following case: On June 1, 1888, George P. Burnett made a conveyance of certain described realty in Floyd county to the Georgia Loan & Trust Company, to secure a debt of \$2,500; and in the fall of 1889 he died, without having paid the debt, or having had the title to the property in question reconveyed to him. The only heirs at law of George P. Burnett were H. P. Burnett and Mrs. Jessie B. Stephens, and on April 30, 1890, they conveyed this land to the petitioners for a valuable consideration. At the time the petitioners purchased the land there had been no administration on the estate of George P. Burnett, and it was represented to the petitioners by the heirs at law and their attorney in fact that there were no debts against the estate except the one due the Georgia Loan & Trust Company and some state and county taxes, which amounts it was agreed that

the petitioners should pay out of the purchase money of the land. Accordingly, on March 12, 1891, petitioners paid to the Georgia Loan & Trust Company \$2,675, in full satisfaction of the debt contracted by George P. Burnett, and also paid the outstanding taxes against the property, causing the clerk of the superior court of Floyd county to enter upon his records a satisfaction of the debt. Petitioners went into possession of the land under their deed from the heirs at law, and afterwards sold portions of it to various persons named, and to others whose names are not remembered. In April, 1895, C. W. Underwood qualified as administrator of the estate of George P. Burnett, but during his administration made no attempt to recover, by suit or otherwise, any portion of the land which had been conveyed to petitioners by the heirs at law. Underwood died, and in November, 1899, W. H. Ennis qualified as administrator de bonis non, and shortly thereafter instituted suits in ejectment, seeking to recover, as the property of George P. Burnett, the different parcels of land which had been sold off by petitioners, all of which were embraced in the tract purchased by them from the heirs at law of George P. Burnett. They allege that these heirs at law are nonresidents of this state, and are both insolvent; that they are informed and believe that one of them (Mrs. Stephens) is dead; that they are therefore remediless to recover on their warranty; and inasmuch as the title to the land now claimed as the property of George P. Burnett was not in Burnett at the time of his death, but was redeemed by petitioners after his death, they insist that as against George P. Burnett, even if he were in life, and against his creditors and heirs, they have a higher claim to the property in dispute, both in law and equity. They assert that they are subrogated to the rights of the Georgia Loan & Trust Company, and that, if it is necessary to sell the property of George P. Burnett to pay his debts, the administrator cannot recover the real estate described until he has first paid petitioners the amount which they paid as taxes, and also the amount paid by them to the Georgia Loan & Trust Company to redeem the property, with interest. They accordingly pray for an injunction restraining Ennis, as administrator, from prosecuting the several ejectment suits now pending, or from instituting any further suits of like character for the recovery of the land in dispute, or any part thereof, until he shall have done full and complete equity by the payment of these amounts; for process; and for such other and further relief as to the court may seem proper. To this petition the defendant filed a demurrer, which is not here considered, as it does not appear from the record what action was taken by the court thereon. He also filed an answer admitting the substantial allegations of fact

contained in the petition, but denying that the plaintiffs had any legal or equitable right to relief in the premises, claiming that, by their failure to ascertain whether or not the representations made to them by the heirs at law were true, they purchased the land at their peril, and took the chances of there being any debts against the estate, and that they took no greater interest in the land than was owned by the heirs at law, who in turn had no title to the property that was not subject to be administered as the estate of George P. Burnett. He denied that the plaintiffs were entitled to be subrogated to the rights of the Georgia Loan & Trust Company, and claimed that the payment to that company by the plaintiffs of the amount to secure which the deed was given by Burnett was made for the purpose of disencumbering the title of the heirs at law to the property, and that the title thereby vested absolutely in George P. Burnett and his heirs, subject to administration by the administrator of George P. Burnett for the purpose of paying the debts of the estate. The evidence for the plaintiffs supported the material allegations of their petition. That for the defendant, consisted of a memorandum showing judgments quando acciderint against Ennis as administrator, amounting to \$2,589.22, besides costs; a memorandum of an order granted by the ordinary of Floyd county giving leave to Ennis, as administrator, to sell the lands in dispute; and an affidavit by Ennis, as administrator, to the effect that he had no assets of the estate, and knew of none which he could obtain without bringing suit to recover the realty disposed of by the heirs of George P. Burnett after his death. After hearing argument, the court refused the injunction prayed for, and the plaintiffs excepted.

1. "One of the most familiar instances of the application of the doctrine of subrogation is where the purchaser of incumbered property, without having assumed the incumbrance, pays it off in order to protect his own interest or to perfect his own title. In such cases it is uniformly held that he is entitled to be subrogated to the position of the incumbrancer in respect of all the latter's securities, rights, remedies, and priorities." 24 Am. & Eng. Enc. Law (1st Ed.) 253. So, also, in *Sheld. Subr.* § 3, we find enumerated among those who are entitled to subrogation as a matter of right, independently of agreement, a purchaser who has extinguished an incumbrance upon the estate which he has purchased. This rule is in thorough conformity with the equitable principle upon which the doctrine of subrogation is founded, and is supported by numerous authorities and by adjudicated cases in this and other states. In New York it has been held that where one conveyed lands to his wife, who died intestate, leaving a number of heirs, and afterwards judgment creditors of the husband had the

deed to the wife set aside as fraudulent, one of the heirs of the wife, who had succeeded by purchase to the rights of nearly all the other heirs, was entitled to pay off the judgments and be subrogated to the rights of the judgment creditors. See *Cole v. Malcolm*, 66 N. Y. 363. In *Gooch v. Botts*, 110 Mo. 419, 20 S. W. 192, it was held that where one who had acquired title to a tract of land by a decree of court, and was in possession, paid, in good faith, an existing incumbrance thereon, and the decree was afterwards reversed on writ of error, the party in possession was entitled, in equity, to be subrogated to the rights of the holder of the incumbrance, and to hold possession as mortgagee until repayment of the outlay. In *Condert v. Condert*, 43 N. J. Eq. 408, 5 Atl. 722, a widow, supposing herself to be the sole devisee of lands under a will which was in fact void, paid off with her own money, and canceled on the record, a mortgage on part of the lands devised to her. She was held to be entitled to have the lien of the mortgage reinstated to secure the money so paid by her, and the lands sold to satisfy it. The courts of many other states have made similar rulings, and in Georgia, also, there are repeated decisions which sustain this principle. *Corbally v. Hughes*, 59 Ga. 493, was a case where a vendor, retaining the legal title, gave to the vendee a bond for title, and took her notes for the purchase money of land, and before the notes fell due and the money was paid a judgment was obtained against the vendor, and the land levied upon. The vendor was notified, but failed to relieve the land from levy and incumbrance of the judgment. The property was sold, and the vendee, to protect her possession, was forced to buy the title of the purchaser at the sheriff's sale, the vendor being insolvent. This court held that the vendee might set up by equitable plea the partial failure of consideration in defense of the notes, and that a verdict for the balance due, after deducting from the notes the amount necessarily expended to make good her possession, would be upheld. This case, while differing somewhat as to the facts, is in principle clearly controlling of the case under consideration; for it plainly recognizes the equitable right of one who purchases land, and takes up an incumbrance thereon in order to protect his title, to be subrogated to all the rights of the incumbrancer in the land. The same principle is upheld, also, in the cases of *English v. English*, 69 Ga. 636 (2), and *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1068 (3). The case of *Swift v. Lucas*, 92 Ga. 796, 19 S. E. 758, we think, also tends to support the rule of law which we have announced. That case held that where land is conveyed by an absolute deed to secure a loan, bond for titles being given for a reconveyance to the debtor upon payment of the debt, and the latter has no property except his interest in the land, the remedy of another creditor who

obtains judgment against the debtor after the execution of the deed is to redeem the land by discharging the debt for which it is held as security, and then cause it to be levied upon and sold. The equitable petition in that case failed to conform to the legal requirements, but Lumpkin, J., in the opinion, on page 799, 92 Ga., and page 759, 19 S. E., uses the following language: "If Swift [the judgment creditor] should pursue the course above indicated, the note would, of course, become his property, and he would be subrogated to all the rights of Hollingsworth [the holder of the security deed], and hold the title to the land as security for the payment of the note, just as Hollingsworth did." It matters not that the plaintiffs below were ignorant, at the time they bought the land in dispute from the heirs at law of George P. Burnett, of outstanding debts against the estate of inferior dignity to that secured by the deed to the Georgia Loan & Trust Company; nor is it of any consequence that they did not expect, when they redeemed the land, to be called upon to assert their right to subrogation. That right will be enforced, though they may have been in ignorance of its existence at the time it accrued. 24 Am. & Eng. Enc. Law (1st Ed.) 192.

2. We think it is clear, therefore, that the plaintiffs below were entitled to be subrogated to the rights of the Georgia Loan & Trust Company with respect to the land in dispute. If that be so, it necessarily follows that they were entitled to the equitable relief for which they prayed. It can hardly be questioned that, if the status of the parties had remained as they were before the plaintiffs took up this debt and canceled the security deed, the administrator could not have proceeded to eject the Georgia Loan & Trust Company from the land without first paying in full the debt which incumbered it. The plaintiffs, having succeeded to all of the rights which the company had in the land, occupy a position no less advantageous with respect thereto; and it is their right, in order to protect the warranty given by them to their subsequent vendees, to be reimbursed the amount which they paid to the Georgia Loan & Trust Company in extinguishment of its debt, as well as the amount paid by them for taxes on the property, for, of course, what has been said with reference to the payment of the debt due the loan company applies equally to the payment by them of the taxes to protect their title. They are entitled to equitable relief, also, in order to prevent the multiplicity of suits which would arise by virtue of the purchasers from them falling back on their warranty of title, because, as the administrator has now in his hands no funds with which to meet this condition precedent to the prosecution of the ejectment suits, the plaintiffs will thereby be rid of any further danger from that source.

In view of what is here laid down, we are

clearly of the opinion that the court erred in refusing to grant the injunction prayed for by the plaintiffs. Judgment reversed. All the justices concurring.

(114 Ga. 208)

LARNED v. WENTWORTH et al.

(Supreme Court of Georgia. Nov. 8, 1901.)

VENDOR AND PURCHASER—OPTION TO PURCHASE—DEMAND OF CONVEYANCE—PERFORMANCE—AUTHORITY OF AGENT.

1. When, by the terms of a written contract, an option to purchase within a stated time lands at a named price is given to another for a valuable consideration, the performance of or offer to perform the conditions stated within the time limited is necessary to entitle the party to whom the option is given to the right to demand a conveyance of the land. No rights thereunder will accrue by an offer to perform after the time limited has expired.

2. To be effective, the acceptance and performance of the conditions named must be absolute and unconditional. Notice, given within the time, that the conditions are accepted, and the payment of a nominal sum as earnest money to an agent not authorized to change the terms of the contract, under an agreement with him that the title shall be examined, and, if found good, the entire purchase money shall be then paid, is not, when these things fall short of compliance with such conditions, such an acceptance as will authorize a decree for a specific performance of the contract.

3. An agent who is authorized by the owner to give to a prospective buyer an option to purchase described land at a given price if exercised within a named time has no implied authority to consent to a conditional acceptance of the terms of the option, to be performed after the time limit has expired.

4. The acceptance of the terms of the option under the evidence in this case was not unconditionally made within the limit of the time expressed in the written contract of option, and therefore performance could not have properly been decreed. It follows that the grant of injunction to restrain the owner from changing the status of the title to the land pending litigation was erroneous.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by J. & G. K. Wentworth against Charles Larned. From a judgment against Larned, he brings error. Reversed.

J. R. Lamar, for plaintiff in error. Sam F. Garlington, for defendant in error.

LITTLE, J. J. & G. K. Wentworth filed a petition in the Richmond superior court against Charles Larned and Clarence E. Clark, seeking to compel Larned to specifically perform an alleged contract for the sale of certain land, and, ancillary to the relief sought, they prayed for an injunction against Larned restraining him from changing the status of the title to the land. No relief was prayed against Clark. On the hearing of the application an injunction was granted, and Larned excepted.

Substantially, the facts relied on to author-

the injunction were these: Prior to January 1, 1900, Larned, a resident of Boston, secured the services of Clark, a real estate agent at Augusta, Ga., to negotiate a sale of Tuckahoe plantation (which is fully described), in Screven county, Ga., at the price of \$9,000. On January 1, 1900, Clark wrote Larned as follows: "I think at last I have found you a purchaser for Tuckahoe. My party wants an option for sixty days at eight thousand dollars cash. As you well know, I do not want to tie up your lands with an option unless there is a good chance to sell. Please let me have it promptly, and I will do all in my power to make the sale,"—to which Larned replied on January 3d: "Referring to yours of the first, I beg to call your attention again to my letter of April 10th last, where I made you a price of \$9,000.00 cash. I have made the price no less to any party since that time. To give an option to any one at that price, even, would necessitate to withdraw it from sale (for the time I gave an option) with others with whom it is listed with, which I could not do." In a letter of Clark's to Larned, January 6th, acknowledging receipt of this letter, Clark said: "It is impossible for you to ever sell your land without giving an option. * * * Now, I would suggest, if you want to sell your place, to give me an option at \$9,000.00 for thirty days, with the understanding that my man is to go or send some one at once. If my man concludes he will not give \$9,000.00, I will write you, and then you can withdraw it if you wish. If you decide to give me this option, let me hear from you at once." Replying to this on January 8th, Larned wrote Clark that he would do for him what he had done for no one else, and would give him an option for 30 days, price \$9,000, allowing him a commission of 5 per cent. On January 22d, Clark wrote Larned: "I have just received a letter from my party. He says an option of thirty days is long enough, but he is afraid he cannot go to look at it until February first. He wants an option at \$9,000.00 until March 1st. I think this is fair, and, if you conclude to let me have it, wire me at my expense;" to which Larned replied by telegram dated January 24th: "Yours of 22d received. March first will be right." On January 27th Clark, acting under the authority thus given by Larned, entered into a contract in writing with Dunham, as follows: "State of Georgia, Richmond County. This agreement, made and entered into this the 27th day of January, 1900, between Charles Larned of the first part and C. E. Dunham of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of \$1.00, to him in hand well and truly paid by said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, does agree and does hereby give to the said party

of the second part an option upon the purchase of a tract of land in Screven county, Georgia, containing five thousand two hundred and fifty acres, more or less, known as 'Tuckahoe'; the price at which said party of the first part hereby agrees to sell said land being nine thousand dollars. It is hereby agreed and distinctly understood that this option shall expire at noon, 75th meridian time, March 1st, 1900. In witness whereof, the said party of the first part has caused these presents to be duly signed at Augusta, Ga., by his duly-authorized agent at Augusta, Georgia, this 27th day of January, 1900. [Signed] Chas. Larned, by Clarence E. Clark, Agent at Augusta, Ga." This option was duly witnessed, and was by Dunham transferred and assigned in writing for value received to J. & G. K. Wentworth. Clark, at the time the option was given, was aware that Dunham was acting for other parties. On February 17th Clark wrote Larned as follows: "For the last four or five days the Savannah river has been at its very highest. Tuckahoe has been almost under water, and it has been impossible for my man to look it over. He has just called on me, and asked me to have his option extended for thirty days. * * * If you conclude to do this, wire me at my expense on receipt of this letter." This request for extension was made at the instance of Dunham, representing the Messrs. Wentworth. On February 20th Clark again wrote Larned, stating that he had not heard from his letter of the 17th; that his man had been to Tuckahoe, but on account of high water could not see it, and had come to Augusta on Saturday (the date of the former letter), and asked to have the option extended; that he had left for a point near Tuckahoe, and he (Clark) was to wire him that day (January 20th) if he heard from Larned; and begging Larned to grant the extension. On February 23d, Larned wired Clark: "Will extend option to March 15th. Will write;" and on the same day Larned wrote Clark, explaining the cause of delay in answering. On February 23, 1900, Clark exhibited to Dunham Larned's telegram agreeing to extend the option. Acting on this, plaintiffs had the land examined, and decided to purchase. On March 13th Clark wired Larned: "My party offers eight thousand cash for Tuckahoe. Answer by wire." To this telegram no answer seems to have been received. On March 14th George K. Wentworth, accompanied by Lloyd J. Wentworth and Dunham, went to Clark's office in Augusta, and told him that Larned's offer of sale of Tuckahoe at \$9,000 was accepted by the petitioners in this case, and asked Clark, as Larned's agent, to name the amount of cash to bind the trade, and Clark named \$10, which was then and there paid to Clark by George K. Wentworth, and the following receipt given to him by Clark: "Augusta, Ga., March 14, 1900, Received from J. & G. K.

Wentworth ten dollars earnest money account of Tuckahoe; balance due, \$8,990.00. Amount of purchase, \$9,000.00. [Signed] Clarence E. Clark, Agent for Charles Larned.] A plat of the land was shown petitioners, and it was then understood and agreed that Larned would at once forward papers through his agent, Clark, that an abstract of title of the land could be made, and delivered by Clark to petitioners' attorney, whom petitioners instructed in Clark's presence to proceed at once to Sylvania, and examine the title of the land; and the purchasers there and then stated through J. K. Wentworth to Clark that as soon as the examination was made, and the title found to be good, Larned should sign a proper deed conveying the property to the Wentworths, and attach the deed to a draft on the Wentworths for the balance of the purchase money, and deposit same in some bank, with instructions to the bank to forward same to some bank in Bay City, Mich.,—Wentworths' place of business,—to be delivered to the purchasers when they should pay the draft. Clark agreed to this arrangement, and said that it was perfectly satisfactory to him, and wired Larned on the same day: "Party accepts option. Nine thousand cash. Tuckahoe. Earnest money paid. Send all papers;" and on the next day (March 15th) wrote Larned: "Yesterday I wired you, 'Party accepts option. Nine thousand cash for Tuckahoe. Earnest money paid. Send papers.' He is ready to pay me the cash as soon as I can deliver the deed. Awaiting your papers, and trusting will be satisfactory to you, I am, yours very truly, Clarence E. Clark." In reply to Clark's telegram informing him of the acceptance of the option, Larned wrote Clark on March 15th: "Your telegram received reporting sale of Tuckahoe \$9,000.00 cash. I am glad you have made the sale. As requested, I send you by registered mail the abstract and seven separate papers for title;" and later on the same day wrote further as follows: "Since writing you this morning, it has occurred to me to ask how much money the purchaser has put up as part of the purchase money. I suppose the full amount (as is the usual custom) will be paid on or within ten days from date." On March 16th, and prior to the receipt by Clark of Larned's letter of the 15th, Larned wired Clark: "Sent papers yesterday. Please do nothing until you receive my letter of this date;" and on the same date, and in pursuance of the same purpose, Larned wrote Clark the following letter: "I wrote you yesterday, and sent papers as requested. Since then I have seen and had a talk with my man, who went recently to look over and report to me on my Tuckahoe place. He thinks I ought not to have sold, and I have come to the same conclusion myself, and all this happened by giving an option, as you know, against my own wish. Now, Mr. Clark, you are my agent, and you are ex-

pected to do all you can for your and my interest. If the sale is consummated, you get your commission as agreed. You have worked hard for years to sell this place, and if the sale does not go through I will pay you your commission of \$450.00 the same, and in addition to that I will give you \$1,000.00 besides; making in all \$1,450. I wired you today to do nothing until you received letter from me this—March 16th—date. Should I give your party a deed, it would, of course, be all the law requires,—a quitclaim deed. Now you know the whole situation, and I put myself in your hands to do the best you can, and as you would wish me to do by you under like circumstances. Should you have any doubt about getting the money as above, I will send it to you beforehand, if you tell me you can do what I have herein expressed. Please do not for a moment think that I ask you to do anything dishonorable." Clark delivered the first letter written by Larned on the 15th to Wentworth's attorney, and, under the impression that Larned's telegram of the 16th referred to his second letter of the 15th, delivered the abstract and papers also to Wentworth's attorney. On March 19th Clark wrote Larned acknowledging receipt of his letter of the 16th, in which he stated that he did not see how he could help Larned out; that \$10 had been paid to bind the bargain, and the balance to be deposited with the National Bank at Augusta; that the papers had been turned over to Garlington, the attorney for Wentworth, and, if approved by him, the purchasers would insist on their trade. On March 22d Larned wired Clark: "Send copy of your contract with Dunham when he paid the ten dollars;" and on the same day Clark wrote, inclosing copy of the receipt. This letter was received by Larned on March 24th, and he at once, on the same day, wired Clark: "Will not sell to Wentworths. There is no contract. Return them the ten dollars." Clark at once telegraphed Wentworth the contents of Larned's telegram, and inclosed his check for \$10, which was returned to him by Wentworth with the statement that they had been advised that the contract held good, and that they had instructed their attorney to go ahead and enforce it.

We have, from a voluminous record, culled the above as the facts which seem to have been established at the hearing, and which are not materially controverted. Very much other evidence appears, but inasmuch as, in our judgment, the case, on its merits, turns upon the question whether the Messrs. Wentworth had so properly exercised their right of option as to entitle them to a conveyance of the land, it has not been deemed necessary to make reference in detail to other portions of the evidence. We have endeavored to arrange (whether successfully or not) in this epitome of the evidence in relation to the action of the parties as to the option in chrono-

logical order, so that the controlling features of the case may the more readily appear. A demurrer to the petition was filed by Larned on a number of grounds, and an amendment made to the petition, by which the allegation that Larned placed the land in the hands of Clark "to negotiate a sale" was stricken, and an allegation substituted therefor to the effect that Larned placed the land in the hands of Clark to sell for \$9,000, with authority to Clark to make a binding contract of sale by proper writing. The result of the hearing was the grant of an injunction by the judge in the following terms: "Without extended discussion, * * * I think it is established in the case: First That O. E. Clark was the agent of the defendant, Larned. Second. That said agent was expressly clothed with authority to grant an option on the sale of a plantation called 'Tuckahoe,' situated in Screven county, as well as with authority to make a contract of sale thereof at the sum of nine thousand (\$9,000.00) dollars cash; that said authority also embraced power to collect the purchase price, and to deliver the deed when forwarded by the principal; and that, having this latter power, his agreement as to the particular method of consummating said cash sale would be binding. Third. That plaintiffs directly and through others had for a valuable consideration taken said option, and before its withdrawal had accepted the terms of the purchase. Fourth. That said contract of sale with Clark, the agent of defendant, sufficiently set forth the three elements necessary to constitute such contract of sale, viz. the identity of the thing sold, the purchase price, and the consent of the minds of each as to all necessary terms. Fifth. That said option, the receipt for part of the purchase money, and the letters and telegrams are sufficient to take this case out of the statute of frauds. For which reasons it should appear that plaintiffs are apparently entitled to a decree for specific performance, and it is therefore ordered and adjudged that the injunction prayed for by plaintiffs be granted." To the order granting the injunction Larned excepted, specifically assigning that the granting of the same was error, for many reasons; among others that under the facts petitioners were not entitled to a specific performance of the contract; that the contract was unilateral, wanting in mutuality, and without consideration to support it; that the offer was withdrawn before acceptance; that Clark was not authorized to make a contract of sale, under the evidence; that he had no power to bind his principal by collecting the purchase money; that under the evidence Clark had no authority to agree on a particular method of consummating the sale, nor to grant an extension of time in which the title might be examined and in which the purchase money should be paid, nor to agree that the purchase money should be paid in Michigan; that the

agent had no authority to agree that the purchase price should be paid when it was ascertained that the title was satisfactory, nor that the purchase money should be paid by a draft; that the court erred in holding that under the evidence the plaintiffs, for a valuable consideration, had taken the option, and before its withdrawal had accepted the terms of the purchase; that the court erred in ruling that the option, the receipt for part of the purchase money, and the letters and telegrams were sufficient to take the case out of the statute of frauds. Inasmuch as the result of our consideration of the pleadings and evidence in this case brings us to the conclusion that the plaintiffs would not be entitled thereunder to a decree for a specific performance of the contract which they set out, we deem it entirely unnecessary to consider and pass upon the collateral questions raised and insisted on as reasons why the court erred in granting the injunction; for, if the option and the action of the parties thereunder do not make in law a binding contract, it follows that Larned should not be enjoined from making such a disposition of the land as he may see proper. Therefore our consideration of the case will be confined to the question as to whether the action of the transferees of the written option was in law sufficient to constitute a legal obligation on the part of Larned to convey the land to them. Before determining the rights of the parties under the contract of option, it is essential to determine to what extent Mr. Clark was the agent of Larned in the sale of the property; and just here it is in place to say that we do not understand from the evidence of Mr. Clark that he was the general agent of Larned, nor a special agent possessed of powers in addition to those which are necessarily implied in the correspondence which passed between them, and what occurred in the interview they had. That Clark considered he had full authority as agent to accept an advance on the purchase money and to agree to the payment of the balance by draft after the time limited in the option, in the event the title was satisfactory, is evident from an inspection of the record. The conduct of Mr. Clark appears to have been perfectly correct towards all of the parties during the different phases of the transaction, but the question as to the extent of his agency, and his powers to bind Larned, must be determined, not from the conclusions which he drew from the correspondence, but from settled rules of law growing out of the relation of principal and agent; and the powers of the agent to act for his principal must be determined by the writings and telegrams which passed between them, because it is not insisted or shown that Clark had any other powers as agent than those conferred by the correspondence, from which it is clearly indicated that he was not originally invested with authority by his principal to give an op-

tion, although it is shown that he was originally invested with the power to sell the land for \$9,000 cash. Having placed the land in the hands of Clark to sell for him for a named price, the correspondence in relation to giving the option of purchase shows that Clark wrote to his principal that he thought he had found a purchaser for the land, but that his party wanted an option for 60 days. Certainly, up to this period of time, there is nothing to indicate that the agent was invested with any power to grant an option for the purchase of the land. In the letter applying for the option the agent says, "Please let me have it promptly, and I will do all in my power to make the sale." So far as this record shows, the principal at that time declined to give the option, and the agent subsequently informed his principal that it would be impossible for him ever to sell his land unless an option was given, and that, if his principal would give an option for 30 days, and the prospective purchaser which the agent had in contemplation would not in that time give the named price, the principal could then withdraw it. It was apparently under the influence of this second letter that the principal wrote his agent that he would give an option for 30 days at the price of \$9,000, allowing him a commission of 5 per cent. From the correspondence leading up to the giving of the option, three things are well established: First, that Clark had no legal power to give an option for the purchase of Larned's land; second, that Larned gave to Clark directly authority to make for him a contract of option for 30 days at a price of \$9,000; and, third, that the terms of the option were cash. Under this authority Clark was authorized to give an option to his prospective purchaser, whoever he might be, to purchase the land within 30 days by the payment of a sum named in cash. But it does not appear that he was authorized in any manner to change the terms of the option, nor does the subsequent correspondence by which the agent was authorized to enlarge the time in which the right of option could be exercised enlarge the powers of the agent in any other respect. On January 22d Clark applied to Larned for an extension of the time limit of the option till March 1st, which, on January 24th, Larned granted by telegram. Then, by its terms, the option expired on March 1st at noon. Subsequently, on the application of Clark for given reasons, Larned extended the same to March 15th. So it is apparent that the only result of this correspondence was that Larned authorized Clark, his agent, to give to a prospective purchaser, whom the agent had found, an option to purchase the land for \$9,000 cash, which option was to be exercised by March 15th. Then, as it does not appear that the agent was authorized by the principal to change or give any other option than the one prescribed by him, the question whether

Wentworth exercised his right in such a manner as to entitle him to a conveyance can only be determined by a consideration of the legal incidents which attach to such a contract. It was ruled in the case of *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723, that such contracts, when founded upon a valuable consideration, were legal and binding on the parties, and, when performance of the terms of the contract had been made or offered to be made, a specific performance of the contract would be decreed against the party giving the option. The manner of performance which satisfies the terms of a contract of this character is, however, a matter of importance. It was ruled in the case of *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447, that "the offer of a seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort." Our present chief justice, in delivering the opinion in that case, said: "An absolute acceptance of a proposal coupled with a condition will not be a complete contract, because there does not exist the requisite mutual assent to the same thing in the same sense." To the same effect, see *Potts v. Whitehead*, 23 N. J. Eq. 512; *Sawyer v. Brossart*, 67 Iowa, 678, 25 N. W. 876, 56 Am. Rep. 371; *Orcoran v. White*, 117 Ill. 118, 7 N. E. 526, 57 Am. Rep. 858, in which latter case it was ruled that: "To constitute a contract of sale of land by the acceptance of an offer to sell, the acceptance must be unconditional. No contract would result from a letter that the party will accept the offer, 'provided the title is perfect.'" An option such as that we are now dealing with is purely an offer to sell land, having the binding force of a contract, so that the party offering cannot legally withdraw within a time named. It is such an offer as entitles the person to whom it is made to compel the owner to convey the land if the person to whom it is offered does the prescribed things within the time limit. But when the time has expired no obligation rests upon the owner afterwards to convey the land. It is peculiarly a contract of which time is of the essence. As was said in *Black v. Maddox*, supra, it is a legal contract imposing the obligation to make another contract within a limited period, if named conditions were complied with. The contract, if valid, is, nevertheless, a conditional one, and its obligations terminate if the condition as to time is not complied with. For the proposition that the option must be exercised within the time limit or it will be lost, see *Longfellow v. Moore*, 102 Ill. 289; *Mason v. Payne*, 47 Mo. 517; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500; *Kemp v. Humphreys*, 13 Ill. 573; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Vassault v. Edwards*, 43 Cal. 458. In the case of *Longworth v. Mitchell*, 26 Ohio St. 334, it is said that a limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the

time named. Now, it appears in the present case in reference to the acceptance that on March 14th—the day prior to that on which the option would expire—the defendants in error informed Clark that Larned's offer for sale of Tuckahoe was accepted, and in connection with that information they requested Clark to name the amount of cash to bind the bargain. Clark named \$10, and the Messrs. Wentworth paid it, and took a receipt. This was not a compliance with the terms of the contract. The contract of option was Larned's contract, and without authority of Larned nothing could be added to or taken from it so as to bind him. The terms of purchase were cash. The payment of \$10 on account of the purchase was not a compliance with the terms. Not only so, but at the time this advance on the purchase price was made there was, as appears from the record, a distinct agreement to the effect that Larned should forward his papers that an abstract of title should be made, which papers were to be delivered by Clark to the attorney for the defendants in error; that this attorney should go to the county in which the land was situated, examine the title, and, as soon as the examination was made and the title found good, that Larned should convey the property to the purchasers, who would pay for the same through a draft drawn on them by Larned through some bank in a named city in Michigan. Here was a new contract,—one which could not have been accomplished in the time limit. It makes no difference, as to the legal principle involved, whether, after March 15th, Larned was willing to wait 10 days for the purchase money or that he expected it to be paid within that time. There was nothing binding him to wait. He could have done so had he so chosen. The contract, without regard to Larned's willingness or unwillingness to waive any part of its essential terms, must stand on its merits, unless in fact he waived a particular part of its performance, or agreed to new conditions. The acceptance on the part of the Messrs. Wentworth was not unconditional. On the contrary, it was conditional; that is, that they would complete the purchase if the title proved to be good. The contrary proposition is embraced in this agreement that they would not complete the purchase under certain conditions; but the legal requirement of the option, in order to give defendants in error any rights thereunder, was that the contract should be completed by the 15th of March. After that day had expired, and it remained uncompleted in any essential particular not expressly agreed to by Larned, the Messrs. Wentworth acquired no rights under it. The agreement by the agent annexing other conditions to the performance of its terms was not expressly given, so far as the record shows, and was not embraced by implication in the correspondence, and did not bind Larned. We must therefore rule that there was

no performance of the terms of the contract of option by the Messrs. Wentworth within the time limit, and that they were not, in the absence of such performance, entitled to a decree for the specific performance of the contract. Not being so, the granting of the injunction was error.

Judgment reversed. All the justices concurring.

(124 Ga. 164)

NEAL v. FOX.

(Supreme Court of Georgia. Nov. 8, 1901.)

CERTIORARI—PETITION—AFFIDAVIT—JUSTICE OF THE PEACE—NONSUIT—RIGHT TO APPEAL.

1. Even if it is necessary that a petition for certiorari should be signed by the petitioner or his counsel, it is sufficient if the petitioner sign the affidavit to the petition.

2. Where, upon the trial of a case before a magistrate in a justice's court, the plaintiff closes his evidence, and the defendant moves to dismiss the case because of an insufficiency of the plaintiff's evidence, the magistrate should not dismiss the case, but, if the plaintiff's evidence is not sufficient to authorize a judgment in his favor, should grant a nonsuit or find in favor of the defendant. If the magistrate erroneously makes an entry on his docket that the case is dismissed, it amounts in law to a nonsuit, or a judgment for the defendant. In such a case the plaintiff has a right to appeal to a jury, and on the call of the appeal it is error for the magistrate to dismiss the appeal on the ground that the case had been dismissed, and that there was nothing to appeal from. See *Hollis v. Dooster*, 38 S. E. 306, 113 Ga. 115, and cases cited.

3. Where an appeal has been entered from a judgment in a justice's court, the appellant cannot by certiorari review the same judgment. *Boroughs v. White*, 69 Ga. 841.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action by J. N. F. Neal against W. H. Fox. Judgment of nonsuit, and defendant appeals, and brings certiorari. Affirmed.

Starr & Erwin, for plaintiff in error. Geo. A. Coffee, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 33)

MCGOUGH v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

VOLUNTARY MANSLAUGHTER—EVIDENCE—INSTRUCTIONS—NEW TRIAL—MISCONDUCT OF JURY.

No new questions are presented by the record in this case; the charges complained of were substantially correct; the requests to charge, in so far as they were legal and appropriate, were fully covered by the general instructions given to the jury; the verdict for voluntary manslaughter gave the accused the benefit of the theory that he killed the policeman to prevent being illegally arrested by him; the alleged newly-discovered evidence was merely cumulative and impeaching in its character, and not likely to produce a different result. Consider-

ing all the evidence in reference to the alleged misconduct of the jury and bias of one of the jurors, except that of some of the jurors which tended to impeach their verdict, the trial judge was warranted in finding there was nothing shown prejudicial to the accused; the verdict was amply supported by the evidence; and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

John McGough was convicted of voluntary manslaughter, and brings error. Affirmed.

S. T. Pinkston, C. C. Minter, J. H. Worrill, and Hatcher & Carson, for plaintiff in error. S. P. Gilbert, Sol. Gen., E. J. Winn, and T. T. Miller, for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 73)

JONES v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

OBSTRUCTING OFFICER—EVIDENCE.

One cannot be convicted of the offense of obstructing or resisting an officer in an attempt to execute a warrant of arrest, unless he had notice that the person attempting to make the arrest had authority so to do. It follows that a verdict of conviction for such an offense will be set aside, when the evidence fails to show that the accused had notice of the official character of the person attempting to make the arrest, and does show that such person did not have a warrant for the arrest of the accused. The fact that the accused knew that a warrant had been issued and was in the possession of the sheriff in a distant part of the county does not change the rule.

(Syllabus by the Court.)

Error from city court of Dawson; J. G. Parks, Judge.

Jack Jones was convicted of obstructing an officer, and brings error. Reversed.

Jno. R. Irwin, W. H. Gurr, and R. R. Martin, for plaintiff in error. M. J. Yeomans, Sol. Gen., for the State.

COBB, J. The accused was prosecuted for the offense of obstructing an officer while attempting to execute a warrant of arrest upon him. He was convicted, and, his motion for a new trial having been overruled, he excepted. The evidence was substantially as follows: The person who attempted to arrest the accused was a constable. A warrant had been issued for the arrest of the accused charging him with wife whipping, and the constable had been informed by the sheriff of the county that the warrant had been issued, and had been requested by the latter

officer to make the arrest. The sheriff did not, however, send the constable the warrant, but retained it in a distant part of the county, in another town from the one in which the accused resided and in which the arrest was made. The sheriff took no part in the arrest, either actually or constructively. When the constable went to arrest the accused he informed him that there was a warrant out for his arrest, but did not state what offense was charged in the warrant. The accused knew that a warrant had been issued for his arrest for wife whipping, but did not know that the constable was an officer, so far as appears from the evidence, and he avers in his statement that he did not know this fact. The constable did not prior to the resistance which the accused offered state that he was an officer, and as soon as he made known this fact the accused submitted to arrest. The judge charged the jury, in effect, that if they believed from the evidence that the person who sought to make the arrest was a lawful constable, and that the sheriff had in his possession at the time a legal warrant of arrest for the accused, and had instructed the constable to make the arrest, they would be authorized to convict, if it appeared that the accused resisted arrest. The accused excepted to this charge, and we think the exception is well taken. It is the duty of an officer who attempts to make an arrest to exhibit the warrant, if he has one, and, if not, to inform the person to be arrested of his official character, and of the offense charged in the warrant. Every person is justified in resisting arrest at the hands of a person who has no authority to make the arrest. In the absence, therefore, of some sort of notice that a person who is attempting to arrest him has authority to do so, a person sought to be arrested has a right to offer resistance. The statute makes it an offense to resist or obstruct an officer, and, if the person resisting has no knowledge of the official character of the party who is attempting to make the arrest, he cannot be convicted of the offense defined by the statute. This case is controlled in principle by the decision in *Davis v. State*, 79 Ga. 767, 4 S. E. 818. See, also, *Croom v. State*, 85 Ga. 718, 724, 11 S. E. 1035, 21 Am. St. Rep. 179; *Snelling v. State*, 87 Ga. 50, 13 S. E. 154; *Robinson v. State*, 93 Ga. 77 (3), 18 S. E. 1018, 44 Am. St. Rep. 127. We are of opinion, therefore, that the judge erred in refusing to grant a new trial, both on account of the error in the charge and because the evidence did not authorize the verdict.

Judgment reversed. All the justices concurring.

(114 Ga. 56)

ROBINSON v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—MURDER.

1. In charging the jury on the subject of what is circumstantial evidence, it is not error to define direct evidence.

2. When, in the trial of a case founded solely on circumstantial evidence, the court in its charge to the jury covers, in a general way, all the rules to be followed in determining cases founded upon circumstantial evidence, if amplification of such rules is desired written requests therefor should be made.

3. In the trial of one charged with the murder of a female, evidence showing that when the body of the deceased was found it was in such a condition that probably a rape had been committed is admissible as a circumstance to show the motive which actuated the slayer.

4. In the absence of a written request so to do, it is not error for the trial judge to fail to charge the law of a theory of the case presented solely by the prisoner's statement.

5. The evidence authorized the verdict, and the court did not abuse its discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Laurens county; Jno. C. Hart, Judge.

John Robinson was convicted of murder, and brings error. Affirmed.

E. L. Stephens and B. B. Blount, for plaintiff in error. H. G. Lewis, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

COBB, J. The accused was placed on trial charged with the offense of murder, and upon being convicted was sentenced to death. He made a motion for a new trial, which was overruled, and he excepted.

1. The court in its charge to the jury gave the definition of direct evidence. It is alleged that this was error, and was calculated to mislead the jury, inasmuch as the case was one depending entirely upon circumstantial evidence. It is almost impossible to explain to a jury what is circumstantial evidence without at the same time explaining what is direct evidence. In this way only can the difference between the two classes of evidence be distinctly impressed upon the minds of the jury. Upon an examination of the judge's charge, it is apparent that he used the definition of direct evidence for the purpose above indicated, and there was no error in so doing.

2. Complaint is made that the court failed

to fully explain to the jury the rules they were to be governed by in a case founded solely on circumstantial evidence. While the charge is not as full as it might have been in reference to the rules governing in cases of circumstantial evidence, still it referred in a general way to such rules, and, when taken as a whole, we cannot say that there was anything therein which was calculated to mislead the jury. Its effect could not have been otherwise than to inform the jury that the circumstances relied on for conviction must not only be of a character to show beyond a reasonable doubt the connection of the accused with the perpetration of the crime charged, but they must also be of such a character as to exclude every other reasonable hypothesis. If any fuller explanation of the rules of circumstantial evidence had been desired, a request in writing should have been made to that effect. See *Smith v. Manufacturing Co.*, 112 Ga. 680 (2), 37 S. E. 861.

3. Error is assigned upon the admission of testimony showing the condition in which the body of the deceased (a female) was when found, such condition indicating that probably a rape had been committed. The objection to this testimony was that it was irrelevant, as the accused was not charged with rape. The evidence was not inadmissible for the reason assigned, or for any other reason. It was properly admitted as a circumstance to show the motive which prompted the slayer.

4. Error is further assigned upon the failure of the judge to charge the jury on a theory of the case arising solely from the prisoner's statement. It has been repeatedly held that, in the absence of an appropriate written request, it is not error to fail to charge the law of a theory of the case which has for its foundation only the statement of the accused. *Baker v. State*, 111 Ga. 141, 143, 36 S. E. 607, and cases cited; *Ragland v. State*, 111 Ga. 211, 36 S. E. 682; *Gay v. State*, 111 Ga. 649, 36 S. E. 857, and cases cited.

5. The evidence, though entirely circumstantial, was sufficient to authorize the verdict, and the discretion of the trial judge in refusing to grant a new trial will not be controlled.

Judgment affirmed. All the justices concurring.

(114 Ga. 45)

TURNER v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

LARCENY—PRESUMPTIONS—POSSESSION OF STOLEN PROPERTY.

While proof that an accused was found recently after a larceny in the possession of stolen goods is a circumstance from which the presumption of guilt arises sufficiently strong to authorize a conviction, yet where the evidence shows such possession not to have been recent, and the articles stolen to be of such a nature that they could readily have passed from hand to hand, a presumption of guilt still arises, but it is not, without other evidence, sufficient to sustain a conviction. (a) The trial judge erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

Levi Turner was convicted of larceny, and brings error. Reversed.

Jas. B. Conyers, for plaintiff in error.
Sam'l P. Maddox, Sol. Gen., for the State.

LITTLE, J. Levi Turner was charged with the offense of larceny from the house in stealing from the gin house of W. H. Griffin and R. E. Griffin two carpenter's planes. On arraignment he pleaded not guilty, and substantially the following evidence was introduced on behalf of the state: W. H. Griffin testified that his brother and himself, composing the firm of Griffin Bros., did a ginning as well as a mercantile business at Kingston, Ga. About three months before the trial, which was had on September 10, 1900, witness, in company with another, went to the house of defendant to search for some stolen corn, and while searching his smokehouse witness found the two patent planes, which he identified, upon a shelf therein. One was a small plane and the other a large one. Griffin Bros. had two planes just like these in their gin house, which they had missed about 18 months before the trial. The planes had been kept in a box with some bristles and cotton, and the planes found had on them bristles and cotton and tallow. There was some excelsior in the smokehouse of defendant where these planes were found. Defendant claimed that he had bought them in Rome on the occasion when he helped Mr. Kitchens move to that city, and denied having stolen them at the time they were found. There was no private mark on them, and witness declined to swear positively that the planes were those which were lost, but said that they were like them; that there were a great many other planes like those which belonged to witness and his brother. Another witness testified that he had worked for Griffin Bros., and identified the planes as being those that had belonged to them, though he said there was no private mark by which he could identify them from others of the same make. Kitchens testified that

after defendant was arrested he had asked him (Kitchens) how long it had been since he (defendant) had helped to move to Rome, and he told defendant it was in the year 1894; that defendant and another negro did help him to move to Rome in the fall of that year; that he gave them some money with which to buy a pint of whisky, and that defendant did not buy any planes at that time. A witness testified that in 1897 the accused was in possession of two planes just like the two before the jury; that they were new, and of the same make; that defendant was "a sort of cobbler of a workman," and owned other planes at the time he saw the ones like these. In his statement the defendant said that he bought the planes in Rome in 1896, and that he did not buy them when he helped Mr. Kitchens move to that city. The jury returned a verdict of guilty. The defendant made a motion for a new trial on a number of grounds, which being overruled, he excepted.

A reversal of the judgment is asked because it is insisted that the evidence was not sufficient to support the verdict, and because the court erred in giving, under the facts of this case, the following charge to the jury: "The state contends that the defendant was found in the recent possession of the property alleged to have been stolen. Now, as to whether this possession of the defendant was recent or not is a question of fact which you are to determine. If you find that the property was stolen, then I charge you that you would be authorized to infer the guilt of defendant from such possession, if you find that his possession of the property was recent, unless he explained his possession to your satisfaction." Assuming that the principles of law incorporated in this charge are sound, the evidence did not warrant a finding, as a matter of fact, that the property was in the possession of the accused recently after the larceny was committed. It was ruled by this court in the case of Calloway v. State, 111 Ga. 832, 86 S. E. 63, that, "while recent possession of stolen goods, unexplained, will justify a conviction for larceny, the mere possession of the goods several months subsequent to the time they were alleged to have been stolen, and a failure to satisfactorily account for such possession of the goods several months subsequent to the time they were alleged to have been stolen, and a failure to satisfactorily account for such possession, will not alone authorize a conviction." The question of the recency of the possession of goods which have been stolen is a very important one in determining the guilt of one charged with larceny, where such possession alone is relied on for a conviction. It does not necessarily follow that because one is found in the possession of stolen goods he is a thief, but the fact that he was so found is a circumstance which may always go to the jury.

Proof of such possession, under certain circumstances, will authorize a conviction, under others it will not. This court has in a number of cases ruled that where recent, absolute, and unexplained possession is shown to exist immediately after a theft it is almost conclusive of guilt, and that where indicative evidence on collateral points is added to the fact of recent possession of the stolen property it will support a conviction. *Jones v. State*, 105 Ga. 649, 31 S. E. 574, citing many cases. In the case of *McAfee v. State*, 68 Ga. 823, this court ruled that the nearer the possession to the time of the larceny the stronger will be the inference of guilt. In the present case evidence of the fact that the goods alleged to have been stolen were found in the possession of the defendant some 15 months after the larceny was alone relied on to establish his guilt. The property being personal, and of easy transmission from one to another, such possession, while a circumstance pointing to his guilt, was not of itself sufficient to justify a conviction. Had it been recent, a different rule would prevail. Nor can it be replied that the jury should determine whether such possession was recent or not when applied to a case of larceny, for the purpose of raising the presumption of guilt, when there is no evidence that possession was in fact recent. The very reason of the rule which authorizes the presumption would be rendered nugatory, if a possession which was in fact not recent could be determined to be otherwise. We must therefore rule that while there was evidence to show that the accused was in possession of the stolen goods in this case, and while such evidence was a circumstance from which a presumption of his guilt might arise, as a matter of fact the possession, under the evidence of the present case, was not recent, and, not being so, the presumption of his guilt was not concluded by such possession, and that in all cases where such possession is relied on to establish guilt it must either be shown to have been recent, or else it must be strengthened by other evidence.

The trial judge erred in overruling the motion for a new trial, and the judgment is reversed. All the justices concurring.

(114 Ga. 171)

STOVER v. ADAMS.

(Supreme Court of Georgia. Nov. 8, 1901.)

ASSIGNMENTS OF ERROR—GARNISHMENT—ANSWER.

1. Exceptions pendente lite, upon which no error is assigned in the main bill of exceptions, and upon which counsel make no assignment before the argument of the case, cannot be considered by this court.

2. Where an answer to a garnishment is accepted by the court over the objection of the plaintiff that it is not filed within the time pre-

scribed by law, and the plaintiff in garnishment files exceptions pendente lite to this ruling, he is bound thereby until it is set aside or reversed, and cannot, at a subsequent term of court, reopen the question by a motion to strike the garnishee's answer.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

Action by J. A. Stover against Matilda Howren. Judgment for plaintiff, and garnishment proceedings against N. M. Adams. From a judgment for garnishee, plaintiff brings error. Affirmed.

Jas. B. Conyers, for plaintiff in error. Milner & Anderson and J. W. & P. F. Akin, for defendant in error.

LEWIS, J. John A. Stover brought suit against Mrs. Matilda Howren, returnable to the December term, 1900, of the city court of Cartersville, and at the same time instituted garnishment proceedings against N. M. Adams, requiring him to answer what property, money, or effects of Mrs. Howren he had in his possession. No issuable defense was filed by the defendant within the time required by law, and at the March term, 1901, judgment was rendered against Mrs. Howren for the full amount sued for. The garnishee having failed to make any answer up to that time, counsel for the plaintiff asked that judgment be likewise entered against him. This, however, the court refused to do, "stating that inasmuch as the court had not called the appearance docket at the December term, 1900, he did not know that he had the legal right to enter said case in default at that time." To this ruling the plaintiff filed exceptions pendente lite upon various grounds set forth in the record. Later, at the same term of the court, the garnishee was allowed, over the objection of the plaintiff's counsel, to file an answer stating that he had no property, money, or effects of the defendant, Mrs. Howren, in his possession, and owed her nothing. To the action of the court in allowing this answer to be filed the plaintiff also excepted pendente lite. At the June term, 1901, the plaintiff filed a petition setting up all these facts, and praying that the answer filed by the garnishee be stricken, and judgment rendered against him in favor of the plaintiff for \$339.25, the principal of the judgment obtained against Mrs. Howren, together with interest and costs. To this petition or motion to strike N. M. Adams demurred, on the grounds (1) that the motion is not authorized by law; (2) that the motion shows on its face that the identical questions made therein were passed upon by the court on the objections of the movant to the filing of the respondent's answer to the summons of garnishment at the March term, 1901, of the court, and the exceptions pendente lite filed by the movant to the ruling allowing the

answer; (3) that the grounds set out in the motion are legally insufficient to authorize the court to strike the respondent's answer to the summons of garnishment, and to enter up judgment against him as prayed; (4) that the motion on its face shows that the respondent's answer to the summons of garnishment was filed in the time allowed by law, and that no traverse has been filed to the answer; and (5) that the alleged errors of the court cannot be attacked in the way the movant seeks to attack them in his motion. The court sustained this demurrer, and dismissed the motion to strike the garnishee's answer, to which ruling the plaintiff excepts, and brings the case here for review.

1. In specifying the parts of the record material to a clear understanding of the errors complained of, counsel for plaintiff in error state that "it is unnecessary to send up the bill of exceptions pendente lite, as all of the errors alleged therein are fully set out in the petition and motion to strike the answer of the garnishee." The assignments of error in the main bill of exceptions relate entirely to the action of the court in sustaining the demurrer to the petition, or motion to strike the garnishee's answer, and nowhere is error assigned upon the exceptions pendente lite, either in the main bill or at any time before the argument of the case in this court. It follows, therefore, that under the rulings of this court in the case of *Nicholls v. Popwell*, 80 Ga. 605 (9), the exceptions pendente lite in the present case cannot be considered by this court, and that our decision must be confined to the question of the correctness of the ruling of the trial court in sustaining the demurrer to the plaintiff's motion to strike the garnishee's answer.

2. There was no error in sustaining this demurrer. It is not necessary to decide whether or not the court below erred in allowing the garnishee to file his answer at the time that he did, for that question is not properly before us. The plaintiff objected to this answer being received at the time that it was offered, and the entire matter was, or should have been, thoroughly argued and fully decided at that time. The plaintiff had the opportunity to bring the question here by direct bill of exceptions when the ruling was made, and have its correctness reviewed by this court, but he did not do so. To hold that he can come in at a subsequent term of court, and again take up a question which has already been directly decided, would be to encourage indirectness and circuitousness in pleading and practice, and would be a legal absurdity. By his failure to take due advantage of his right to except to the ruling of the court in allowing the garnishee to file his answer the matter has become res adjudicata, and he will not now be heard to reopen the question.

Judgment affirmed. All the justices concurring.

(114 Ga. 30)

ALLEN v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

CRIMINAL LAW—ERROR—SUFFICIENCY OF EVIDENCE.

The evidence, though not absolutely clear and convincing, was sufficient to sustain the conviction of the accused, and the supreme court will therefore not disturb the judgment of the court below overruling the motion for new trial, which was based only on the general grounds that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Prince Allen was convicted of crime, and brings error. Affirmed.

M. G. Bayne and R. D. Feagin, for plaintiff in error. Wm. Brunson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 64)

WIGGINS v. TYSON.

(Supreme Court of Georgia. Nov. 6, 1901.)

HABEAS CORPUS—DISMISSAL—REMITTITUR FROM SUPREME COURT.

1. When this case was here before (38 S. E. 86, 112 Ga. 744) the judgment of the lower court was reversed, with direction that, "if at another hearing it is made to appear that the remittitur has been received and made the judgment of the superior court of Putnam county, [the prisoner] be remanded to the custody of the warden of the penitentiary having him in charge." It appearing from the present record that upon the other hearing it was shown to the trial court that the remittitur from this court had been received by the clerk of the lower court and made the judgment of that court by a proper order of the judge, there was no error in dismissing the habeas corpus and remanding the prisoner.

2. Under Pen. Code, § 1075, the judge of the superior court has power in vacation to pass an order making the judgment of the supreme court, affirming a judgment in a criminal case, the judgment of the superior court.

3. If the judgment of the lower court in a criminal case is affirmed by this court, and the accused commences to serve his sentence before the remittitur from this court is received and filed by the clerk of the lower court, his term of service should be computed from the time the remittitur is filed in the lower court. *Knox v. State*, 39 S. E. 830, 118 Ga. 729.

(Syllabus by the Court.)

Error from superior court, Wilcox county; D. M. Roberts, Judge.

Application by Martha Wiggins against one Tyson for a writ of habeas corpus. From a judgment Wiggins brings error. Affirmed.

J. W. Preston and Hall & Wimberly, for plaintiff in error. J. F. De Lacy, Sol. Gen., for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 34)

BROUGHTON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1901.)

ENTICING AWAY SERVANT—EVIDENCE.

1. An essential element of the offense defined in section 122 of the Penal Code is enticing, persuading, or decoying the servant of another to leave his employer during his term of service; and proof of such facts as establish that the accused did one of these things is essential to sustain a conviction of the offense therein defined. Hence a conviction under this section cannot lawfully stand where the evidence in this regard shows no more than that the servant left the place of his employment in company with the accused.

2. On the trial of one indicted under the section referred to, a declaration made by the accused to the effect that he himself would not live with the prosecutor is irrelevant.

3. Irrespective of the other questions raised or sought to be raised in the present case, the evidence was not sufficient to support the conviction, under the principle ruled in the first preceding headnote, and a new trial should have been granted.

(Syllabus by the Court.)

Error from city court of Lexington; P. W. Davis, Judge.

Moses Broughton was convicted of enticing away a servant, and brings error. Reversed.

B. E. Thrasher and S. H. Sibley, for plaintiff in error. Joel Cloud and H. McWhorter, for the State.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., disqualified.

(114 Ga. 96)

HERRING v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

DENTISTRY—PRACTICE WITHOUT LICENSE—INDICTMENT.

1. By the terms of an act approved December 15, 1897, to engage in the practice of dentistry in this state without a license was made a penal offense only as to those not engaged in such practice at the time of the passage of the act. (a) Being an offense only as to a particular class of persons, an indictment charging one with a violation of the prohibition declared in the statute should aver that the accused was embraced in the class as to which the practice was made penal.

2. The indictment on its face being insufficient to charge an offense against the laws of this state, the question of the constitutionality of the act under which it was framed will neither be considered nor passed on.

3. The trial judge erred in overruling the demurrer to the indictment.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

B. J. Herring was convicted of practicing dentistry without a license, and brings error. Reversed.

T. T. Miller, for plaintiff in error. S. P. Gilbert, Sol. Gen., and S. S. Bennet, for the State.

LITTLE, J. The plaintiff in error was indicted by the grand jury of Muscogee county for the offense of a misdemeanor. The specific facts which it is alleged constituted such misdemeanor are thus set out in the bill of indictment: "For that the said B. J. Herring, on the 1st day of May, in the year 1901, in the county aforesaid [Muscogee], did then and there unlawfully, in violation of law, practice dentistry for a reward, the said B. J. Herring not having obtained a license from a board of dental examiners, duly appointed and authorized, under the provisions of law, to issue license, and the said B. J. Herring not having registered his license with the clerk of the superior court of said county, contrary to the laws," etc. On arraignment the accused filed a demurrer to the indictment on the grounds (1) that the facts charged did not constitute any crime against the laws of this state; (2) that the acts charged are not sufficient to charge the defendant with a violation of any penal law of this state; (3) because it is not made a crime to fail to register with the clerk of the superior court; (4) because it is nowhere alleged that the defendant did not have the lawful right to practice dentistry in this state; (5) because the act of the general assembly on which the indictment was founded is unconstitutional because that act contains more than one subject-matter and matter different from that expressed in the title; and (6) that the act is unconstitutional because it attempts to enact class legislation. This demurrer was overruled, and to the judgment overruling same the defendant filed exceptions pendente lite. The case proceeded to trial, and the defendant was found guilty. He subsequently submitted a motion for a new trial, which was overruled, and he excepted to the judgment overruling same.

In his bill of exceptions the plaintiff in error specifically assigns as error the judgment overruling his demurrer, and inasmuch as, in our opinion, the trial judge erred in not sustaining the demurrer, and a reversal of the judgment must result, an adjudication of the errors assigned in the motion for new trial becomes unnecessary. By an examination of the grounds set out in the demurrer, it will be seen that the objections to the bill of indictment were twofold,—one class of these referred to the sufficiency of the indictment; the other to the constitutionality of the act on which the indictment, if good, must rest. It is not permissible to pass upon the question of the constitutionality of a legislative enactment, which is raised on an indictment which in law charges no offense. Hence, as (for the reasons hereinafter given) we have arrived at the conclusion that the acts which, in the indictment preferred against the accused, it is alleged that he did, do not, under the provisions of the act in question, charge him with any violation of law, the validity or in-

validity of the act upon which it is founded will not be considered. This court will not presume that the general assembly has enacted an unconstitutional law, and it will only so declare when it is clearly shown that an act is in violation of some particular provision of the organic law; and if, for any reason, an indictment which seeks to charge a violation of the terms of a particular act cannot be sustained for the want of essential averments, all inquiry touching the validity of such act is precluded. Therefore the discussion and determination of the questions raised by the demurrer will be confined to the sufficiency of the indictment under the act. We do not understand that the bill of indictment in the present case undertook to charge the accused with a misdemeanor in having failed to register his license with the clerk of the superior court, nor do we understand that such a failure is made a misdemeanor by the terms of the act. On the contrary, the penalty prescribed for such failure is, by the express terms of the act, forfeiture of the license. We may regard the allegation in the indictment that the accused did not have his license registered as surplusage, which did not affect the distinct charge made that the accused was guilty of a misdemeanor, in that he did unlawfully practice dentistry for a reward without having obtained a license so to do. The act which the accused is alleged to have violated is entitled "An act to establish a board of dental examiners, prescribe its powers and duties, and to regulate dentistry and the practice thereof," etc. Laws 1897, p. 119. The first section of that act is as follows: "Be it enacted by the general assembly of the state of Georgia, and it is hereby enacted by authority of the same, that it shall be unlawful for any person to engage in the practice of dentistry in the state of Georgia unless said person shall have obtained a license from a board of dental examiners, duly authorized and appointed under the provisions of this act to issue licenses: provided, that this act shall not affect the right under the laws of Georgia of dentists to practice dentistry who have lawful right to practice dentistry at the time of the passage of this act." The indictment charges that the accused did on a named day "unlawfully, in violation of law, practice dentistry for a reward," he not having obtained a license from a board of dental examiners duly appointed and authorized, under the provisions of law, to issue licenses. It is contended on the part of the accused that the allegations made do not of themselves show that the accused has violated this law; that for the indictment to have charged an offense, under the terms of this act, it should have been further alleged that the accused did not have the right to practice dentistry at the time of the passage of the act. This contention raises an important question, and, under the authorities

which we have consulted, it seems to be one not entirely free of difficulty in its solution. It is a general rule that the allegations of fact made in the body of an indictment, in order to constitute an offense, must allege that the accused did all of those acts which the statute prescribes shall be a crime if done; and it is also a general rule that if all the facts which are charged in the indictment be true, and yet the accused can be guiltless, the indictment is bad.

These general rules are, however, in effect, qualified in certain instances; and it is contended on the part of the state that it was not necessary that the indictment should negative the proviso in the first section of the act, but that the qualification made by the proviso, that persons who were practicing dentistry at the time of its passage were not required to procure a license, was a matter of defense, to be urged by plea and proof, and a number of authorities have been cited which it is claimed support that contention. Mr. Bishop, in his work on Criminal Procedure (volume 1, § 631), discussing the rule as to what exceptions in the statute an indictment must negative, says that the principle is that the indictment must show a prima facie case against the defendant, and, where the statute has exceptions, provisos, and the like, the indictment must aver the contrary of those, the negative whereof constituted an affirmative element in the offense, but it may be silent as to those which are merely available in defense. This author further says in the same section: "But the question whether a particular exception or proviso is of the one class or the other depends largely upon how the statutory words are arranged." In endeavoring to ascertain whether the proviso in the first section of this act under consideration contains matter which is merely available as defense, or whether it constitutes an affirmative element of the offense made by this act, certain well-established rules must be consulted. Mr. Chitty, in the first volume of his Criminal Law (sections 283a-284), says: "When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. Nor is it even necessary to allege that he is not within the benefit of its provisos, though the purview should expressly notice them, as by saying that none shall do the act prohibited, except in cases therein-after excepted. But these are matters of defense, which the prosecutor need not anticipate, but which are more properly to come from the prisoner. On the contrary, if the exceptions themselves are stated in the enacting clause, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute." This eminent writer, it will be seen, in so far as has been quoted, rests

the necessity of pleading provisos and exceptions on the determination of the question whether such provisos and exceptions are contained in distinct clauses of the statute, or whether in the enacting clause. Mr. Bishop, in his work cited above (section 636), narrows the distinction to this legal proposition: "The negative of all exceptions in the enacting clause should be averred, unless they are such in form and substance that an affirmative offense will appear without." He follows this with two other principles, namely: "Where the negative is descriptive of the offense, it must be alleged in the indictment;" and that, "whatever be the location of the different provisions of a statute, an indictment on it, as on the common law, must aver all negatives necessary to show affirmatively an offense." Mr. Wharton, in his work on Criminal Practice and Procedure (section 238), in considering this subject in the light of a number of adjudicated cases, says that when provisos and exceptions are not so expressed in the statute as to be incorporated in the definition of the offense, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the statutory provisos. In section 239 the same author says: "But where a proviso adds a qualification to the enactment, so as to bring a case within it which but for the proviso would be without the statute, the indictment must show the case to be within the proviso." This rule he deduces from a long line of authorities. We have referred to the text of these leading authors for the purpose of ascertaining the rules which should be applied in determining the question made. The rules quoted are of English origin, and some of them are almost purely technical; but although technical they are nevertheless established rules, and have been recognized by this court. As an instance, in the case of *Williams v. State*, 89 Ga. 483, 15 S. E. 552, it was ruled that generally it was not necessary for the indictment to negative any of the exceptions contained in the statute, "such exceptions not being inserted in the enacting clause which defines and describes the offense."

Without any intention of detracting from the force of these rules, they must, we think, be applied in connection with another rule of primary importance in the interpretation of statutes, and that is to ascertain whether the legislative body which enacted the law intended by the enacting clause and the proviso to create a general offense, or an offense limited to a particular class of persons. Mr. Wharton, in his work above cited (section 241), gives an illustration which seems to be pointed and apt on this particular branch of the question, as follows: The sale of alcohol is prohibited by a sweeping section of an act. In a subsequent section of the same act alcohol is excepted for medicinal purposes. Here, he

says, the very structure of the statute shows the intent of the lawmakers was to make the sale of alcohol a crime by the statute. But, in an act declaring that none but licensed persons shall sell alcohol, a general crime is not created. The effect of the latter act is to declare that if certain persons do certain things they shall be liable to indictment. In the last sentence named this author says "that it must be averred that the defendant was in the class named"; and he declares that the test is practically this: "Is it the scope of the statute to create a general offense, or an offense limited to a particular class of persons or conditions? In other words, is it intended to impose the stamp of criminality on an entire class of actions, or upon only such actions of that class as are committed by particular persons or in a particular way? In the latter case, the defendant must be declared to be within the class; in the former case, this is not necessary. * * * Of course, the question thus involved, whether a crime is general or limited to particular persons, may be determined otherwise than by the structure of the statute. If it be clear that an act is only to become a crime when executed by particular persons of a particular class, or under particular conditions, then this class or those conditions must be set out in the indictment, no matter in what part of the statute they may be expressed." This reasoning seems to be sound, affording a practical and reasonable conclusion, namely: If, by the words of a statute, particular acts done are declared to be a crime for which punishment is provided, the offense created is general and applicable to all, and an indictment which sets out the offense in the language of the statute is sufficient, notwithstanding there may be matters found in the body of the statute elsewhere which provide that a given class of persons, or persons with certain qualifications, shall not be convicted of that offense, or that certain existing conditions may be a justification for doing the act set out in the statute. In such a case the offense is a complete one as it stands stated, and it is not necessary in framing the indictment to negative the conditions under which the force of the statute may be avoided. These are matters of plea and defense to a general statutory crime. If, however, by the terms of a statute, the doing of an act by a particular class of persons, or persons without certain qualifications, is declared to be a criminal offense, then the offense is not general, it does not apply to all, but is restricted to the class or condition of persons who may not lawfully do the act. In such a case the acts done amount to an offense only when done by particular persons, and in an indictment charging the offense it is absolutely essential that facts should be set forth which clearly aver that the commission of

the acts by the person charged is an offense against the law. In the case of *Elkins v. State*, 18 Ga. 435, this court had under consideration the question whether or not it was necessary in an indictment to negative the exception which was found in a general statute declaring that if any person should retail liquors without a license, except in certain corporate towns, he should be guilty, etc. Judge Nisbet, who delivered the opinion of this court, said: "Our criminal pleadings are reduced to great simplicity. Yet neither the law nor the practice of our courts have dispensed with the rule that an indictment must in its averments bring the accused within the operation of the law for a violation of which he is put on trial. It must make a case upon which, if proven, the court would be enabled to adjudge the defendant guilty of a crime. * * * From the structure of the section which creates this offense there can be no proper description of it, without averments which will deny to the defendant protection under its exception. They are not made in subsequent and independent sections, or by provisos which set forth a ground of excuse or justification. They are inherent in the body of the definition of the offense, and cannot be separated from it. * * * Every allegation in this indictment may be true, and yet the plaintiff in error be guiltless of any violation of the law; for the facts stated do not necessarily constitute an offense by the law. It was necessary, therefore, for the indictment to have negatived the fact that the defendant was within the exceptions, or in some other form (and as to that this court would not be strict or technical) brought him within the purview of the statute. Not having done this, it is, in our judgment, defective in a vital particular."

Now, we find that the act on which the indictment in this case was founded in its first section simply undertakes to define when the practice of dentistry shall be made penal in this state. That section declares that it shall be unlawful for any person to engage in the practice of dentistry who shall not have obtained a license, and provides that this act shall not affect the right, un-

der the laws of Georgia, of those dentists who had the lawful right to practice their profession at the time of the passage of the act. No punishment is in this section undertaken to be imposed. Acts which constitute the crime are simply defined. They are that all persons who practice dentistry shall have a certain license, provided that the right of one who was engaged in that practice at the time this act was passed should not be affected. Hence it is not a fair interpretation of this act to declare that the practice of dentistry without the license provided for therein is a crime. It was not the intention of the general assembly, as expressed by this first section, that the practice of dentistry should be a crime as to all persons when carried on without a license. On the contrary, the effect of the proviso is that the very acts which should after the passage of the act constitute a crime as to some persons should not constitute a crime as to others. The whole section deals with the definition of the offense which was then created. The punishment for the offense is found in the ninth section of the act. It is there declared that any person who, in violation of the provisions of this act, shall practice dentistry, etc., shall be guilty of a misdemeanor, and punished in a particular way. The proviso declaring that the rights of those who were practicing dentistry at the time of the passage of the act should not be affected by its provisions was just as much a provision of the act as that portion of section first which declares that the practice of dentistry without a license shall be unlawful. They are to be taken together, and it is clear, even under the consideration of the rules heretofore referred to, that it was the intention of the legislature that certain acts of a particular class of persons should not constitute an offense. So defining this statute, it is necessary, in our opinion, that an indictment under its provisions, in order to charge an offense, should aver that the person accused was not engaged in the practice of dentistry at the time of the passage of the act.

Hence the judgment of the court below in overruling the demurrer must be reversed. All the justices concurring.

(114 Ga. 156)

**NORCROSS BUTTER & CHEESE MFG. CO.
v. SUMMEROUR.**

(Supreme Court of Georgia. Nov. 8, 1901.)

**SUBSCRIPTION—LIABILITY OF PARTIES THERE-
TO—FORMATION OF CORPORATION—
PLEADING—AMENDMENT.**

1. When, in pursuance of a contract entered into between two persons, in which one of them subscribes money for the purpose of building a factory, and the other agrees to construct such factory when a certain amount shall have been subscribed, and it is further agreed that when this is done subscribers shall have themselves incorporated into a company for the purpose of operating the factory, the liability of the subscribers on their subscriptions is, in the first instance, to the person agreeing to construct the factory; but after the corporation is formed such liability is to the corporation only, and it becomes liable, to the extent of the unpaid subscriptions, to the person who agreed to build the factory.

2. Though an amendment making entirely new parties plaintiff may have been improperly allowed, yet, if allowed without objection from the defendant, the suit can proceed in the name of the new plaintiffs; and, if a liability to them is established, a recovery can be had.

3. The mere fact that a plaintiff in his pleadings declares his intention of suing for the use of a third person does not raise any question as to the liability either of the plaintiff or of the defendant to such third person. The words declaring an intention to use the recovery for the benefit of another are, as to the defendant, harmless surplusage. He is not concerned in what disposition is to be made of the recovery.

(Syllabus by the Court.)

Error from superior court, Milton county; Geo. F. Gober, Judge.

Action by the Chicago Building & Manufacturing Company against H. H. Summerour. The Norcross Butter & Cheese Manufacturing Company was substituted as plaintiff. Demurrer to complaint sustained, and plaintiff brings error. Reversed.

H. L. Patterson, for plaintiff in error. B. F. Simpson, T. L. Lewis, and E. Faw, for defendant in error.

COBB, J. This was a suit originally brought in the justice's court by the Chicago Building & Manufacturing Company against H. H. Summerour to recover from the defendant a sum subscribed by him for the purpose of building a butter and cheese factory at Norcross, Ga. The case was by consent appealed to the superior court. Attached to the summons was a copy of a contract entered into by the plaintiff company with the defendant and his associates. From this contract it appeared that these persons had subscribed a certain sum of money for the purpose of building a butter and cheese factory at the place named, and that they had agreed, when the entire amount necessary for the purpose indicated had been subscribed, to incorporate themselves under the laws of this state. The defendant filed a plea setting up that the subscribers to the stock had been incorporated pursuant to the contract under the name and

style of the Norcross Butter & Cheese Manufacturing Company, and that after their incorporation the plaintiff's right of action for unpaid subscriptions must be asserted against the incorporated company. The plaintiff thereupon offered to amend the original summons by inserting the name of the Norcross Butter & Cheese Manufacturing Company as plaintiff, suing for the use of the Chicago Building & Manufacturing Company. This amendment was allowed, without objection from the defendant, so far as appears from the record. The defendant then demurred to the summons as amended, upon the grounds that no cause of action was set forth; that, if the plaintiff had any cause of action at all, it was against the Norcross Butter & Cheese Manufacturing Company; and that, not having established any debt or claim against the Norcross Company, it could not proceed in its name against the defendant to collect any sum that may be due such company. The court sustained this demurrer and dismissed the case, and this ruling is assigned as error by the Norcross Butter & Cheese Manufacturing Company.

Under the contract attached to the summons, the defendant was originally liable to the Chicago Building & Manufacturing Company for the amount of his subscription. As soon, however, as the subscribers were incorporated pursuant to the contract, the liability of the defendant was shifted to the new company, and this corporation became liable to the Chicago Building & Manufacturing Company for the amount of the unpaid subscriptions. In other words, after the incorporation of the new company the liability of the subscribers to the Chicago Company ceased, and the only recourse of this company was upon the corporation which the subscribers had formed. Such was the opinion of this court as to the respective liabilities of the parties to a similar contract in the case of Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Mfg. Co., 106 Ga. 84, 89, 31 S. E. 809. It is entirely probable that, if the proper objection had been made by the defendant to the allowance of the amendment to the summons, such amendment should have been rejected. The amendment made a complete change of parties plaintiff, and converted the suit into one in which a different party was seeking to enforce a liability to it, though growing out of the same contract which was sought to be enforced in the first instance. But, be this as it may, no objection whatever was made to the allowance of the amendment, and we are called upon to decide simply whether the demurrers to the summons as amended were well taken. We are of opinion that they were not. In framing these demurrers the defendant seems not to have apprehended the radical change which had been made in the cause of action by the amendment. The original plaintiff was entirely eliminated, and the question of

the liability of the Norcross Company to it was entirely immaterial. The sole question to be considered was, did the summons as amended state a liability on the part of the defendant to the Norcross Butter & Cheese Manufacturing Company? Such a liability is shown when the contract attached to the summons is considered in the light of the allegations in the amendment, from which it can be inferred that the subscribers had been incorporated pursuant to the contract, and that the name of this corporation was the Norcross Butter & Cheese Manufacturing Company. The suit, therefore, is to be treated as if originally brought by this latter company; and, so treating it, it was not subject to the objections set up in the demurrers. Nor did the circumstance that the suit was proceeding in the name of the Norcross Company for the use of the original plaintiff present any sufficient reason why the suit should have been dismissed. Any plaintiff may, at his option, provided so doing does not prejudice any defense which the defendant may have had, declare his intention to recover for the benefit of any other person. *Buffington v. Blackwell*, 52 Ga. 129, 130; *Railroad Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676; *Terrell v. Stevenson*, 97 Ga. 572, 25 S. E. 352. But, irrespective of the right of such third person after recovery to enforce such a declaration of intention, it is certainly a matter about which ordinarily a defendant will not be allowed to complain. The liability of the defendant to the person for whose benefit the recovery is sought is not in any way involved in an action of the nature of the one instituted in the present case. It is a matter of no concern to the defendant what becomes of the money which he owes the plaintiff after it is recovered. As to him, the words "for use," etc., are generally mere surplusage. *Burke v. Steel*, 40 Ga. 217; *Cröss v. Johnson*, 65 Ga. 717.

Judgment reversed. All the justices concurring.

(114 Ga. 77)

PENNY v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

ASSAULT—INSTRUCTIONS.

Not only should the charge requested have been given, but a new trial should have been granted because the verdict was without evidence to support it.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Burt Penny was convicted of assault, and brings error. Reversed.

John W. Bale, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

LITTLE, J. Burt Penny was indicted for an assault, and it was charged against him that he did attempt to commit a violent in-

jury upon one J. C. Smalley. On the trial of the case the following facts were shown: On a certain night in February, 1901, between 7 and 8 o'clock, three men drove up in a buggy and stopped in front of Smalley's house. One of these (Penny) got out of the buggy, went to the house, and knocked at the door. He replied to an inquiry made by one of Smalley's daughters at the door, and who asked him what he wanted: "I want a drink of water, by God!" He was then directed to go away. About that time Smalley came to the door and told Penny to go away, and, on his failure to do so, Smalley pushed Penny off the steps and out of the gate. Penny, after getting outside the gate, was discovered by a witness to have a rock in each hand, and he (Penny) then made the remark: "You girls get out of the way. I don't want to hurt you;" adding that the old man was the one he was after, and using in connection with his reference to Smalley very indecent and reprehensible language. Penny did not throw the rocks, nor did he make any attempt to throw them. No one saw him when he picked them up. The jury, under the charge of the court, returned a verdict of guilty, and the defendant made a motion for a new trial on the ground that the verdict was contrary to law, and without evidence to support it. The motion being overruled, the defendant excepted. An amendment to the motion alleges further error in the refusal of the judge to direct a verdict of not guilty, and in refusing to charge the following written request: "A mere preparation to commit a violent injury upon the person of another, or a mere threat to do so, unaccompanied by physical effort to do so, will not justify a conviction for an assault. Mere words or threats, unaccompanied by some physical effort to commit a violent injury upon the person of another, will not justify a conviction for an assault." While we are not prepared to say that a refusal to direct a verdict in a criminal case is under any circumstances erroneous, we are clearly of the opinion that the trial judge erred in refusing to give in charge to the jury the principle of law requested; it being both sound and applicable to the facts of the case. We are further of opinion that he erred in overruling the motion for a new trial on the ground that the verdict was without evidence to support it. There was no evidence of any kind or character that the defendant attempted to commit a violent injury on the person of Smalley. The defendant's conduct on that occasion, if the evidence be true, merited punishment, and afforded sufficient ground for his prosecution on another and distinct criminal charge; but we cannot, because of that, sanction this verdict. The evidence does not show that Penny struck Smalley, or that he attempted to do so. While he had rocks in his hands, he did not throw nor otherwise attempt to use them on the person of Smalley.

Whatever else the defendant may have been guilty of under the evidence, certainly no portion of it shows that he was guilty of an assault. See *Brown v. State*, 85 Ga. 481, 20 S. E. 495. A new trial should have been granted.

Judgment reversed. All the justices concurring.

(114 Ga. 75)

WALTHOUR v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

LARCENY—INDICTMENT—DESCRIPTION OF STOLEN PROPERTY.

A bill of indictment, charging one with simple larceny, in which the property alleged to have been stolen, as therein set out, was "a lot of cord wood," of a stated value, belonging to named persons, should have been quashed on demurrer for want of a sufficient description of the property alleged to have been stolen.

(Syllabus by the Court.)

Error from city court of Floyd county; J. H. Reece, Judge.

John and Jiles Walthour were indicted for larceny. From the verdict of conviction, John brings error. Reversed.

C. E. Carpenter, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

LITTLE, J. John and Jiles Walthour were indicted by the grand jury of Floyd county for the offense of simple larceny. On the charge thus preferred they were tried at the September term, 1901, of the city court of Floyd county, and a verdict of guilty returned as to John Walthour, and a verdict of not guilty as to Jiles. The defendants filed a demurrer on the following grounds: (1) Because the cord wood alleged to have been stolen is not described with that certainty required by law; (2) because the indictment did not disclose what kind of cord wood was stolen; and (3) because the indictment did not describe the number of cords, or amount of cords, and did not charge the theft of any specified number of cords of wood, or of any specified amount of wood. This demurrer was overruled, and the defendants excepted. Walthour also filed a motion for a new trial on the general grounds, which was heard and overruled by the trial judge, and the accused excepted to the order overruling his motion. As we think the judge erred in not sustaining the demurrer, it will not be necessary to consider the exceptions based upon the overruling of the motion. The indictment charged the defendants with stealing "a lot of cord wood" of the personal goods of certain named persons, "of the value of ten dollars," and the sole question raised by the demurrer is whether this description of the property alleged to have been stolen is sufficient to meet the requirements of the law.

When the subject-matter of a larceny is horses, cows, or hogs, the Penal Code prescribes certain elements of description, but in the case of other personal chattels the rule of the common law prevails. Mr. Wharton, in his work on Criminal Pleading and Practice, states the rule thus: "When, as in larceny, * * * personal chattels are the subject of an offense, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated." Section 206. In the case of *Davis v. State*, 40 Ga. 229, Warner, J., quotes this principle from Archb. Cr. Pl., in almost the identical words, and states that the principle of the common law is still of force in this state. See, in this connection, *Rap. Larceny*, § 75; 2 Bish. Cr. Proc. § 699. Mr. Bishop, in his work just cited, states the object of the description to be "to individualize the transaction, and enable the court to see that they are, in law, the subjects of larceny. * * * The description should be simply such as, in connection with the other allegations, will affirmatively show the defendant to be guilty, will reasonably inform him of the instance meant, and put him in a position to make the needful preparations to meet the charge." See *Sanders v. State*, 86 Ga. 724, 12 S. E. 1058, where this author's rule is quoted with approval. Mr. Wharton, in his work above quoted (section 208), further says: "There must be such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded." Still another reason given why the description should be definite is that a judgment may be pleaded in bar of a subsequent prosecution for the same offense. 12 Enc. Pl. & Prac. 979, and cases cited.

Webster defines "lot" to mean "a great quantity or number; a great deal." No description could be more indefinite than "a great quantity" or "a great deal of cord wood." Certainly, the property alleged to have been stolen is not by these words "described specifically." Nor does this description "individualize" the transaction, but, on the contrary, it leaves it indefinite. Nor does it "reasonably inform" the defendant of the instance meant, or "put him in a position to make the needful preparations to meet the charge." What charge could be made more general than is embraced in the language, "a lot of cord wood," in Floyd county, belonging to named persons? Surely, such description did not give the defendant or the jury any definite information as to what he was charged with stealing. The indictment should also so sufficiently identify the property alleged to have been stolen that a finding thereon could be pleaded in bar of a subsequent prosecution for the same offense. A verdict under the charge in this indictment might not, so far as the descrip-

tion of the property therein described is concerned, be any protection to a subsequent prosecution for a larceny of a given quantity of cord wood.

Being of opinion that the indictment did not sufficiently identify and describe the property alleged to have been stolen, so as to meet the requirements of the law, the judgment overruling the demurrer is reversed. All the justices concurring.

(114 Ga. 35)

PITTS v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

CRIMINAL LAW—NEW TRIAL—INSTRUCTIONS—ASSIGNMENT OF ERROR.

1. Taking into view both the evidence and the statement of the accused, it does not appear that the court below erred in refusing to sustain the general grounds of the motion for a new trial.

2. The newly-discovered evidence was not of such materiality or importance as that the introduction of it upon another trial would probably bring about a different result.

3. While it is much the better practice to charge concerning the prisoner's statement in the language of the statute, failure to do so is not cause for a new trial, when the substance of the law is correctly stated. (a) There is in the present case no assignment of error presenting the point that this was not done.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Gilbert Pitts was convicted of crime, and brings error. Affirmed.

W. F. Slater and A. S. Way, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 35)

NELSON v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CERTIORARI—EVIDENCE.

The evidence authorized the verdict rendered in the county court, and there was no error committed at the trial which would have warranted the judge of the superior court, upon certiorari, in remanding the case to the county court for another hearing.

(Syllabus by the Court.)

Error from superior court, Liberty county; P. E. Seabrook, Judge.

George Nelson was convicted of crime, and brings error. Affirmed.

Donald Fraser and B. A. Way, for plaintiff in error. Livingston Kenan, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 60)

BROWN v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CARRYING WEAPONS—EVIDENCE—CONSTITUTIONALITY OF ACT.

1. The provisions of Pen. Code, § 341, which prohibits the carrying of concealed weapons, are sufficiently broad to embrace the carrying of such weapons by a person within the limits of his own home.

2. This court will never pass upon the constitutionality of an act of the general assembly unless it clearly appears in the record that the point was directly and properly made in the court below, and distinctly passed on by the trial judge.

3. The evidence authorized the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Joe Brown was convicted of carrying concealed weapons, and brings error. Affirmed.

I. Van Duser, for plaintiff in error. Thos. J. Brown, for the State.

COBB, J. The accused was tried upon an accusation charging him with having and carrying about his person a concealed pistol. It appears from the evidence that at the time the pistol was carried in the manner just referred to the accused was in his own home. The court charged the jury "that a man has no right to carry a pistol in the manner prohibited by law (that is, concealed on his person), even though he might be carrying the same for the purpose of defending and protecting his own home, his person, or his property, and might be at the time he so carried it in his own house or home." Upon this charge there is a general assignment of error, and it was argued here by counsel for plaintiff in error that the charge was erroneous for two reasons: First, because the statute prohibiting the carrying of concealed weapons did not apply when a man was in his own home; and, second, that, if the statute could be properly so construed, it was to that extent unconstitutional. The statute declares that "any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol . . . shall be guilty of a misdemeanor." Pen. Code, § 341. The statute is broad enough to embrace any and all places, and there is nothing in it to indicate a legislative intent that the statute should not apply when the person carrying the concealed pistol was at the time within the confines of his own home. But it is claimed that the general assembly had no authority, under the constitution, to pass an act so broad in its terms. There is nothing in the record to indicate that such a question was ever passed upon by the presiding judge. The motion for a new trial contains only the general grounds and an assignment of error

upon the charge complained of, which is quoted above; and this assignment is merely a general one, without specifying any reason why the charge is erroneous. It is well settled now that, before this court will undertake to pass upon the constitutionality of an act of the general assembly, it must clearly appear from the record not only what clause or paragraph of the constitution the statute is claimed to be in violation of, but it must also in like manner appear that the question so made was actually presented to the presiding judge, and distinctly passed upon by him. See *Railway Co. v. Hardin*, 110 Ga. 433, 437, 35 S. E. 681. The evidence authorized the verdict, and the rulings complained of were not erroneous for any reason appearing in the record.

Judgment affirmed. All the justices concurring.

(114 Ga. 165)

WEAVER v. STONER.

(Supreme Court of Georgia. Nov. 8, 1901.)

ERROR—REVIEW—COSTS—ACTION ON NOTE.

1. The court committed no error in the ruling on evidence which was complained of, and the verdict for the plaintiff was, under the facts of the case, properly directed.

2. Where counsel for plaintiff in error is compelled by the court, at the instance of counsel for the defendant in error, to embody in the bill of exceptions a mass of documentary evidence, which could have been properly briefed, and occupied a very small space in the bill of exceptions, this court will direct that the cost of bringing so much of such documentary evidence as was unnecessary and useless be taxed against the defendant in error.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

Action by M. Stoner against David Weaver. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Conyers and B. J. Conyers, for plaintiff in error. J. M. Neel, for defendant in error.

COBB, J. The plaintiff brought suit against Weaver upon a promissory note. Weaver filed a plea setting up that the consideration of the note had partially failed, for the reason that the note was given in part payment of the purchase money of a tract of land, and that he had lost possession of a portion of this tract because the plaintiff did not have title thereto. He asks in his plea that the purchase money be abated to the extent of the value of the land to which he had failed to obtain title. Upon the trial it appeared that Thaddens Pickett owed Stoner, and to secure the debt conveyed to him a large quantity of land by a deed which was absolute on its face. It also appeared that Pickett was indebted to Weaver, and that they entered into an agreement by which

Pickett was to sell to Weaver a certain portion of the land embraced in the deed from Pickett to Stoner, and that the balance of the purchase money after the debt due by Pickett to Weaver had been deducted was to be paid to Stoner, and that Weaver was to give notes for this amount to Stoner, and take a bond for titles from him for the land which he had agreed to purchase from Pickett. This agreement was submitted to Stoner, and approved of by him, and Weaver gave to Stoner notes for the balance of the purchase money after the debt due by Pickett to Weaver had been deducted. Stoner then gave to Weaver a bond for title, conditioned to convey to Weaver, upon the payment of the notes above referred to, certain portions of lots numbers 254 and 255, in the Twenty-Third district and Second section of Bartow county, Ga.; such portions being distinctly described in the bond, the descriptions being followed by the words: "Being 100 acres, more or less, of lot 255, and 20 acres, more or less, of lot 254, except that portion of 255 belonging to Dr. Baker's mill property." It appeared that Weaver went into possession under this bond for titles of a portion of the land claimed by Dr. Baker as a part of his mill property, and that upon suit being brought by Baker a judgment was rendered in his favor by which he recovered the land from Weaver. This is the portion of land on account of the loss of which Weaver seeks to obtain a deduction from the notes sued on of an amount equal to the value of the land. Upon this state of facts the court directed a verdict in favor of Stoner, and Weaver excepted.

There was no error whatever in directing a verdict for the plaintiff, and this is conceded by counsel for Weaver in their brief. The bond for titles fixed the line of the land sold to Weaver at Baker's mill property, and distinctly excepted this property, and of course Stoner was in no way responsible for the fact that Weaver had lost land which he had entered into possession of, and which was in no way covered by the bond for titles. But it is said that the court erred in refusing to allow Weaver to prove that before the bond for titles was made by Stoner, and while he and Pickett were negotiating, Pickett pointed out the lines of the land which was the subject-matter of the trade, and that the lines so pointed out embraced the land which he lost under the judgment in the Baker suit. The court refused to admit this testimony, on the ground that Stoner was not bound by Pickett's declarations. It is not necessary to determine in the present case whether Pickett was such an agent of Stoner as that he would be bound by Pickett's declarations, as we think the evidence was properly ruled out for another reason; that is, that both Stoner and Weaver are bound by the terms of the written contract, which distinctly fixes the lines of the land intended

to be sold, and, even if it was the intention of the parties that one of the lines should be at a different place, until the bond for titles is corrected and reformed the parties must stand by it as it is. The bond for titles calls for the Baker line, and Weaver, according to the record, is in possession of every particle of land within the boundaries embraced in the bond for titles. The case is controlled upon its merits by the familiar principle that, where parties reduce their agreement to writing, all oral negotiations antecedent thereto are merged in the writing, and, even though the writing does not express the contract actually made, the parties must stand by it until it is reformed in a proper way by a competent tribunal.

2. There was no motion for a new trial, and the evidence is contained in the bill of exceptions. There is set forth in the bill of exceptions the record in the case of Baker against Weaver, consisting of 21 pages of typewritten matter. It appears from allegations in the bill of exceptions that when the same was presented to the judge it contained only an abstract of this record, and that upon the application of counsel for the defendant in error counsel for plaintiff in error was compelled by the court to place the entire record in the bill of exceptions. Counsel for plaintiff in error in the bill of exceptions assigns error upon this "ruling." Of course, this is not a proper subject-matter of an assignment of error in the bill of exceptions, and, no matter whether the judge was right or wrong in compelling counsel for plaintiff in error to set out in full this mass of evidence in the bill of exceptions, it does not affect the merits of the case.

It is apparent upon an examination thereof that it was not at all necessary to have this mass of documentary evidence incorporated in the record. All that is material to the present investigation in reference to the Baker suit could have been set forth in an abstract of not exceeding two pages of typewritten matter, and this should have been done. The policy of the law regulating the practice in this court is in favor of brevity, and our brethren of the trial bench as well as our brethren of the bar should co-operate with each other at all times in making records and bills of exceptions models of precision and brevity. This course will conduce both to expedition and accuracy in the decision of cases by this court. As the plaintiff in error is unsuccessful in this case, and is therefore liable for the costs of the case, we think, in the interest of justice, as this useless mass of evidence has been forced in the record at the instance of the defendant in error, the cost of bringing that portion of the bill of exceptions should be taxed against him. While there is no statute which in terms provides that this shall be done in a case like the present, still, in the exercise of the power given us to make such direction as

the interests of justice shall require, we direct that the costs of this useless part of the record be taxed against the defendant in error.

Judgment affirmed, with direction. All the justices concurring.

(114 Ga. 16)

PUGH v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

JUSTIFIABLE HOMICIDE—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

1. The law embraced in section 73 of the Penal Code does not qualify or limit the law of justifiable homicide, as contained in sections 70 and 71. While the law embodied in sections 70 and 71, as well as that embodied in section 73, may both be properly given in the same case, the provisions of the different sections should not be charged in such a way as to leave the impression upon the jury that they are both applicable to the same state of facts.

2. The law with reference to voluntary manslaughter is not applicable to the facts disclosed by the record, and it was therefore error to give the same in charge, and to fail to set aside a verdict finding the defendant guilty of that offense.

(Syllabus by the Court.)

Error from superior court, Hart county; H. M. Holden, Judge.

John Pugh was convicted of voluntary manslaughter, and brings error. Reversed.

A. G. & Julian B. McCurry, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

LEWIS, J. John Pugh was indicted and tried for the murder of Gus Prather. The evidence was very conflicting. That for the state tended to show a case of deliberate murder, preceded by threats that the defendant would take the life of the deceased when they met, and an effort to seek out the deceased for the purpose of killing him. That for the defendant was to the effect that the deceased fired two shots at the defendant before the defendant drew his weapon, and that it was necessary for the defendant to kill the deceased in order to save his own life. The jury returned a verdict finding the defendant guilty of voluntary manslaughter. The defendant moved for a new trial on various grounds, the important ones of which will be taken up in due order. The court below overruled the motion, and the defendant excepted.

1. Complaint is made in the motion that the court erred in the following charge: "A bare fear of any of those offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were such as to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.

upon the charge complained of, which is quoted above; and, this assignment is merely a general one, without specifying any reason why the charge is erroneous. It is well settled now that, before this court will undertake to pass upon the constitutionality of an act of the general assembly, it must clearly appear from the record not only what clause or paragraph of the constitution the statute is claimed to be in violation of, but it must also in like manner appear that the question so made was actually presented to the presiding judge, and distinctly passed upon by him. See *Railway Co. v. Hardin*, 110 Ga. 433, 437, 35 S. E. 681. The evidence authorized the verdict, and the rulings complained of were not erroneous for any reason appearing in the record.

Judgment affirmed. All the justices concurring.

(114 Ga. 165)

WEAVER v. STONER.

(Supreme Court of Georgia. Nov. 8, 1901.)

ERROR—REVIEW—COSTS—ACTION ON NOTE.

1. The court committed no error in the ruling on evidence which was complained of, and the verdict for the plaintiff was, under the facts of the case, properly directed.

2. Where counsel for plaintiff in error is compelled by the court, at the instance of counsel for the defendant in error, to embody in the bill of exceptions a mass of documentary evidence, which could have been properly briefed, and occupied a very small space in the bill of exceptions, this court will direct that the cost of bringing so much of such documentary evidence as was unnecessary and useless be taxed against the defendant in error.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

Action by M. Stoner against David Weaver. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Conyers and B. J. Conyers, for plaintiff in error. J. M. Neel, for defendant in error.

COBB, J. The plaintiff brought suit against Weaver upon a promissory note. Weaver filed a plea setting up that the consideration of the note had partially failed, for the reason that the note was given in part payment of the purchase money of a tract of land, and that he had lost possession of a portion of this tract because the plaintiff did not have title thereto. He asks in his plea that the purchase money be abated to the extent of the value of the land to which he had failed to obtain title. Upon the trial it appeared that Thaddens Pickett owed Stoner, and to secure the debt conveyed to him a large quantity of land by a deed which was absolute on its face. It also appeared that Pickett was indebted to Weaver, and that they entered into an agreement by which

Pickett was to sell to Weaver a certain portion of the land embraced in the deed from Pickett to Stoner, and that the balance of the purchase money after the debt due by Pickett to Weaver had been deducted was to be paid to Stoner, and that Weaver was to give notes for this amount to Stoner, and take a bond for titles from him for the land which he had agreed to purchase from Pickett. This agreement was submitted to Stoner, and approved of by him, and Weaver gave to Stoner notes for the balance of the purchase money after the debt due by Pickett to Weaver had been deducted. Stoner then gave to Weaver a bond for title, conditioned to convey to Weaver, upon the payment of the notes above referred to, certain portions of lots numbers 254 and 255, in the Twenty-Third district and Second section of Bartow county, Ga.; such portions being distinctly described in the bond, the descriptions being followed by the words: "Being 100 acres, more or less, of lot 255, and 20 acres, more or less, of lot 254, except that portion of 255 belonging to Dr. Baker's mill property." It appeared that Weaver went into possession under this bond for titles of a portion of the land claimed by Dr. Baker as a part of his mill property, and that upon suit being brought by Baker a judgment was rendered in his favor by which he recovered the land from Weaver. This is the portion of land on account of the loss of which Weaver seeks to obtain a deduction from the notes sued on of an amount equal to the value of the land. Upon this state of facts the court directed a verdict in favor of Stoner, and Weaver excepted.

There was no error whatever in directing a verdict for the plaintiff, and this is conceded by counsel for Weaver in their brief. The bond for titles fixed the line of the land sold to Weaver at Baker's mill property, and distinctly excepted this property, and of course Stoner was in no way responsible for the fact that Weaver had lost land which he had entered into possession of, and which was in no way covered by the bond for titles. But it is said that the court erred in refusing to allow Weaver to prove that before the bond for titles was made by Stoner, and while he and Pickett were negotiating, Pickett pointed out the lines of the land which was the subject-matter of the trade, and that the lines so pointed out embraced the land which he lost under the judgment in the Baker suit. The court refused to admit this testimony, on the ground that Stoner was not bound by Pickett's declarations. It is not necessary to determine in the present case whether Pickett was such an agent of Stoner as that he would be bound by Pickett's declarations, as we think the evidence was properly ruled out for another reason; that is, that both Stoner and Weaver are bound by the terms of the written contract, which distinctly fixes the lines of the land intended

to be sold, and, even if it was the intention of the parties that one of the lines should be at a different place, until the bond for titles is corrected and reformed the parties must stand by it as it is. The bond for titles calls for the Baker line, and Weaver, according to the record, is in possession of every particle of land within the boundaries embraced in the bond for titles. The case is controlled upon its merits by the familiar principle that, where parties reduce their agreement to writing, all oral negotiations antecedent thereto are merged in the writing, and, even though the writing does not express the contract actually made, the parties must stand by it until it is reformed in a proper way by a competent tribunal.

2. There was no motion for a new trial, and the evidence is contained in the bill of exceptions. There is set forth in the bill of exceptions the record in the case of Baker against Weaver, consisting of 21 pages of typewritten matter. It appears from allegations in the bill of exceptions that when the same was presented to the judge it contained only an abstract of this record, and that upon the application of counsel for the defendant in error counsel for plaintiff in error was compelled by the court to place the entire record in the bill of exceptions. Counsel for plaintiff in error in the bill of exceptions assigns error upon this "ruling." Of course, this is not a proper subject-matter of an assignment of error in the bill of exceptions, and, no matter whether the judge was right or wrong in compelling counsel for plaintiff in error to set out in full this mass of evidence in the bill of exceptions, it does not affect the merits of the case.

It is apparent upon an examination thereof that it was not at all necessary to have this mass of documentary evidence incorporated in the record. All that is material to the present investigation in reference to the Baker suit could have been set forth in an abstract of not exceeding two pages of typewritten matter, and this should have been done. The policy of the law regulating the practice in this court is in favor of brevity, and our brethren of the trial bench as well as our brethren of the bar should co-operate with each other at all times in making records and bills of exceptions models of precision and brevity. This course will conduce both to expedition and accuracy in the decision of cases by this court. As the plaintiff in error is unsuccessful in this case, and is therefore liable for the costs of the case, we think, in the interest of justice, as this useless mass of evidence has been forced in the record at the instance of the defendant in error, the cost of bringing that portion of the bill of exceptions should be taxed against him. While there is no statute which in terms provides that this shall be done in a case like the present, still, in the exercise of the power given us to make such direction as

the interests of justice shall require, we direct that the costs of this useless part of the record be taxed against the defendant in error.

Judgment affirmed, with direction. All the justices concurring.

(114 Ga. 16)

PUGH v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

JUSTIFIABLE HOMICIDE—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

1. The law embraced in section 73 of the Penal Code does not qualify or limit the law of justifiable homicide, as contained in sections 70 and 71. While the law embodied in sections 70 and 71, as well as that embodied in section 73, may both be properly given in the same case, the provisions of the different sections should not be charged in such a way as to leave the impression upon the jury that they are both applicable to the same state of facts.

2. The law with reference to voluntary manslaughter is not applicable to the facts disclosed by the record, and it was therefore error to give the same in charge, and to fail to set aside a verdict finding the defendant guilty of that offense.

(Syllabus by the Court.)

Error from superior court, Hart county; H. M. Holden, Judge.

John Pugh was convicted of voluntary manslaughter, and brings error. Reversed.

A. G. & Julian B. McCurry, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

LEWIS, J. John Pugh was indicted and tried for the murder of Gus Prather. The evidence was very conflicting. That for the state tended to show a case of deliberate murder, preceded by threats that the defendant would take the life of the deceased when they met, and an effort to seek out the deceased for the purpose of killing him. That for the defendant was to the effect that the deceased fired two shots at the defendant before the defendant drew his weapon, and that it was necessary for the defendant to kill the deceased in order to save his own life. The jury returned a verdict finding the defendant guilty of voluntary manslaughter. The defendant moved for a new trial on various grounds, the important ones of which will be taken up in due order. The court below overruled the motion, and the defendant excepted.

1. Complaint is made in the motion that the court erred in the following charge: "A bare fear of any of those offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were such as to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.

If a person kill another in his defense, it must appear that at the time of the killing the danger was so urgent and pressing that in order to save his own life the killing of the other was absolutely necessary. It must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." The language quoted is that embraced in sections 71 and 73 of the Penal Code, and it is objected that this charge deprived the defendant of the right to rely upon justification of the killing under the fears of a reasonable man, and not in a spirit of revenge, and placed his defense solely upon the ground that the killing was necessary to prevent the commission of a felony. The precise question here made was decided by this court in the case of *Teasley v. State*, 104 Ga. 738, 30 S. E. 938, where a charge almost identical in phraseology with the one heretofore quoted in this opinion was given by the trial court, and objected to by the plaintiff in error. It is also to be noted that the facts of the case cited are very similar to those of the case at bar, and that the assignment of error in each case is the same. The principle ruled in that case is therefore directly applicable to the case under consideration. The language of the headnote, which has been partially followed in the first headnote of the present case, is as follows: "The law embraced in section 73 of the Penal Code does not qualify or limit the law of justifiable homicide as laid down in sections 70 and 71 of that Code. The section first mentioned applies exclusively to cases of self-defense from danger to life arising during the progress of a fight wherein both parties had been at fault. The other two sections are applicable when the homicide is committed in good faith to prevent the perpetration of any of the offenses mentioned in section 70, or under the fears of a reasonable man that such an offense will be perpetrated unless the person who is actually or apparently about to commit it, be slain. Instructions as to these two separate branches of the law of justifiable homicide should not be so given as to confuse the one with the other." We do not see that anything could be added to the language quoted, which

clearly states the law on this subject, and which demonstrates that the court below erred in the charge to which exception is made. See, in this connection, *Powell v. State*, 101 Ga. 11 (6), 29 S. E. 309, 65 Am. St. Rep. 277; *Dover v. State*, 109 Ga. 498 (5), 34 S. E. 1030; *Ragland v. State*, 111 Ga. 217, 36 S. E. 682; *Mell v. State*, 112 Ga. 78, 37 S. E. 121; *Moultrie v. State*, 112 Ga. 121, 37 S. E. 122.

2. The record before us discloses two distinct and widely different theories. That of the state, supported by the evidence of several witnesses, was that the defendant had an old grudge against the deceased, sought him out, and deliberately murdered him; that on the day before the killing he made frequent inquiries for the deceased, announcing his intention of killing him when they should meet, and declaring that he would "carry Gus' name home on his pistol barrel"; and that in furtherance of this intention he picked a quarrel with the deceased when they met, and shot him down. On the other hand, witnesses for the defendant swore that the quarrel which immediately preceded the homicide was provoked by the deceased; that the deceased drew a pistol and fired twice at the defendant before the latter began firing; and that the killing was absolutely necessary to save the defendant's life. In the first view of the case, the defendant was guilty of murder; in the second, the homicide was entirely justifiable, and the accused was entitled to an acquittal. In no view which can be taken of the evidence did voluntary manslaughter enter into the case. There is in the defense of the accused no suggestion of the sudden heat of passion, supposed to be irresistible, which is an element of manslaughter. Two hypotheses, and only two, are admissible. The defendant is either guilty of murder, or he is guilty of nothing at all. It was therefore error for the judge to give in charge to the jury the law relating to voluntary manslaughter, and, the defendant having been convicted of that offense, his exception to that portion of the charge of the court is well taken, and will be sustained. *Robinson v. State*, 106 Ga. 506, 34 S. E. 1017.

Judgment reversed. All the justices concurring.

(114 Ga. 112)

WALTON v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—EVIDENCE.

1. The charge complained of in the motion for new trial, upon the offense of assault with intent to murder, was fully in accord with the law as laid down by this court. It left the question of intention to kill entirely with the jury. *Gilbert v. State*, 16 S. E. 652, 90 Ga. 691; *Gallery v. State*, 17 S. E. 863, 92 Ga. 463.

2. There was no error in failing to charge upon the right of the city marshal to arrest the accused, inasmuch as the evidence for the state showed that no arrest was attempted when the shots were fired, and the accused, in his statement, said that he did not shoot at the marshal, but at another person.

3. The evidence was amply sufficient to sustain the verdict, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Butts county; *E. J. Reagan*, Judge.

Josh Walton was convicted of assault with intent to kill, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 176)

WHEATLEY v. STATE.

(Supreme Court of Georgia. Nov. 9, 1901.)

WITNESS BEFORE GRAND JURY—CRIMINATING EVIDENCE.

Under the rulings made by this court in *Higdon v. Heard*, 14 Ga. 255, and *Kneeland v. State*, 62 Ga. 385, a witness before a grand jury, investigating a charge of gaming preferred against another, may be compelled to answer whether he has seen the latter play and bet at cards for money, in the county wherein the jury is sitting, within two years prior to the inquiry, and this is so although the testimony of such witness may relate to an act of gaming in which the witness himself criminally participated.

(Syllabus by the Court.)

Error from superior court, Sumter county; *Z. A. Littlejohn*, Judge.

J. C. Wheatley was convicted of crime, and brings error. Affirmed.

J. H. Lumpkin and E. A. Hawkins, for plaintiff in error. F. A. Hooker, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

Upon a review of the cases cited supra, four of the justices of this court (*LUMPKIN*, P. J., and *FISH*, *COBB*, and *LEWIS*, JJ.) are of the opinion that the decisions therein to the effect above indicated should be overruled, but, as this cannot be done without the concurrence of at least five justices, the doctrine of those cases must stand

as good law, binding upon the entire court. For this reason alone, the four justices herein named concur in the judgment.

(114 Ga. 6)

BROOKS v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

MURDER—ARREST WITHOUT WARRANT—CONTEMPT—NEW TRIAL—EVIDENCE.

1. If a policeman, at a late hour of the night, hear a pistol shot within two blocks of his beat, and immediately thereafter discover a man running from the direction of the shot and towards him, he has a right to arrest him without a warrant. Where, under such circumstances, the officer attempts to make the arrest, and is shot and killed by the person whom he is seeking to arrest, the offense is murder, and not manslaughter; especially where the slayer has in fact fired the shot first heard, and has thereby wounded another.

2. When a person, without a warrant, illegally arrests a witness in attendance upon a court, who has been examined, but not discharged, it is not error for the judge, before the trial is concluded, but out of the hearing of the jury, to try and punish such person for a contempt of court.

3. Grounds of a motion for a new trial, not approved by the trial judge, cannot be considered by this court.

4. The evidence warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; *R. Falligant*, Judge.

Henry Brooks was convicted of murder, and appeals. Affirmed.

Twiggs & Oliver, for plaintiff in error. W. W. Osborne, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, O. J. It appears from the record that Fender, a policeman in the city of Savannah, while on duty, heard a pistol shot two blocks from the street which he was patrolling. Immediately thereafter he saw a person running towards him from the direction in which the pistol had been fired. Fender was in the uniform of a policeman, and approached and attempted to arrest the runner, when he was shot and killed by that person. Brooks, the plaintiff in error, was subsequently arrested, and was indicted, tried, and convicted of the murder. There was considerable circumstantial evidence, which tended to establish that Brooks was the person who shot the policeman, and the direct testimony of one witness to that effect. It was proven that Brooks had shot a man by the name of Burns two blocks away from where Fender was killed, and that immediately after shooting Burns, which was at about 2 o'clock in the morning, Brooks ran in the direction of Fender. Brooks was arrested a few minutes after Fender was shot. After conviction Brooks made a motion for a new trial. This was overruled, and he excepted.

1. One of the grounds of the motion for a new trial complains that the trial judge erred in not giving in charge to the jury the law of the offense of manslaughter. This ground does not allege that there was any request that the judge should charge upon this subject. This court does not look upon such complaints with much favor. It is the duty of counsel in the trial of a case to assist the court in arriving at correct conclusions in his charge. Counsel ought not to sit by and allow the court to commit error, if, by a proper request, he could correct it. This practice upon the part of counsel seems to be growing. Many motions for new trial are full of these complaints,—the failure of the judge to charge certain things which are merely incidental to the main questions in the case. But, treating this ground as a refusal on the part of the court to charge the law of manslaughter, was it error? Under the facts of the case, we think this was not error. The deceased was a policeman in the city of Savannah, and therefore an officer of the state. He was in the discharge of his duty, walking his beat, at about 2 o'clock in the morning. He heard a pistol shot. Immediately thereafter he heard a person running towards him from the direction in which he had heard the shot. He intercepted the fugitive, and attempted to arrest him, and was shot to death. He was dressed in his policeman's uniform, and was near enough to an electric light for the slayer to see that he was a policeman. The policeman, in our opinion, had the right to arrest the fugitive without a warrant. Having heard the shot, and seen a person apparently fleeing from the place where the shot had been fired, he had reasonable grounds to suspect that an offense against the laws of the state or of the municipality had been committed, and that the fugitive had committed it. Pen. Code, § 896, provides that "an arrest may be made for a crime by an officer * * * without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant." While the policeman did not actually see the pistol fired, yet he heard the report, and immediately afterwards heard footsteps, and saw Brooks running towards him. It is not necessary that an officer should actually see the offense committed before he can arrest without a warrant. If he hears such a noise as leads him reasonably to believe that an offense has been committed, the offense is, under the law, committed in his presence. See *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613, and cases cited. Moreover, it appears that the accused was running when he was intercepted by the officer. He had committed an offense against the laws of the city and of the state, and was endeavoring to escape. We say he was endeavoring to escape, because, when intercepted, he was running

from the scene of the shooting. At 2 or 3 o'clock in the morning there was no opportunity for the officer to obtain a warrant in time to arrest the fleeing offender. Had he stopped the pursuit, and gone to a magistrate to obtain a warrant, the offender would certainly have escaped for the time being, and possibly for good and all. Under such circumstances the officer had a right to arrest, and the arrest, if made, would have been legal. The accused had no right to resist a legal arrest, but should have submitted. When an officer is shot and killed by one whom he is seeking legally to arrest, the offense is murder, and not manslaughter. All the cases and text-books, so far as we know, lay this down as the law. It is especially true in a case like the present, where it appears that the fugitive had actually shot another, and was running away from the place of the shooting. It was therefore not error to fail or refuse to charge upon the subject of manslaughter in this case.

2. Pending the trial of the accused, a witness by the name of Patterson was sought to be impeached by a record from the courts of South Carolina. In order to show that he was the person referred to in such record, it was necessary that he should be identified by certain witnesses from South Carolina. One of these appears to have been a sheriff of that state, who had obtained a requisition for Patterson from the governor of South Carolina. The governor of this state, however, had never issued his warrant authorizing the arrest. After Patterson had been examined, he was excused, but not discharged, from attendance upon the court. As he left the court room, the South Carolina sheriff, without a warrant, arrested him. When the attention of the judge was called to this matter, he sent the jury to a room upon an upper floor, and tried the sheriff for contempt of court. This action of the court is complained of in the motion for new trial. It appears from the record that the jury did not and could not have heard the trial for contempt. Even if they had, we do not see how it could have affected the rights of the accused any more than where the judge punishes for a contempt committed in his presence any other person in attendance upon the court. It was argued here that the jury might have heard it, and have come to the conclusion that the judge was in favor of Patterson, and was protecting him, when counsel had announced an intention to impeach him; but we think that the action of the judge cannot be held to have had such a tendency. It is true that Patterson fled shortly after his release, but the record shows that the South Carolina witnesses saw and identified him fully before he fled, and that they testified as to his identity.

3. There were several other special grounds in the motion, which were either not approved at all by the trial judge or so ex-

plained and modified by him as to make it obvious that there was no merit in them. Grounds not approved by the trial judge cannot be considered by this court. Grounds in which, as originally made, there would seem to be error, must be considered in connection with such explanations and modifications as the trial judge may make in approving them. Such explanations and modifications may, and frequently do, show that there was no error in the ruling of which complaint is made.

4. The theory of defense mainly relied upon here was that the accused was not the person who shot the policeman, and that the verdict was contrary to law and the evidence. We have carefully read and studied the evidence in the record, and have come to the conclusion that it was sufficient to authorize the verdict. The accused had shot Burns two blocks away from the policeman. The latter intercepted him, and tried to arrest him, when he shot and killed the policeman. Patterson did not assist the policeman, nor call any other officer at the time, because he said he did not know at the time that the deceased was wounded, as he, when shot, did not fall, but started in pursuit of the accused. It appears that the homicide was reported in the morning papers, and that Patterson, when he had seen this, reported what he had seen to one of the policemen of the city. An attempt was made to impeach Patterson, but his credibility was for the jury to determine. Besides Patterson's evidence, there was considerable circumstantial evidence tending to show the guilt of the accused. If the state's evidence was true,—and the jury seem to have believed it,—the accused was guilty. On the whole we think that the trial judge did not abuse his discretion in refusing a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 58)

HARDIN v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

PROFANE LANGUAGE—EVIDENCE.

There being no evidence that the profane language alleged to have been used by the defendant in the presence of females was without provocation, or that the defendant knew of the proximity of the females, his conviction was contrary to law.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Ed Hardin was convicted of using profane language in the presence of a female, and brings error. Reversed.

Persons & Persons, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

LEWIS, J. The plaintiff in error was convicted in the city court of Forsyth of the of-

fense of using obscene and profane language in the presence of females. The judge of the superior court of Monroe county refused to sanction his petition for certiorari, and he brought the case to this court by bill of exceptions.

There is no conflict in the evidence appearing in the petition for certiorari. Several witnesses for the state swore that, on the occasion of a Christmas tree gathering in Monroe county, after the exercises were over a number of those present went outside the building where the exercises were held, for the purpose of hitching up their teams to return home. In the party were three ladies. The defendant passed by where they were, and went on a distance of 50 or 75 yards, in the direction of a gin house. There were others with the defendant, and when they got to the gin house the defendant was distinctly heard to use certain profane language. The profanity was used in a loud tone, and could be plainly heard by the witnesses, and presumably by the ladies, who were not introduced as witnesses, but who, it was shown, were not deaf. The time was near midnight, and it was very dark, but all the witnesses identified the defendant by his voice, and one of them identified him by means of a lantern which the defendant had in his hand at the time the profanity was used. All the witnesses (none of whom were nearer to the defendant than 50 or 75 yards at the time) swore that they did not know why he used the profane language. It was not shown that the defendant knew that any ladies were within hearing distance at the time the language was used. The defendant introduced no witnesses and made no statement.

Pen. Code, § 396, declares that any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, etc., shall be guilty of a misdemeanor. Under this law, in order to sustain a conviction for the offense of using opprobrious words to or of another, it must clearly appear that the words were used without provocation, and by the use of the words "in like manner" the legislature clearly expressed an intention that the same rule should apply in cases of using obscene, vulgar, or profane language in the presence of a female. Applying to this law the well-established rule of strict construction for penal statutes, this court had held, in the case of *Fuller v. State*, 72 Ga. 213, that "under an indictment for using opprobrious words it is incumbent on the state to allege and prove that such words were used without provocation. Proof of the use of opprobrious words alone is not sufficient, without showing the circumstances or in any way proving want of provocation."

In the present case no effort was made by the state to show that the profane language used was without provocation, and hence the Fuller Case is squarely in point.

The state also failed to prove that the defendant knew of the proximity of any females when he used the profane language which the witnesses testified to having heard. It is true that he passed near them on his way to the gin house, but the night was very dark, and no presumption arises that he saw them. It is also worthy of notice that when the defendant passed the party in which the ladies were the men were engaged in hitching up their horses, and from aught that appears he might well have concluded that the party had driven away by the time he arrived at the place where the profane language was used. In the case of *Parks v. State*, 110 Ga. 761, 86 S. E. 73, where this identical question arose, Mr. Justice Cobb used the following language: "While the evidence in this case amply supported a finding that the accused used the language charged in the accusation, it was not sufficient to authorize a finding that when he used the same he knew a female was within hearing, or that he used the same under such circumstances that he must have known this fact. It is true the language was used on a public road, near a dwelling house, and that a female was in the house, and heard the language, but it does not appear that the accused knew who constituted the members of the household of the man who owned the house. Taking the evidence as a whole, it did not warrant the conviction of the accused of the offense charged in the accusation." The sentence last quoted is thoroughly applicable to the case under consideration, and it follows that the refusal of the court below to sanction the defendant's petition for certiorari was error.

Judgment reversed. All the justices concurring.

(114 Ga. 174)

DANNENBERG v. MAYOR, ETC., OF CITY OF MACON et al.

(Supreme Court of Georgia. Nov. 8, 1901.)

MUNICIPAL CORPORATIONS—ENCROACHMENT ON STREET—DISCRETION.

1. The charter of the city of Macon confers upon the corporate authorities of such city the power, in their discretion, to grant encroachments upon its streets, but it is required that the city authorities should pay "due regard to the interests of property holders who are affected" by an encroachment granted in a given case. *Kirtland v. City of Macon*, 66 Ga. 385; *Daly v. Railroad Co.*, 7 S. E. 146, 80 Ga. 793, 12 Am. St. Rep. 283.

2. The record in the present case does not disclose such an abuse of discretion, either on the part of the corporate authorities of the city of Macon or of the judge whose decision is under review, as would authorize this court to

reverse his judgment refusing to grant an injunction to prevent the city authorities from carrying into effect the ordinance granting an encroachment upon one of the streets of the city.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by Joseph Dannenberg against the mayor and council of the city of Macon and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hardeman, Davis, Turner & Jones, for plaintiff in error. Minter Wimberly, Roland Ellis, and Spencer R. Atkinson, for defendants in error.

PER CURIAM. Judgment affirmed.

TAYLOR v. STATE.

(114 Ga. 73)

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—ERROR—INSTRUCTIONS.

The requests to charge were fully covered by the general instructions given the jury; the charges excepted to were free from error; there was no error in admitting evidence, nor in the omissions to charge excepted to; and the verdict was warranted by the testimony.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Mitchell Taylor was convicted of crime, and brings error. Affirmed.

T. T. Miller and E. J. Winn, for plaintiff in error. S. P. Gilbert, Sol. Gen., J. M. Terrell, Atty. Gen., and G. Y. Tigner, for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 115)

FLOWERS v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

CRIMINAL LAW—APPEAL—REVIEW.

1. There being clear and positive proof that a riot was committed, and sufficient evidence to warrant a finding that the accused participated therein, the verdict will be allowed to stand.

2. Points made, but not argued, will be treated as having been abandoned. *Moss v. Bohanon*, 36 S. E. 954, 111 Ga. 871.

(Syllabus by the Court.)

Error from city court of La Grange; F. M. Longley, Judge.

John Flowers was convicted of riot, and brings error. Affirmed.

D. J. Gaffney, for plaintiff in error. A. H. Thompson, for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 36)

ELLIS v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

CRIMINAL LAW—NEW TRIAL—EXCUSING JURORS.

1. While, as a general rule, persons who have been duly drawn and summoned, and who are subject to serve as jurors, should not be excused from service because of private business, yet where it appears that, of the number of persons who are duly summoned to so appear and serve, there is an excess of the number required by law for jury service, it is not cause for a new trial that the trial judge, for any reason satisfactory to himself, excused one of the number not so required.

2. Under the assignments set out in the motion, it does not appear that the trial judge committed any error which would authorize the grant of a new trial, and the evidence was amply sufficient to support the verdict.

(Syllabus by the Court.)

Error from superior court, Sumter county. Gabe Ellis was convicted of crime, and brings error. Affirmed.

Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LITTLE, J. The plaintiff in error was by the grand jury of Sumter county indicted for the offense of incestuous adultery. He was tried and convicted, and to the overruling of a motion for new trial made by him he excepted.

It was contended by counsel for plaintiff in error that the judge had no legal power to excuse from service a juror who had been drawn and summoned, on the ground that such service would interfere with the private business of the person so drawn, and that the failure of the trial judge to sustain the challenge to the array of jurors made in this case by the defendant at the time of his arraignment presents this question for determination. An examination of the challenge shows, however, that this question is not raised by the challenge in such a way that it can be passed upon by this court, so as to have any binding effect. The challenge recites the fact that R. L. McLeod and 47 other named persons were duly drawn and summoned as jurors for the third week of the May term of Sumter superior court; and it alleges that these persons were legally drawn and summoned, and were qualified to serve as jurors for that week. It further alleges that the presiding judge excused R. L. McLeod, one of the persons drawn for service, on his application, and because of the statement by him that he would suffer loss in his business if required to serve, which, it is alleged, was not a lawful excuse; and the defendant insisted in said challenge that McLeod should, under the law, have been impaneled and put on the defendant, and, because he was not, the panel which was put upon him was not a legal one.

Section 852 of the Penal Code, in effect, de-

39 S.E.—56

clares that the names of the persons selected by the jury commissioners as prescribed by law shall be placed on separate tickets in the jury box, and that the judge shall draw therefrom 36 names to serve as a petit jury for the trial of civil and criminal cases, and that they shall be summoned in the regular manner. The succeeding section declares that from the number so drawn the judge shall have made up two panels, of 12 jurors each. Section 853 of the same Code prescribes that, when any person shall stand indicted for a felony, the court shall have impaneled 48 jurors, 24 of whom shall be taken from two panels of the petit jurors, from which to select the jury, while the succeeding section gives the presiding judge authority to draw from the box talesmen necessary to fill up the panel, or he may order a sufficient number of such to be summoned by the sheriff. So that in the case of the trial of a felony the 48 jurors who are put upon the accused shall consist of the two panels of jurors regularly organized by the court, and 24 jurors drawn from the box or summoned by the sheriff. The challenge in this case complained that there were 48 jurors summoned to appear at the court, and that the judge improperly excused 1 of this number. It does not appear from the words of the challenge that these 48 jurors were summoned for the purpose of organizing the two panels of petit or traverse jurors required in the organization of the court. But, if we assume that this was the purpose, and that the two panels prescribed by the statute were to be organized from this body of 48, then 12 more were drawn than were necessary, as only 36 are by the statute required. So the number set out in the challenge exceeds that required by law, and practically 12 of the persons named had been unnecessarily drawn and summoned for the organization of the court. Certainly, if this was the case, no legal right of the defendant would have been infringed had the judge excused 12 of this number for any reason satisfactory to himself; and, as he might have properly excused 12, it could not have been improper to excuse 1. Nor is it material which particular 1 or which particular 12 of the whole number were excused under these circumstances; for, as to regularity in having been drawn and summoned, they were all on the same legal footing, and the defendant had no right to have the panels made up from any particular 36 persons of the number drawn. If, on the other hand, we are to treat the 48 names as of persons drawn to serve as talesmen, then the reply to the point made in the challenge is furnished by section 853, which requires that in the trial of a felony the jurors put upon the prisoner shall consist, first, of the two regular panels, aggregating 24, and 24 additional jurors; and, if the 48 names mentioned in the challenge were drawn as tales jurors.

24 of them would not be needed to make up the panel of 48 to which the defendant was entitled on his trial, he being charged with the commission of a felony. Not being required, they could, of course, have been individually or collectively excused and discharged by the trial judge, in his discretion. So the question whether the presiding judge has the right to excuse a person lawfully summoned to serve as a juror, on account of his business, is not made; and, although presented and asked to be decided in the brief, a decision of that question in the present case would be obiter. Take everything stated in the challenge to be true, and it follows from the provisions of the law to which we have referred that, of the 48 jurors named in the challenge, either, in the one case, 12, or, in the other, 24, of this number, were in excess of the number required by law; and under such circumstances the action of the trial judge in excluding 12 or 24, as the case might be, would be entirely proper. Therefore it cannot be said, under the circumstances set out, that the judge, by excusing McLeod, infringed in any way upon the right of the defendant to have the full panel of jurors, as drawn and summoned, put on him at the trial. Necessarily the judge, in the organization of the court, and in forming the panels of jurors, must be allowed a very wide discretion to meet existing conditions; and, in passing upon the application of citizens drawn to serve on the jury, that discretion, in determining whether a particular person shall be excused for providential or other causes which stand upon the same footing, will not ordinarily be deemed to have been abused. We are free to say, however, that in our opinion the fact that the business of a particular person would be injuriously affected by his service does not come within any class of legal excuses. In the interest of the body of citizens, the public duty is by law placed upon each of those who have been selected to form in part the tribunal which under our system determines the property rights of litigants, and the personal liberty of persons charged with crime. As a rule, those who have been selected according to law to discharge the important functions of jurors should serve; and, as a general rule, it is the right of a party, in having his cause determined by a jury, to have that jury from a panel composed of the persons regularly drawn and summoned under the provisions of the statute, unless from necessity it is otherwise made up according to the statute. But whether or not a failure on the part of the trial judge to require one of such persons to serve on the jury, when no adequate reason has been presented why he should not do so, injuriously affects that right

of a party, is not so made in this case that it may be specifically decided.

2. Several other grounds are set out in the motion for a new trial as affording reasons why the judge erred in refusing to grant the motion. None of these are, in our opinion, sufficient to authorize a reversal of the judgment overruling the motion. As set out therein, legal exceptions under established rules are not made to certain of the rulings complained of, and they cannot, therefore, be considered, even if erroneous. Others, not subject to the same objection, are found not to have been erroneous. It is alleged in one of the grounds that the court erred in the manner in which a request to charge the jury was given; but, under the note relating thereto appended by the judge, the irregularity of reading the request and following it with a charge, without more, was not so material as to require the reversal of the judgment. Still other grounds of the motion were not certified to be true, and have not been considered.

An examination of the brief of evidence in the case shows that there was evidence sufficient to sustain the conviction, and, inasmuch as no error of law is made to appear, the judgment overruling the motion for a new trial is affirmed. All the justices concurring.

(114 Ga. 178)

SOUTHERN RY. CO. v. LOUGHRIDGE.

(Supreme Court of Georgia. Nov. 8, 1901.)

RAILROADS—KILLING STOCK ON TRACK—EVIDENCE—INSTRUCTIONS.

1. While the evidence of the defendant was sufficient to rebut the presumption of negligence which arose on proof of the killing of the animal by the operation of defendant's train, there was evidence on the part of the plaintiff tending to show that the company was negligent at the time of the killing. The question whether the company was negligent was for the jury. (a) There was sufficient evidence to support the verdict.

2. If there was any error in the charge complained of, it was not, under the facts of this case, sufficient to disturb the verdict.

3. The failure to charge, of which complaint was made, was not, in the absence of a request so to charge, error.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by M. B. Loughridge against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, for plaintiff in error. W. E. Mann and J. B. Terry, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 183)

SOUTHERN RY. CO. v. GRESHAM.

(Supreme Court of Georgia. Nov. 9, 1901.)

TRIAL—OPENING AND CLOSE—INSTRUCTIONS—ARREST OF PASSENGER—MEASURE OF DAMAGES—CONCEALMENT ON TRAIN—JURISDICTION.

1. Even if an answer to a petition admits sufficient facts to entitle the plaintiff *prima facie* to a recovery, it is not erroneous to refuse to allow the defendant to open and conclude the argument, when no request to do so is presented until after the testimony on both sides has been closed.

2. It is erroneous for a trial judge to charge the jury upon issues not made by the pleadings or evidence in the case on trial; and where this is done, when the evidence is conflicting on the issues really involved, in a way which may mislead the jury, it is cause for a new trial. (a) Where the questions raised were whether the conductor or other authorities on a railroad train had improperly arrested, misused, and maltreated the plaintiff, and no question as to the propriety or impropriety of ejecting him from the train was, under the evidence, involved, a charge which injected this issue into the case was erroneous.

3. Where, in the trial of a case, evidence has been introduced tending to show that mental and physical pain has resulted from the wrongful act, to recover damages for which the action was instituted, it is not error to instruct the jury that there is no fixed rule for computing damages of this nature, but that the same are left to the enlightened conscience and intelligence of impartial jurors.

4. An attempt to steal a ride by concealing one's self on a moving train of cars is a misdemeanor, and the conductor is by law authorized to cause a person guilty thereof to be arrested. Where, in a given case, the conduct of the passenger is such as to afford reasonable ground and probable cause for believing that one is violating this law, his arrest by the conductor does not render the railroad company liable, although it be shown that the person was not, as a matter of fact, violating or attempting to violate the statute. (a) The court erred in refusing to charge a request containing the above legal proposition. (b) There was in the present case sufficient evidence to find that the plaintiff was actually violating the law in this regard. Though attempt at concealment is one of the essential elements of the offense, there is in the record sufficient evidence to establish the fact that the plaintiff attempted to conceal himself on the train.

5. The refusal to give in charge the other requests specified was not error.

6. The point that the trial court was without jurisdiction is (certainly as to some of the alleged causes on which the right of recovery is predicated) without merit, and, not having been raised by a proper plea or motion in the court below, will not be considered, when presented in this court, as a meritorious ground for a new trial.

(Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by Charles Gresham, by his next friend, against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Shumate & Maddox, Geo. A. H. Harris, and Mr. Chamlee, for plaintiff in error. Fouché & Fouché and McHenry & Maddox, for defendant in error.

LITTLE, J. Gresham, by his next friend, brought suit against the railroad company for injuries he claims to have sustained by the wrongful action of certain employees of the company. The action was seemingly instituted to recover damages for a malicious arrest and malicious prosecution, and for abuse of the person of plaintiff while under arrest. There was a general denial of the allegation that plaintiff was maltreated while under arrest, and an admission of the arrest, and a justification of the same on the ground that the plaintiff was violating one of the statutes of this state in attempting to steal a ride upon the train; and that the prosecution was with probable cause and in reasonable time. Hence a material question was whether the plaintiff was stealing a ride on the train of the company or not. The trial resulted in a verdict for the plaintiff for the sum of \$2,000. The company made a motion for a new trial on a number of grounds. Those alleging that the verdict was contrary to the evidence, without evidence to support it, contrary to law, and excessive in amount, are not dealt with here, because, under the rulings made, the case must be again tried. The evidence is voluminous, and, for the reason above stated, it is not necessary that it should be reported. Other than the general grounds of the motion, the questions raised in the application for a new trial are dealt with in the headnotes above, and need no elaboration to establish the principles which they contain. They are sufficiently full to give direction at another trial on the points of law to which they apply, and cover a consideration of the errors assigned other than those with which it is not now necessary to deal.

Judgment reversed. All the justices concurring.

(114 Ga. 10)

LAWS et al. v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

MURDER—SUFFICIENCY OF EVIDENCE.

The evidence in this case being entirely circumstantial, and not sufficiently strong to establish beyond a reasonable doubt the guilt of the accused, or to exclude every reasonable hypothesis except that the defendants committed the crime with which they were charged, the trial judge erred in not granting a new trial on the ground that the verdict was not supported by the evidence.

(Syllabus by the Court.)

Error from superior court, Henry county; E. J. Reagan, Judge.

Dick Laws and others were convicted of murder, and bring error. Reversed.

Searcy & Boyd and E. M. Smith, for plaintiffs in error. O. H. B. Bloodworth, Sol. Gen., R. I. Daniel, and J. M. Terrell, Atty. Gen., for the State.

LITTLE, J. Dick Laws and Ben Laws, together with one Bill Young, were by the grand jury of Henry county indicted for the murder of Jack Gray, at a term of that court previous to that at which they were tried and convicted. Bill Young theretofore had been put on trial separately from Dick and Ben Laws, and was convicted. He made a motion for a new trial, which having been overruled, he sued out a bill of exceptions, assigning as error on the part of the trial judge the overruling of the same. His case was heard in this court at the October term, 1900 (see 112 Ga. 765, 38 S. E. 79), and the judgment of the court below was affirmed. The evidence was entirely circumstantial, but, on a close and careful examination of the record in that case, this court was of the opinion that the evidence contained therein was sufficient to sustain the verdict, and to exclude every other reasonable hypothesis but that Young, in connection with others, killed the deceased, and that the offense was murder. It was the theory of the state in that case, as well as in the case at bar, that Young, together with the plaintiffs in error and perhaps others, were engaged with the deceased in playing cards during the night in which the killing took place, in the woods, not far distant from the railroad track; that they there got into an altercation, when Gray was killed, and his body carried from the woods to a point on the railroad track, and left there, for the purpose of inducing the belief that he was killed by a passing train. The evidence in the case of Young, as well as in this case, was sufficient to authorize the jury to find that Gray was killed and his body was disposed of in the manner indicated. It clearly showed that a number of persons were gaming at the point indicated the night Gray was killed, and Young, as well as these plaintiffs in error, were seen in company with the deceased, going in the direction of the woods in the early part of the night. While these circumstances alone were not sufficient to support a verdict finding Young guilty as charged, evidence of other facts appeared on his trial which as we think placed his guilt beyond a reasonable doubt. It was shown that four persons entered these woods together; that there was an altercation there; that three persons came out from the woods, going in the direction of the railroad track; that the relative position of their tracks indicated that these three persons were jointly carrying some heavy burden; they indicated also that two persons were walking in the same direction two or three feet apart, opposite each other, and that one was on a line between these two, either in front or in the rear, and, while these tracks were not traced to the point where the body was found, they were directly traced to the public road adjacent to the railroad, and within a short distance from where it was found; that they could not be traced further

because of the character of the ground. It was further proved by persons on trains which passed during the night, and who were in position to know, that no object was struck by the locomotive or cars passing the place where the body was found, and from the character of the wounds on the body of the deceased the jury were fully authorized to determine that the deceased had not been killed by a passing train, but that he was killed in the woods, and his body placed on or near the railroad track. This fact having been established, it was then satisfactorily shown that the tracks of one of the persons which came from the woods, and inferentially bearing a burden, were made by Young. The proof that Young was one of these parties was perhaps as well established as such fact could have been by this character of evidence. In addition to these facts, a reflecting lamp, belonging to Young, which he took from his place when the party left town to go to the woods, was found near where the altercation appeared to have taken place; thus almost conclusively showing his presence. In addition to these circumstances, it was also shown that Young was absent from his home all night; that he came in quite early, drunk; that he had a pack of cards, and attempted to burn them; that he was very much excited, and expressed a fear that he was going to be mobbed, and used to different persons language which indicated that he was in trouble brought on by some act of his, for which he feared punishment, or, rather, that he might be summarily dealt with. These, and other circumstances not named, were sufficient, in our judgment, to indicate Young's guilt, in connection with others.

The plaintiffs in error were tried under the same indictment, and found guilty, and, their motion for a new trial having been overruled, they are here asking for a reversal of that judgment. The evidence against them is sufficient to raise a suspicion of their guilt, but is not sufficiently strong to exclude the hypothesis of their innocence. Undoubtedly they were, some time during the night, at the place where the gaming was going on. This fact they did not deny. But the circumstances are not sufficient to clearly raise the inference that they, or either of them, assisted in carrying the body from the woods. It is true that the tracks going out of the woods, other than Young's, were of a size approximating those of the two defendants, but the evidence does not at all clearly show that the tracks were made by them, nor that they could not have been made by many other persons in the community. They insisted that while they were near the place where, in all human probability, the deceased was killed, they were neither participating in the game, nor was there any altercation while they were there, but that they left the party engaged in a game, in a different direction,

and passed through the woods at a different point, from those who were engaged with Young in carrying the body to the railroad, and evidence was introduced showing the tracks of two persons leaving the woods at the point indicated by them. So that, if this conviction is allowed to stand, it can be supported only by the facts that the accused and others were with the deceased the night before he was killed; that with him and others they went to the place where the parties were gaming, and remained there for some time. While these and perhaps other facts which were shown on the trial were sufficient to raise the suspicion that plaintiffs in error were in some way implicated, they are not sufficient, in our judgment, to sustain a finding that they participated in the homicide. The presumption would naturally arise that the persons who carried the body to the railroad track were those properly chargeable with the homicide, and the evidence does not satisfactorily show that either of these plaintiffs in error were in that party; nor did any other fact pointing with reasonable certainty to the guilt of either of them appear in the evidence. Facts and incidents which appeared in Young's Case, and pointed directly to his guilt, were entirely absent in the case of these defendants. And as no additional facts were adduced which connected them with the crime, and pointed to their guilty participation in the homicide, it is our judgment that the trial judge should have ordered a new trial on that ground of the motion which sets out that the verdict was without sufficient evidence to support it.

Judgment reversed. All the justices concurring.

(114 Ga. 233)

FELLOWS v. STATE.

(Supreme Court of Georgia. Nov. 16, 1901.)

CRIMINAL LAW—NEWLY-DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE —NEW TRIAL.

1. Although newly-discovered evidence may tend to establish the truth of a material contention in direct support of which testimony was introduced at the trial, such evidence is not merely cumulative when it relates to a particular fact concerning which no witness had already testified. (a) Thus, where in a criminal trial the defense was alibi, and the accused introduced witnesses who testified that on the day of the commission of the crime they saw the accused in a county other than that in which it was perpetrated, he being on that day, according to the testimony of some of them, at one place in the county to which their testimony related, and according to the testimony of others of them at other places therein, and according to the testimony of all too far from the scene of the offense to have been possibly present at the time of its perpetration, newly-discovered testimony of still another witness, which placed the accused in the county where the other witnesses located him on the day in question at a different hour and place from any testified to by them, is not merely cumulative, though it, of course, tended, like the other tes-

timony, to establish the truth of the defense of alibi.

2. In a case of the nature above indicated, where at best the correctness of the verdict of guilty is to be most gravely doubted, and apparently there should have been a verdict of acquittal, a new trial should be granted upon such newly-discovered evidence, for under such circumstances it is most probable that upon another trial that evidence would, in connection with that which had been previously introduced, result in a verdict of not guilty.

3. Applying these rules to the present case, the court should have granted a new trial, for it appeared that there was no want of diligence in discovering the new evidence, which was of the character outlined above, and the showing made in respect thereto was in all respects legal and complete.

(Syllabus by the Court.)

Error from superior court, Jackson county, W. H. Felton, Jr., Judge.

Gus Fellows was convicted of crime, and brings error. Reversed.

J. A. B. Mahaffey and Shackelford & Shackelford, for plaintiff in error. C. H. Brand, Sol. Gen., and W. W. Stark, for the State.

LEWIS, J. Gus Fellows was arraigned in the superior court of Jackson county upon an indictment charging him with the offense of rape. The jury returned a verdict of guilty, with a recommendation to mercy. The accused made a motion for a new trial, which was overruled, and he excepted.

The victim of the alleged rape was introduced in behalf of the state, and testified as to the details of the crime. She identified the accused, and swore positively that he was the man who committed the rape, which she said took place in the immediate vicinity of her home, near Harmony Grove, in Jackson county. The cross-examination of this witness tended to show that she was a person of little intelligence, education, or experience, but did not impeach her credibility. It was shown by other testimony, however, that shortly after the accused was apprehended she was taken to the jail in Athens, where he was then confined, for the purpose of identifying him; that she pointed out another negro, in no way connected with the crime, as her assailant, and, when confronted by the accused, stated positively that he was not the man who had committed the crime; and that it was only after the accused had, at the instance of others, put on a coat which it was supposed had been worn by the guilty man at the time the crime was committed, that she finally identified him. Opposed to this evidence, the accused made out by the testimony of unimpeached witnesses, most of whom were not related to him either by blood or friendship, an alibi which was perfect in every particular, which showed him to have been 18 or 20 miles away from the scene of the crime at the time of its commission, and which, if the witnesses were to be believed, rendered it impossible for him to have been

gully of the offense as charged in the indictment. It is worthy of remark that, before any evidence tending to establish an alibi was introduced, the accused made his statement, in which he recounted in the minutest detail his whereabouts on the day the crime was committed; and this statement, in every essential particular, and in many of its trivial details, was completely corroborated by the witnesses who followed him. This statement was to the effect that the accused had had trouble with his wife a day or two previously to the day the crime was committed, and had beaten her; that, fearing that his wife would have him arrested, and get him into trouble, he decided to leave home, and visit the family of a relative, Ellen Nail, or Ellen Johnson (she seems from the record to have been called by both names), who lived about 18 miles distant in the adjoining county of Hall, near Gainesville; and that, in pursuance of this intention, he set out, early in the morning of the day the crime is alleged to have been committed, on the way to the home of this relative. In his hand he carried a small bundle containing sundry articles of clothing. He met several persons during the course of his journey, some of whom were known to him and some not. Part of the way he was allowed to ride in the rear of a wagon which overtook him on the road, and in this wagon were two men,—Amos Fuller and Homer Ogle,—neither of whom had previously known the accused. Arrived at the home of Ellen Nail, he remained there until about 9 o'clock in the morning, when he went, in company with his cousin, Gaines Johnson, a son of Ellen, to the home of a Mr. Kilgore, near by, to see if he could get work. Kilgore was not at home, but his wife and son both saw the accused, and the former directed him to return when her husband was at home, as she did not know whether he wanted to employ any one or not. This was between 9 and 10 o'clock, and according to the testimony of the state's witnesses the crime took place at about 10 o'clock at a place about 18 miles distant from the home of the Kilgores, and in another county. The accused then returned, according to his statement, to the home of Ellen Nail, where he remained until after dinner. In company with Gaines Johnson, he then set out on foot for Gainesville, where he remained until about 10 o'clock that night, returning to the home of his relatives, where he spent the night. Fearing arrest on account of the trouble with his wife, the accused had, throughout the day on which these occurrences took place, gone under the assumed name of William Winn. On the following day his brother, Aaron Fellows, came to where he was, and warned him that a posse was in pursuit of him, but said nothing about the commission of the rape which had been committed, and left the accused under the impression that he was wanted for beating his

wife. He then went into hiding, and on October 26th—two days after the commission of the crime—he was arrested, and lodged in jail. Such, in substance, was the statement of the accused. He gave the names of a number of people whom he had seen on the day of the crime, and without exception these witnesses corroborated his statement, and established his alibi. With two exceptions, these witnesses were not in any way related to the accused. Many of them had never seen him before the day on which the crime with which he is charged was committed, but were enabled, from one circumstance or another, to identify the accused as the man whom they had seen on that day, several miles distant from the scene of the crime. All of them identified him as a man who carried a small bundle, or bag, in his hands. Fuller and Ogle both testified as to the defendant having ridden for some distance in the rear of a wagon in which they were riding, and they were able to fix positively the date of the occurrence from the fact that they were on their way to Gainesville to get a coffin for the child of Fuller's brother, the child having died the day before. They also corroborated the accused in the trivial detail as to what greetings were exchanged between him and his cousin, Ellen Nail, when they met. Mrs. Kilgore and her son both testified that on the morning of the crime, between 9 and 10 o'clock, the accused, accompanied by Gaines Johnson, came to their house, and applied for work; the accused giving his name as William Winn. In like manner all the other details of the alibi were established by substantial proof. In rebuttal of this testimony the state offered evidence to the effect that the accused was seen in the vicinity of the place where the crime was committed about the time of its commission. This rebutting testimony was positive as to the identity of the accused, but was very inconsistent as to circumstantial details.

The motion was upon the general ground that the verdict was contrary to law and the evidence, and upon the further ground of newly-discovered evidence. This evidence is outlined in an affidavit of R. R. Hitchcock, as follows: "That on Wednesday, the 24th day of October, 1900,—the day Miss Dola Hood is said to have been raped at a turnip patch near the residence of Claud Scoggins,—deponent saw the defendant, Gus Fellows, six miles south of Gainesville, in Hall county, on the state road, two miles above Sugar Hill P. O., and about three hundred yards from Ellen Nail's; and it was between nine and ten o'clock a. m. This was about twenty miles from Harmony Grove. On the same day, about four o'clock p. m., deponent met the defendant, Gus Fellows, with Gaines Johnson, something like 1½ miles from Gainesville, south of Gainesville, and defendant was walking towards Gainesville. Deponent further swears that about or between

ten and eleven o'clock a. m. on the same day he saw Amos Fuller and Homer Ogle on said road with a coffin in a wagon. Deponent is positive of the day from examining his bills of cotton sold that day, and from examining a bill of goods bought that day, and he swears that it was Gus Fellows and the day stated, beyond all reasonable doubt. Deponent further swears that he never informed defendant nor either of his counsel until this day." This affidavit was supported by other affidavits to the effect that the accused and his counsel had used all diligence to discover testimony before the trial, and did not know anything about the evidence of Hitchcock, and that the affiant, Hitchcock, was a man of high character, and thoroughly worthy of belief. Upon the refusal of the court below to grant a new trial on the ground of this newly-discovered evidence the decision of the case in this court turns. The portion of the affidavit of Hitchcock in which he swears to having seen the accused about 4 o'clock in the afternoon on the day of the crime, in company with Gaines Johnson, was clearly cumulative, as Gaines Johnson himself testified that he was with the accused at the time and place mentioned; and it is also unnecessary to consider that portion which refers to the meeting of the deponent with Fuller and Ogle, as it merely corroborates testimony as to a particular fact to which other witnesses testified on the trial in the court below. But the first part of the affidavit, in which the deponent states that he saw the accused between 9 and 10 o'clock in the morning, presents a very different aspect. No witness on the trial testified to having seen the accused at that time and place. It is true that many witnesses gave testimony going to establish the defense of alibi, but each of these witnesses swore to a different fact or set of facts from that offered to be proven by the testimony of Hitchcock. For many reasons, which need not be here discussed, a jury might believe Hitchcock when they would not believe any of the other witnesses who testified to the ultimate fact of alibi. This evidence was clearly material to the issues in the case, and, if believed, ought to result in the acquittal of the accused. This case, we think, is directly controlled by the decision of this court in *Dale v. State*, 88 Ga. 552, 15 S. E. 287. In that case, as in this, the defense relied on was alibi, and, incidentally to that defense, a question arose as to the identity of the accused, who was indicted for bigamy as "J. O. H. Nutall, alias W. R. Dale," but who claimed that he and Nutall were entirely different persons, and that he had never borne the name of Nutall. The accused was convicted, and he moved for a new trial on the ground, among others, of newly-discovered evidence of witnesses who knew Nutall in North Carolina, and who, by means of certain distinguishing characteristics, were able to swear that, while Dale and Nutall were very much

alike, they were not one and the same man. On that point the same question was raised in the *Dale Case* as in the case now under consideration,—that the newly-discovered evidence was merely cumulative of the evidence offered by the defense on the subject of alibi. In that case our present chief justice, who delivered the opinion of the court, used the following language (see page 561, 88 Ga., and page 290, 15 S. E.): "Cumulative evidence is defined to be 'additional evidence offered to establish a fact to which witnesses have already testified.' It does not necessarily include all evidence which tends to establish the same ultimate or principally controverted fact. 1 Abb. Law Dict. 331, and cases cited. Although the defendant's evidence as to alibi related to the same general question, to wit, that of identity, this newly-discovered testimony, dealing as it does with the comparative appearance and characteristics of Nutall and the defendant, is wholly different in its nature; and, although there was other evidence on the latter subject, this testimony, especially that of Mrs. McCraney, as we have shown, relates to distinct facts as to which there was no evidence on the trial. It therefore cannot be regarded as merely cumulative within the meaning of the law as to new trials." See, also, *Cooper v. State*, 91 Ga. 362, 18 S. E. 303. Applying this rule to the present case, we think it clear that the accused was entitled to a new trial on the ground of this newly-discovered evidence; for while it tended to support the ultimate defense of alibi, to which many other witnesses had sworn on the trial, it was in no sense cumulative of any particular fact already proven going to make up that defense. On the contrary, it is evidence of a new fact, to which no other witness had sworn. It located the accused at a different place and time from that testified to by any other witness, and to that extent was a separate and distinct alibi. While it harmonizes entirely with all the other evidence introduced in behalf of the accused, it might be true independently of the truth of that other evidence. The principle of law here announced would of itself require the reversal of the judgment of the court below, but we take occasion to state in this connection that we the more readily give the case this direction on account of the very grave doubt existing in our minds of the possibility, under the record before us, of the guilt of the accused. The case made by the state was by no means strong. Opposed to it is the overwhelming testimony of a large number of witnesses, which, if worthy of belief, rendered it impossible for the accused to have committed the crime with which he is charged. It is inconceivable that such a defense as appears in this record could have been fabricated; and we are at a loss to understand how the jury could have disregarded evidence apparently so strong and convincing as that which supported the defense.

In view of all the circumstances of the case, we are convinced that the ends of justice require that the accused be given a new trial.

Judgment reversed. All the justices concurring.

(114 Ga. 146)

ATKINSON v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Nov. 7, 1901.)

CARRIERS—EXPULSION OF PASSENGER.

If a ticket seller of a railroad company sells a ticket for passage on a particular train, assuring the purchaser that the train will stop at the station at which he desires to alight, he may recover damages from the company if expelled from the train by the conductor solely on the ground that the train does not stop at the station in question, unless the purchaser knew or had reason to believe that the information given him by the ticket agent was incorrect, or that there was a rule or regulation of the company making the agent incompetent to give the information, or prohibiting the conductor from stopping the train at that station.

(Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by H. A. Atkinson against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Seaborn Wright, for plaintiff in error. Shunate & Maddox, Geo. A. H. Harris & Son, and R. L. Chamlee, for defendant in error.

COBB, J. The plaintiff sued the railway company for damages alleged to have been sustained on account of having been wrongfully expelled from one of its trains. Upon the trial it appeared from the testimony introduced in behalf of the plaintiff that he desired to go as a passenger upon one of the trains of the defendant from the city of Rome to a station called "Seney." When he went to the ticket office of the defendant, and informed the ticket agent that he desired to go to Seney, the agent told him that the train to Seney had gone. Upon his asking the agent when there would be another train to Seney, he was told that in about two or three hours there would be a freight train, which carried passengers, and upon which he could go. The agent then sold him a ticket to Seney, and stated that the ticket would be good on the freight train, which would arrive two or three hours later. Plaintiff then left the station, and returned later in the day. Upon the arrival of the freight train he again inquired of the ticket agent if that was the train on which he could go to Seney, and the agent told him that it was. He then boarded the train, and went into the caboose. When the train had moved forward from the station about 125 or 150 yards, the conductor asked plaintiff where he was going, and plaintiff replied to Seney; stating that the

agent had sold him a ticket to that point to be used on that train. The conductor then stated that he did not stop at Seney; that he did not see why the agent had sold a ticket to that point for that train, which did not carry passengers; that plaintiff could not go to Seney on that train; and that, if he attempted to do so, he (the conductor) would put him off. Plaintiff then returned to the station, and offered the agent his ticket, and requested that his money be refunded. The agent refused to redeem the ticket, and when plaintiff told him what the conductor had said the agent told him to go back, and get on the train, and go to Seney,—the train having stopped a short distance from the station. Plaintiff then returned to the train, and the conductor again informed him that he could not go to Seney on that train, whereupon plaintiff again returned to the agent, and requested that his money be refunded, which the agent refused to do. The ticket sold plaintiff was introduced in evidence, and appears to be a ticket which entitled the plaintiff to one first-class passage from Rome to Seney, but does not specify in any way what train it was to be used on, nor is there anything on it to indicate that it would not be good on freight trains. The only witness called by the defendant was the ticket agent. He denied the plaintiff's statements about his offer to surrender the ticket and request for the return of his money, and stated that he did offer to redeem the ticket, but that the plaintiff refused to allow him to do it. The agent further testified that he had nothing at all to do with the freight train, that the superintendent and train master had authority over it, and that the conductor was in sole charge. The witness admitted that he sold plaintiff the ticket to go to Seney on the freight train, and that he expected him to go on the train upon which the conductor refused to allow him to ride. Upon this state of facts the court directed a verdict for the defendant, and the plaintiff assigns error upon the direction of this verdict.

When a railroad company places an agent in charge of its business at a place where passengers are expected to board its trains, and authorizes such agent to sell tickets to passengers to be used when taking passage upon its trains, one who purchases from such an agent a ticket upon which there is no statement as to what trains it will or will not be good for passage upon has a right to presume that the agent is authorized by the company to give him information on this subject. When, therefore, the purchaser of such a ticket applies to the ticket agent for information as to what train or trains the ticket will be good for passage upon, and the agent gives him this information, he has a right to act upon the information so given. If in so doing he boards a train of the company upon which the ticket is not good for passage to the point indicated thereon, and is for this reason ex-

pelled therefrom by the agent of the company in charge of the train, the company is liable to him for whatever damages he may sustain on account of such expulsion, notwithstanding there is in existence a rule or regulation of the company which prohibits the conductor from carrying passengers on the train thus boarded, or from carrying passengers to a given point along the line of road. The company can only avoid this liability by showing that the purchaser of the ticket knew, or had sufficient reason to believe, that the ticket agent was misinforming him, or that the purchaser knew of a rule of the company which made the agent incompetent to give the information, or forbade the recognition of the ticket by the conductor. The principles just stated are clearly deducible from the ruling made in the case of *Railroad Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315. In that case it appeared that the defendant's ticket agent sold the plaintiff an excursion ticket, consisting of two parts, one of which signified that it was to be used in going and the other in returning, but neither of them indicating any particular train. The agent informed the plaintiff that the ticket would be good for return passage on a fast train of the defendant's known as the "Cannon Ball." The plaintiff boarded this train for the return passage, and tendered the portion of the ticket which was then sold for such passage, but the conductor refused to accept the ticket, and ejected plaintiff from the train. It was ruled that the plaintiff could recover for this ejection; Mr. Chief Justice Bleckley using in the opinion the following language: "The agent who sold the Sunday excursion ticket represented the company in making the sale, and the information which he gave as to whether the ticket would afford a right to return on a particular train could be relied on unless it was known to be incorrect, or unless some known rule or order of the company made the agent incompetent to give such information, or forbade the recognition of such a ticket by the conductor of the designated train or of trains belonging to that class. The ticket being silent on its face as to trains, and one of the parts of the ticket being for a return passage, of course it would be proper for the company to authorize some one to answer questions when the ticket was sold, so that the buyer might know how to use it; and no other person would seem to be so proper for this purpose as the agent selling it." See, also, in this connection, *Head v. Railway Co.*, 79 Ga. 353, 7 S. E. 217, 11 Am. St. Rep. 434. Rulings to the same effect have also been made in other states. See *Boehm v. Railway Co. (Wis.)* 65 N. W. 506; *Railway Co. v. Reynolds (Ohio)* 45 N. E. 712, 60 Am. St. Rep. 706; *Railway Co. v. Pierce (Mich.)* 11 N. W. 157; *Railroad Co. v. Huffman*, 76 Ala. 492, 52 Am. Rep. 349; *Railway Co. v. Adcock (Ark.)* 12 S. W. 574; *Burnham v. Railway Co.*, 63 Me. 298, 18 Am.

Rep. 220; *Murdock v. Railroad Co.*, 137 Mass. 293, 50 Am. Rep. 307. See, also, 1 Fetter, Carr. Pass. § 322; 5 Am. & Eng. Enc. Law (2d Ed.) 670 (8). The court erred in directing a verdict for the defendant.

Judgment reversed. All the justices concurring.

(114 Ga. 113)

EDGE v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

CHEATING—EVIDENCE.

1. A promise relating to the future cannot be the basis of a prosecution for cheating and swindling.

2. The evidence was wholly insufficient to support the verdict of guilty, which should have been set aside on motion for new trial.

(Syllabus by the Court.)

Error from city court of Wrightsville; V. B. Robinson, Judge.

John Edge was convicted of cheating and swindling, and brings error. Reversed.

A. L. Hatcher and J. L. Kent, for plaintiff in error. Wm. Faircloth, for the State.

LEWIS, J. The defendant below was convicted of the offense of cheating and swindling, upon evidence substantially as follows: In January, 1901, the defendant traded with the prosecutor to make a crop on halves. The defendant was to furnish the labor, and the prosecutor the necessary stock, tools, and supplies. In June, 1901, the defendant asked the prosecutor for certain supplies, stating that he was working the crop, and that it was in good condition, and that the supplies requested were needed for the purpose of working the crop. Upon these representations the prosecutor furnished the defendant with supplies amounting in value to \$2.77. Shortly afterwards the prosecutor heard (from what source it does not appear) that the defendant had quit the crop, and he went to see the defendant, who was absent at the time he called. He stated that at the time the crop did not look as if it had been worked, though he could not tell whether it had or not. A few days later he again went to see the defendant, and again failed to find him at home, whereupon he told the defendant's wife that they would have to get out at once, as he wanted to put some one in the house who would work the farm. The defendant in his statement admitted having received the supplies, but denied that he had ever abandoned the crop. He stated that he had left home for a few days, until he could work out a loan of \$8 which he had contracted; that as soon as that was accomplished he intended in good faith to return and finish working the crop, but was prevented from so doing on account of his eviction by the prosecutor. This evidence, we think, was clearly insufficient to sustain the

conviction of the accused. Even if the defendant had permanently left the prosecutor's farm, moving his family and his effects, he would not be guilty, under the evidence heretofore set out, of the offense of cheating and swindling, as defined by the Penal Code, or as construed by the decisions of this court. See *Holton v. State*, 109 Ga. 127, 34 S. E. 358, where it was held that false representations acted on by another, in consequence of which he was cheated and defrauded, must, to be the basis of a prosecution for cheating and swindling, relate either to the present or to the past, and that a promise relating to the future cannot be the basis of a prosecution for this offense. See, also, *Ryan v. State*, 45 Ga. 128, in which it was decided that where one advances money to a laborer on a promise of the laborer to work it out, and the laborer afterwards refuses to do so, he is not guilty of being a common cheat and swindler. In the present case, however, it does not affirmatively appear that the defendant had violated his promise, or intended so to do. His family remained on the place, and there was no evidence to contradict his statement that his absence therefrom was merely temporary, and that he intended in good faith to carry out his contract, until the prosecutor by his own act rendered it impossible for him to do so. The verdict finding him guilty was therefore contrary to law and the evidence, and should have been set aside on motion for new trial.

Judgment reversed. All the justices concurring.

(114 Ga. 118)

MILNER et al. v. NEEL.

(Supreme Court of Georgia. Nov. 7, 1901.)

VENDOR AND PURCHASER—JUDGMENT FOR PURCHASE MONEY—LIEN ON REALTY—ENFORCEMENT—REMEDY—REVIVAL OF JUDGMENT—BAR TO ACTION—SUBSEQUENT PROCEEDING—JUDGMENT OF REVIVOR—EFFECT.

1. Under the allegations in the petition, the remedy in equity is more adequate and complete than at law.

2. Where the law provides that a suit to revive a dormant judgment must be brought within three years from the time it became dormant, the fact that suit is brought after the expiration of the three years does not deprive the court of jurisdiction of the subject-matter. That the suit is barred is a matter of defense.

3. If the judge erroneously finds, as a matter of fact, that the suit was within time, and renders a judgment reviving the dormant judgment, the judgment of revival is not void, and, although erroneous, is binding upon the parties thereto until reversed or set aside.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Equitable petition by Neel, receiver of the estate of Lewis Tumlin, against Haynes Milner and others. From a judgment in favor

of plaintiff entered on a directed verdict, and an order denying a motion for a new trial, defendants bring error. Affirmed.

J. B. Conyers and Thos. W. Milner & Sons, for plaintiffs in error. A. S. Johnson, Thos. H. Milner, and J. M. Neel, for defendant in error.

SIMMONS, C. J. An equitable petition filed by Neel, receiver, against Haynes Milner, Maggie Sproull, and Katie Patterson, alleged that in the year 1875 Lewis Tumlin sold to Milner and Ellis Patterson a lot of land in the city of Cartersville, Ga. They gave Tumlin their notes for the purchase money of the land, and he gave them a bond for title, conditioned to make them a deed when the notes were paid. Subsequently Tumlin died. Messrs. Gray and Erwin were appointed his administrators. The notes being unpaid and past due, the administrators brought suit upon them, and recovered a judgment against Milner and Patterson on July 14, 1876. Several years thereafter, on the petition of certain parties to the circuit court of the United States for the Northern district of Georgia, the estate of Tumlin was put into the hands of Neel, as receiver. Subsequently the administrators died, and Neel continued, as receiver, to administer the estate. The judgment against Milner and Patterson became dormant, and, upon application of the receiver, was revived. After the revival of the judgment against Milner and Patterson, the latter died insolvent and leaving no estate. There was no personal representative appointed to administer his estate, and his widow, Katie Patterson, was his sole heir. Before Patterson's death, he and Milner had sold one-half of the land to Maggie Sproull. She built a small house upon this half, and occupied it as her home. After making the above recitals, the petition prayed an injunction against the defendants to restrain them from interfering with the property or removing the improvements therefrom, and also that the judgment be declared a purchase-money lien upon the land, and that the land be sold, and the proceeds applied to the payment of the judgment. To this petition demurrers were filed by Milner and Maggie Sproull on the ground that there was no equity in the petition, and that the plaintiff had a statutory remedy. These demurrers were overruled, and Milner and Maggie Sproull excepted. They also answered, setting up various reasons why the relief prayed for should not be granted; one of the most important insisted on here being that the petition for the revival of the judgment was not filed within three years after the judgment had become dormant, and that therefore the judgment of the court reviving the dormant judgment was void for want of jurisdiction in the court to render it. On the trial the records of the proceedings

to revive the judgment were put in evidence, and showed that the judgment really became dormant July 14, 1883; that on August 22, 1883, the sheriff made on the execution an entry of levy; and that the judge, in passing the order reviving the judgment, recited the facts, but found and decided that the judgment was kept alive by the entry of August 22, 1883; and that this entry gave an additional seven years of life to the judgment, which therefore became dormant August 22, 1890. Within three years of this latter date the application to revive was made and granted. On this state of facts the points made by defendants in the present case were ruled. The judge directed a verdict for the plaintiff, and entered a decree appointing a commissioner to sell the land, and providing for the distribution of the proceeds. A motion for a new trial was made, assigning error on the direction of the verdict, and on the admission of certain evidence alleged to be irrelevant, to wit, the record of the suit brought by the administrators against Milner and Patterson, the judgment, the execution and the entries thereon, the scire facias to revive the judgment, and the order of the court granting the same.

1. Under the allegations of the equitable petition as above set out, we think that the equitable remedy is more adequate, complete, and direct than the remedy at law. Tumlin, the vendor of the land, is dead. His administrators are dead, and have no successors. The management of the estate was taken from them by the federal court, and placed in the hands of Neel, as receiver. One of the purchasers of the land has died, leaving no personal representative and no estate. The counsel for the plaintiffs in error admitted all of this, but insisted that the statute provided a remedy in such cases, that an administrator de bonis non could have been appointed by the ordinary on the application of any creditor, and that an administrator on the estate of Patterson could likewise have been appointed for the purpose of having Tumlin's administrator make a deed to Milner and the administrator of Patterson, so as to have the same recorded, and the land levied upon. The Code does provide for such remedies in ordinary cases, but it seems to us that such a course by Neel would have given rise to many complications. Had he secured the appointment of an administrator on Tumlin's estate, this administrator could have demanded the assets of the estate from Neel. The latter could not well have given them up, for he was an officer of the federal court, with directions to hold all of the assets of the estate, and to answer to the court for them. Had the administrator demanded the assets, and Neel refused to turn them over, litigation would probably have arisen between them. For this and other reasons we think the equitable remedy is more adequate, complete, and direct than

the remedy at law. It was accordingly not error to find that there was equity in the bill.

2. It was contended here that the judgment reviving the dormant judgment was void because the court had no jurisdiction to render it. It was contended that, as the Code declares that a suit to revive a judgment must be brought within three years from the time the judgment becomes dormant, if it is not so brought no court has jurisdiction to entertain it. We do not agree to this. The superior court in which this suit was brought is a court of general jurisdiction. The first thing such a court decides in any case is whether it has jurisdiction. This decision is always implied when the court takes jurisdiction and renders judgment, whether it appear upon the record or not. The superior court had jurisdiction of the matter of reviving dormant judgments, and it was not deprived of such jurisdiction by the fact that the suit was not brought within the limitation of three years after dormancy, any more than it would have been of a suit on a promissory note by the fact that such note was barred by the statute of limitations. So far as we have read, no court has ever held a judgment void because it was rendered upon a cause of action which had been barred before the commencement of the suit. If a person is sued upon a cause of action which is barred, he cannot fail or refuse to attend the court, and allow a judgment to go against him, and afterwards claim that the judgment is void. It is his duty to appear at court and plead the statute of limitations, or demur to the petition if the bar appear on the face thereof. Upon this subject, see the admirable treatise of Hukm. Chand on *Res Judicata* (section 181), and the authorities there cited. Most of these authorities we have examined, and they fully sustain the text. See, also, Van Fleet, *Coll. Attack*, § 62.

3. The judgment reviving the former judgment, even if erroneous, was not void. There is a substantial difference between void judgments and erroneous judgments. The latter are binding until reversed or set aside. The judgment reviving the dormant judgment was, in our opinion, erroneous, for the judge decided that the entry of the sheriff, six weeks after the original judgment had become dormant, renewed it and gave it another lease of life. This was, in our opinion, an error, but the court had jurisdiction of the subject-matter, and, as appears from the record, of the parties. They made no defense, and acquiesced in the judgment. Until it is reversed or set aside in the mode prescribed by law, that judgment binds them and their privies. This principle is so well established that it is unnecessary to cite authorities.

For the reasons given, we think there was no error in the direction of the verdict or in the admission of evidence. Judgment affirmed. All the justices concurring.

(114 Ga. 122)

WOOLLEY et al. v. GAINES et al.

(Supreme Court of Georgia. Nov. 7, 1901.)

INSANE PERSON—CONTRACT—OTHER PARTY'S IGNORANCE—EFFECT.

Ignorance by one party to an alleged contract of the fact that the other party was insane at the time of its execution does not per se entitle the former to enforce it against the latter.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Suit to recover land between Gaines and another and Woolley and others. From a judgment entered on a verdict in favor of plaintiffs, defendants bring error. Reversed.

J. B. Conyers and B. J. Conyers, for plaintiffs in error. J. H. Wikle and A. S. Johnson, for defendants in error.

LEWIS, J. The plaintiffs below brought suit to recover from the defendants certain land in Bartow county. The only controversy in regard to the title was as to the validity of a warranty deed from Sarah Woolley, under whom both the plaintiffs and the defendants claim, conveying the property in dispute to the plaintiffs, Gaines and Lewis. It was claimed that this deed was fraudulently obtained, and was void, because at the time of its execution Sarah Woolley was insane, and incapable of making a valid contract. The conveyance recites a consideration of \$460, which the plaintiffs alleged was the amount of an indebtedness due them by Sarah Woolley; the deed being made in satisfaction of that indebtedness. Considerable evidence was introduced as to the mental condition of Sarah Woolley and her capacity to understand what she was doing when she signed the deed in question, and this evidence was more or less conflicting. On this point the court charged the jury as follows: "If you find that she [Sarah Woolley] was of weak mind, and that weakness amounted to imbecility, and therefore she did not have mental capacity to make this deed, then you will go further, and ascertain whether or not Gaines and Lewis, or either of them, knew or had knowledge of her mental imbecility at the time of the execution of the deed, for, if she was mentally incapacitated to make the deed, and Gaines and Lewis did not have knowledge of the fact, and took the deed in good faith, then her mental incapacity would not warrant you in setting aside the deed, and you would sustain the deed notwithstanding her mental incapacity, if you find that they did not know or had no knowledge of the fact of her mental imbecility." The jury returned a verdict for the plaintiffs, and the defendants excepted.

The portion of the charge of the court

which we have quoted was plainly error. No question as to the knowledge or want of knowledge of the plaintiffs, or either of them, concerning the mental condition of Sarah Woolley, should have been injected into the case. "A person whose mind is so unsound as not to have capacity to contract is . . . incapable of making a binding deed of conveyance. But the deed of one who has not been judicially declared insane is not wholly void. It conveys the seisin, and must, therefore, be avoided at the grantor's instance after restoration to reason, or at the instance of his heirs or legal representatives after his death." 9 Am. & Eng. Enc. Law (2d Ed.) 119. "The contract of an insane person who has never been adjudged insane by any tribunal of competent jurisdiction is voidable, after his death, at the option of his personal representatives." Bunn v. Postell, 107 Ga. 490, 33 S. E. 707, and cases cited. And it is well established by the repeated rulings of this court, based upon sound authority, that ignorance by one party to a contract that the other party was insane when it was executed does not affect the validity of the instrument. See Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167, where it was held that a bank would not be protected in paying the check of a person who had been lawfully adjudged to be insane, and who was in fact insane when the check was drawn, although the fact of insanity was unknown to the bank at the time of payment, and the adjudication of insanity was made in another state. Directly in point, also, is the case of Orr v. Mortgage Co., 107 Ga. 499, 33 S. E. 708, where the following language is used: "That the other party to the contract was ignorant that the person with whom he was dealing was in fact insane, and that the existence of such insanity could not have been discovered by an ordinarily reasonable and prudent person, does not make such a contract valid and binding, nor interfere with the right of the legal representative to set up in defense to an action brought against him on the contract the insanity of the decedent." To the same effect, see Bunn v. Postell, supra. The rule is based upon the very excellent reason, as stated in Bish. Cont. § 970, that, "since insanity incapacitates one to make a contract, the mere fact of the other party's not knowing it does not render good what he was legally incompetent to do." The authorities relied on by counsel for the defendants in error in combating this position have no application to the case under consideration. They presuppose such an execution of the contract as that the parties cannot be placed in the position they occupied before it was made. No such state of facts is involved in the present case. From all that appears, except for the deed given to Gaines and Lewis by Sarah Woolley, and

the verdict obtained by them at the trial below, they are already in statu quo. No money or thing of value has passed out of their hands in consideration of the conveyance. It does not appear that the debt in satisfaction of which the deed is alleged to have been given was made in contemplation of the conveyance of this land. They cannot, therefore, take advantage of the equitable rule which they invoke, as there is nothing upon which to base their contention, so far as the record before us is concerned.

The motion for a new trial contains numerous other grounds, but, other than as above set out, we see no errors of sufficient importance to require a reversal of the judgment. We send the case back for a new trial solely on the ground of error in the charge which we have quoted.

Judgment reversed. All the justices concurring.

(114 Ga. 112)

MATHIS v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

CRIMINAL LAW—APPEAL—REVIEW.

The jury was the proper tribunal to pass on the consistency and weight of the evidence and the credibility of the witnesses. Although conflicting, there was evidence which sustained the verdict.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Charley Mathis was convicted of crime, and brings error. Affirmed.

John W. Bale, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 151)

ADAMS et al. v. CANDLER, Governor.

(Supreme Court of Georgia. Nov. 8, 1901.)

RECOGNIZANCE—FORFEITURE—EXECUTION ON SUNDAY.

An obligation binding the principal and sureties in a penal sum named, payable to the governor of Georgia, and his successors in office, conditioned for the personal appearance of the principal at a stated term of a superior court to answer to a bill of indictment which had been preferred against such principal, is a contract to which the state of Georgia and the principal and sureties executing the bond are the only parties. Although a contract of this character is executed on Sunday by the obligatory parties, it cannot be classed as a contract made in the pursuit of a business or the performance of a work within the ordinary calling of one of the parties to the contract.

(Syllabus by the Court.)

Error from superior court, White county; J. B. Estes, Judge.

Scire facias by A. D. Candler, governor of the state, to forfeit a bond executed by S.

M. Adams and others. From a judgment of forfeiture, defendants bring error. Affirmed.

J. W. H. Underwood and J. J. Kimsey, for plaintiffs in error. W. A. Charteris, Sol. Gen., for defendant in error.

LITTLE, J. A scire facias issued to forfeit a bond executed by J. F. Adams as principal and S. M. Adams and John L. Edge as sureties, payable to A. D. Candler, governor of the state of Georgia, or his successors in office, in the sum of \$100, dated November 2, 1899. The condition of the bond was that its obligation should be void in the event that the principal should appear at the superior court of White county at a named term of the court, and from term to term thereafter, to answer to a bill of indictment for the offense of misdemeanor, which had been returned as true by the grand jury of that county. Adams and Edge at the proper time interposed a plea, and set up for cause why the judgment nisi should not be made absolute the following: "That said bond was, as respects the defendant John L. Edge, executed on the 5th day of November, 1899, instead of on the 2d, the day it purports to have been executed; and that said 5th day of November was Sunday; and that at said time the said principal, Frank Adams, was not under arrest, nor legally restrained of his liberty, which was a transaction within the ordinary callings of the parties to it, nor was it an act of necessity or charity." In a separate plea J. F. Adams, the other security, averred that he was released, not only because of the facts pleaded by Edge, but also because he agreed to and did sign the bond with the distinct understanding that Edge was to execute the same as a joint obligor and surety with him, which agreement it was alleged was made and entered into with Turner, the constable, and Jackson, sheriff of the county. The solicitor general demurred to the pleas as presenting no defense to a judgment absolute. The court sustained the demurrer, struck the pleas, and made the judgment absolute. To the striking of these pleas and the rendition of this judgment the defendants excepted.

It may be well in the outset to call attention to the fact that the bond sought to be forfeited and collected was a contract entered into between the state of Georgia, by its governor, on the one part, and the named principal and sureties on the other, by which contract the sureties undertook to pay to the state of Georgia a given amount named in the event the principal named in the contract should not personally appear at a given term of White superior court to answer to an indictment preferred for a violation of a penal law of this state. One of the errors in which our brethren who represent the plaintiff in error seem to have fallen is that the con-

stable who attested the bond was a party to that contract. Not so. The state and the principal and sureties of the bond were the only parties to the contract. The legal objection which Edge urges against the validity of the contract into which he entered was that it was a transaction within the ordinary calling of the parties thereto, and that its execution was had on Sunday, and that the same was not an act of necessity or charity, for the reason that the principal was not at that time under arrest, or restrained of his liberty. In the case of *Salter v. Smith*, 55 Ga. 244, it was practically ruled by this court that the execution of such a bond on Sunday was lawful, when the defendant was in jail, the execution of it being in the nature of an act of charity; and in the case of *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128, it was further ruled that such execution was lawful when the principal in the bond was under arrest. It is, however, claimed that, where the principal was at the time of the execution of the bond neither in jail nor under arrest, the contract came within the inhibition of section 422 of the Penal Code, which declares that no person "shall pursue his business, or the work of his ordinary calling, on the Lord's day, works of necessity or charity only excepted," any violation of its provisions was made a misdemeanor. In construing this section of the Code this court has had repeated occasions to rule on the validity of contracts executed on Sunday. A reference to these cases and the rulings made in each is to be found in the case of *Hayden v. Mitchell*, 103 Ga. 431, 30 S. E. 287, and the conclusion of this court then expressed was that "only those contracts which may properly be included as coming within the ordinary callings of the parties thereto are affected by the inhibition of the statute." In order, therefore, to determine the merits of the plea interposed by each of the sureties, it is only necessary to ascertain whether the contract under consideration came within the ordinary calling of the state on the one hand and of Edge, the surety, on the other. The state of Georgia exercises no ordinary calling, and is engaged in no labor, business, or work. It is a sovereign, organized and instituted as a government, to afford protection to its citizens through the due administration of laws which they are empowered to make. It is hardly necessary to say that it has no ordinary calling. We are not informed by the plea what was the ordinary calling of Edge, the surety on the bond, but it is not insisted that the execution as surety of bonds for the appearance for trial of persons charged with crime was his ordinary calling. No such a pursuit would be recognized by the law as a legitimate calling. Whatever may be the nature of his business or work, we are very safe in saying that his ordinary calling cannot be that of becoming a surety on penal bonds. Taking as true, therefore, the allega-

tions of his plea that the principal in the bond was not under arrest nor restrained of his liberty at the time of its execution so as not to bring the contract within the exception of the rule of law above set out, it must, nevertheless, be ruled that the plea interposed in defense to the rendition of a judgment absolute was without merit, because the nature of the contract was such as could and did not come within the ordinary calling of the parties thereto.

Inasmuch as the plea interposed by the surety Edge is declared to be without merit, it is not necessary that the defense of Adams, another surety, to the effect that by agreement he signed the bond with the understanding that Edge was to execute the same as a joint obligor, should be separately considered. Hence there was no error in sustaining the demurrer to the plea, and, in the absence of further defense, in making the judgment nisi absolute, and thus finally forfeiting the bond.

Judgment affirmed. All the justices concurring.

(114 Ga. 140)

SOUTHERN RY. CO. v. WOOD.

(Supreme Court of Georgia. Nov. 7, 1901.)

CARRIERS—ROUND TRIP—STAMPING RETURN TICKET—EXPULSION OF PASSENGER—INSTRUCTION—DAMAGES.

1. When a railway company sells a round-trip ticket, which provides that it shall not be good for return passage unless the original purchaser shall procure the same to be signed and stamped by an agent of the company at the point of destination, and shall use the ticket on the date it is so signed and stamped, it is incumbent upon the company to have present, a reasonable time before the arrival of trains on which the ticket would be good for passage on any day upon which the purchaser might see fit to use it, an agent authorized to sign and stamp the ticket in the manner therein provided. Upon the failure by the company to have present at such time, on any day the original purchaser of the ticket sees fit to return, an agent so authorized, such purchaser, after having on the day he desired to return used due diligence to find some agent of the company authorized to sign and stamp his ticket so as to make it good for return passage, has authority to board the train without having the ticket so signed and stamped, and, upon explanation of the facts to the conductor, is entitled to ride upon the train; and his expulsion therefrom under such circumstances is a tort, for which the company will be liable in damages.

2. The fact that a passenger holding a ticket of the character above referred to, and who has been expelled from the train, returns to the point where he had boarded the train, and has the ticket signed and stamped as required within the time limit fixed therein, and uses the same in this condition for return passage on another train, does not waive or extinguish any right he might have for the wrong committed in expelling him from the train before the ticket was so signed and stamped.

3. There was no error in the charges complained of, or in refusing to charge as set out in the motion for a new trial. The evidence warranted the verdict, which, under the facts appearing in the record, was not so excessive

as to authorize this court to reverse the judgment of the trial court refusing to set it aside. (Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by Arthur Wood against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, Geo. A. H. Harris & Son, and R. L. Chamlee, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

COBB, J. Wood sued the railway company for damages claimed to have been sustained on account of having been ejected from one of the defendant's trains by its conductor. The trial resulted in a verdict for the plaintiff for \$450. The defendant made a motion for a new trial, which was overruled, and the case is here upon a bill of exceptions assigning error upon the overruling of this motion.

1. It appeared at the trial that the plaintiff had purchased a ticket from Atlanta to Rome and return at a reduced rate of fare, at the same time entering into a special contract with the company. This contract contained, among others, the following stipulations: "This ticket shall not be good for return passage unless the holder identifies him or herself by signature on back hereof and otherwise as original purchaser to the satisfaction of the agent of the terminal line at destination of ticket, and, when officially signed and stamped by said agent, this ticket shall then be good for return passage of the original purchaser only, leaving destination only on date so stamped and canceled on back." The ticket was purchased on December 23, 1899, and was good for return passage until January 1, 1900. There was a train which passed Rome, destined for Atlanta, upon the days on which the ticket was good for return passage, at 1:30 o'clock a. m. each day. The plaintiff decided to return to Atlanta on this train on December 25th. As his ticket provided that, before it would be good for return passage, it must be dated and stamped by the defendant's agent at Rome, he went to the agent of the defendant at the depot in Rome at which he had disembarked from the train about 12 o'clock of the night of the 24th. There was no one present at the station authorized to validate his ticket, and no one appeared prior to the arrival of the train for Atlanta, which on that occasion arrived some later than its schedule time. His business being of a nature which required his presence in Atlanta on that day, he boarded the train, and tendered the unvalidated ticket to the conductor, at the same time explaining the circumstances which prevented him from having it dated and stamped in accordance with the terms of his contract. The con-

ductor refused to accept the ticket, and ejected the plaintiff from the train. An examination of the stipulation in the contract above quoted shows that it was distinctly provided that the plaintiff could leave Rome only on the date on which the ticket was dated and stamped by the agent. In the absence, therefore, of any notice to the plaintiff that he was expected or required to repair to the depot to have his ticket validated at some time prior to the day on which he intended to return, it was incumbent upon him to endeavor to have the ticket validated only on that day. There is nothing in the evidence showing that he had such notice, and consequently he was not at fault in waiting until the day he intended to leave to apply to the agent to have his ticket dated and stamped. The evidence shows that he went to the depot for this purpose at the very earliest time of that day it was possible for him to go, which was about 1½ hours before the train was scheduled to arrive. It has been repeatedly held by this court that when a passenger holds a contract for return passage of the character involved in the present case, and when he has done everything that ordinary prudence and diligence would require to obtain a validation of the ticket for return passage, he is authorized to enter the train with the ticket unvalidated, and is entitled to ride thereon, upon explaining to the conductor the circumstances which prevented him from having the ticket validated. See *Railway Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166, and cases cited. Following the principle laid down in these cases, we are compelled to hold in the present case that the plaintiff had a right to enter the train and ride upon his ticket, notwithstanding it was unvalidated, and that the conductor had no right to eject him therefrom. Under the contract the company was under a duty to provide him a method of having his ticket validated at some time between midnight and the arrival of the train, for the reason that the ticket, when validated, was good for passage on this train, and the contract provided that the ticket must be used on the day it was validated. In other words, the undertaking on the part of the company amounted to a contract to provide a way for the plaintiff to have his ticket validated upon any day that he desired to return to Atlanta upon one of its trains upon which the ticket would be good for passage. Its failure to have some one during the early hours of the morning of the 25th of December to validate tickets for passengers who desired to take the train passing at that point relieved the plaintiff from the necessity of having the ticket validated, and, under the principle of the decisions above referred to, authorized him to board the train and demand that he be carried on the ticket unvalidated. It was said by one of the witnesses for the company that

there was a custom in Rome to validate tickets and date them ahead, so as to meet the very contingency which confronted the plaintiff in this case; but there was not a particle of evidence either that notice of this custom was brought home to the plaintiff, or that any effort was made by any agent of the company on the previous day to validate his ticket and date it ahead. The plaintiff had a right to board the train and ride upon his ticket in the condition in which he tendered it to the conductor, and his expulsion from the train was a tort of which he had a right to complain.

2. It appeared that the plaintiff, after having been expelled from the train, returned to Rome on another train of the defendant, had his ticket properly validated, and used it for return passage on one of the trains of the defendant which returned later. It is claimed by counsel for plaintiff in error that this conduct on the part of the plaintiff amounted to waiver of all claim for damages on account of his expulsion from the train at the time he attempted to ride upon the ticket before it was validated. We do not understand upon what principle this conduct would amount to a waiver of damage resulting from a complete wrong which had taken place before. He had a right to ride upon the unvalidated ticket under the circumstances, and the fact that this right was not recognized, and he was compelled to return to Rome in order to comply with the terms of the company's agent, which, under the circumstances, he had no right to make, does not in any way amount to an admission that he was wrong in entering the train with his ticket unvalidated, or that he was willing to relieve the company from the consequences of his wrongful expulsion from the train. The time limit on the ticket had not expired, and certainly because the company had been guilty of a gross outrage upon him, in not recognizing his right to ride when under the law he was entitled to ride, would be no reason for holding that he had forfeited all rights under the ticket, notwithstanding the failure of the company to recognize them on the day and on the train upon which he attempted to ride as a passenger. We are unable to see one single element of waiver of the previous wrong by anything that the plaintiff did in having his ticket validated, and using it for passage in that condition.

3. There was no error in the charges complained of, or in the refusals to charge. The case was one in which a charge on the subject of punitive damages was proper, and the verdict, under the circumstances of the case, was not excessive. The plaintiff was eject-

ed from the train in the early hours of a dark, rainy morning, at a place with which he was unfamiliar, and four miles from Rome. He had offered to secure with a diamond ring the payment of his fare to the conductor when he reached Atlanta. He had fully explained to the conductor why he had failed to have his ticket validated, and offered to make a showing to the conductor which would satisfy him that he was the original purchaser of the ticket. He remarked to the conductor, "I have paid for this matter, and I am going, and if you put me off you will have to get a little help about it." The conductor responded that he had help. When the train stopped he came back and touched the plaintiff on the shoulder, and said, "Are you going to get off, or have me put you off." Plaintiff replied, "I am going to let you put me off," and, as they were coming back, said, "I will go and risk the consequences in the woods." There were one or two ladies and two old gentlemen in the car at the time, and plaintiff turned around and took the addresses of these gentlemen. When it appears to us that one who has a legal right to ride upon a train has been wrongfully expelled therefrom, and held up by such expulsion before the passengers on the train as one who was trying to ride thereon without lawful right or authority, and subjected to the mortification that such conduct on the part of the company's agents would necessarily bring about in the case of any young man of sensibility and pride, we cannot say, as matter of law, that \$450 is too much to pay him as compensation for the outrage thus committed upon him. It may be that if we had been upon the jury we would have taken the view that a less amount would have been full compensation for the wrong, but the law has reposed in the jury the right to deal with these matters, and we have no authority to interfere with their finding on the subject, when it has been approved by the trial judge, unless the amount involved is so great as to suggest bias and prejudice on their part. In the present case we cannot say this is true.

Judgment affirmed. All the justices concurring; LUMPKIN, P. J., specially.

LUMPKIN, P. J. I concur in the judgment, because, under the decision of this court in *Head v. Railway Co.*, 79 Ga. 353, 7 S. E. 217, 11 Am. St. Rep. 434, the law of the main question is correctly stated in the foregoing opinion. I still think that decision was wrong, and in this connection refer to the concurring opinion which I filed in *Morse v. Southern Ry. Co.*, 102 Ga. 303, 29 S. E. 865.

SOUTHERN RY. CO. v. WALTON.

(Supreme Court of Georgia. Nov. 8, 1901.)

APPEAL—REVIEW.

This case is controlled by the rulings this day made in the case of *Railway Co. v. Wood*, 39 S. E. 894.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by N. G. Walton against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, Geo. A. H. Harris & Son, and R. L. Chamlee, for plaintiff in error. Max Meyerhardt, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J. I concur in the judgment solely for the reason I gave for so doing in the case of *Railway Co. v. Wood*, 39 S. E. 894.

(114 Ga. 40)

BOSWELL v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

CRIMINAL LAW—NEW TRIAL—INDICTMENT—EVIDENCE.

1. An exception to the overruling of a demurrer to an indictment cannot be properly made in a motion for a new trial.

2. If an indictment is on its face fatally defective because based on an unconstitutional statute, or on one which for any reason is not a valid and subsisting law, advantage of such a defect must be taken by demurrer before pleading to the merits, or by motion in arrest of judgment after verdict.

3. An expert may testify to an opinion of his own derived from books.

4. The evidence authorized the verdict, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Putnam county; J. C. Hart, Judge.

Ben Boswell was convicted of poisoning a well, and brings error. Affirmed.

M. F. Adams and J. W. Preston, for plaintiff in error. H. G. Lewis, Sol. Gen., for the State.

COBB, J. The accused was placed on trial upon an indictment based upon the act of December 19, 1896 (Acts 1896, p. 84), charging him with the offense of poisoning a well, and was convicted. His motion for a new trial having been overruled, he excepted.

1. Upon arraignment the accused filed a demurrer to the indictment, which was overruled. There is no assignment of error upon the judgment overruling the demurrer,

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save in the motion for a new trial; and it is well settled now that an exception to a judgment overruling a demurrer to an indictment cannot be properly made a ground of a motion for a new trial. *Flemister v. State*, 81 Ga. 768, 7 S. E. 642 (2); *Robson v. State*, 83 Ga. 166, 9 S. E. 610.

2. Complaint is made in the motion for a new trial that the entire trial was void, for the reason that the act under which the accused was prosecuted was unconstitutional, because the body of the act contains matter which is not referred to in the title. If an indictment fails to charge an offense against the law, for the reason that the statute upon which it is based is unconstitutional, or for any other reason is not valid and subsisting law, such a defect in the indictment can be taken advantage of only by demurrer before pleading to the merits, or by motion in arrest of judgment after verdict. That an indictment charges no offense is no reason for granting a new trial on that indictment, and for this reason such a defect in an indictment cannot be properly made a ground of a motion for a new trial. See *Eaves v. State*, 113 Ga. 750, 39 S. E. 318 (7), and cases cited. It is true that in the case of *Wood v. State*, 46 Ga. 322, it was held that a motion for a new trial on the ground that an indictment was fatally defective, though not strictly proper, would be sustained under the practice in this state. But Judge McCay, in the opinion, says: "We know of no authority for demanding a verdict on a bad indictment. Under our law the jury find their verdict from their own judgment, and not by direction from the judge. We think, too, the practice is a bad one. Perhaps on a new indictment the court might hold the first indictment good, and an acquittal on it a bar. Under our practice the motion for a new trial generally covers any ground that would be good in arrest of judgment. At least, it has long been the practice to include in a motion for new trial such exceptions as this, and we will not disturb the practice, though strictly a motion in arrest of judgment is the proper mode of getting at such a defect as this, since if the indictment is bad a new trial cannot be had upon it." It is also true that in the case of *Tate v. Cowart*, 48 Ga. 540, there appears a statement both in the headnote and in the opinion of Mr. Chief Justice Warner to the effect that, when a motion for a new trial contains a ground which would be a proper ground of a motion in arrest of judgment, the motion for a new trial will be treated as a motion in arrest of judgment. Upon an examination of that case, however, it will be found that the statement in the opinion was purely obiter, and that the headnote was made by the reporter. It seems that neither the ruling in the *Wood Case*, nor the dictum of Judge Warner in

the Tate Case, has ever been followed. On the contrary, in the case of *White v. State*, 98 Ga. 47, 19 S. E. 49, it was distinctly ruled that defects in an indictment afford no ground for a new trial, and that for matters affecting the real merits the remedy after trial is by motion in arrest of judgment. In the opinion in that case Mr. Justice Simmons distinctly refers to the Wood Case, and calls attention to the fact that, while an exception which would be good in arrest of judgment was sustained in that case notwithstanding it was made a ground of a motion for a new trial, still the practice was distinctly disapproved by the judge who wrote the opinion. The ruling made in the Wood Case has never, so far as we have been able to ascertain, been followed; and the ruling made in the White Case has been uniformly adhered to, and was distinctly followed in the Haves Case, cited above. It was the unanimous opinion of three judges in the White Case that the ruling in the Wood Case was not controlling as authority; and this opinion, "whether right or wrong, has the same binding force upon subsequent members of the court as is given any unanimous decision of the court" by the law now contained in section 5588 of the Civil Code, which declares that a decision concurred in by three judges cannot be reversed or materially changed except by a full bench, and then only after argument had, in which the decision is, by permission of the court, expressly questioned and reviewed. See, in this connection, *Weaver v. Carter*, 101 Ga. 209, 28 S. E. 869; *Smith v. Association*, 111 Ga. 737, 740, 36 S. E. 957. We are therefore at liberty to treat the Wood Case as no longer binding as authority, and we must regard the White Case as fixing the proper rule of practice.

3. The state introduced as witnesses two physicians, each of whom testified that in his opinion bluestone was a poisonous substance, but upon cross-examination stated that he had never had any practical experience with cases of poisoning by bluestone, but derived his information on the subject solely from medical books dealing with the subject of poisons. This evidence was objected to upon the ground that it was hearsay, and that an expert should not be allowed to testify as to any matter that did not come within the range of his own experience. Books of science and art are not admissible in evidence to prove the opinions of experts therein expressed. *Cook v. Coffey*, 103 Ga. 384, 30 S. E. 27, and cases cited. But, notwithstanding the inadmissibility of the books, the opinions contained therein may come to the jury through the mouth of an expert witness. *Lawson, Exp. Ev.* (2d Ed.) p. 213; *Mayor, etc., v. Boone*, 93 Ga. 662, 20 S. E. 46; *Railroad Co. v. Mitchell*, 68 Ga. 173.

4. The motion for a new trial contained

several other grounds,—one complaining of the admission of certain evidence; but it does not appear in the motion what objection, if any, was made to the evidence. Another ground complains of certain remarks made by the solicitor general in his argument, but it does not appear that any exception was taken to the argument at the time, by motion for mistrial or otherwise. Still another ground of the motion complains that the judge intimated an opinion on the evidence in a portion of his charge, but the ground does not set forth the language complained of; the ground merely stating that the judge intimated an opinion by making reference in his charge to an alleged confession made by the accused, when it was contended that the accused had made no confession. Under well-established practice, these grounds present no assignments of error with which this court can deal.

What has been said disposes of all of the grounds of the motion for a new trial, except that which complains that the verdict is contrary to the evidence. It was argued with great earnestness by counsel for the plaintiff in error that the evidence did not authorize the jury to find that the water in the well had been poisoned by the bluestone which it was claimed had been placed therein. There was evidence that several persons were made sick by drinking water from the well after the bluestone had been placed therein, and that this sickness was attended with recognized symptoms of bluestone poisoning. It is therefore necessary to determine what is meant by the word "poison," as used in the statute. Applying the familiar rule that words must be taken in their ordinary sense, we find that the word "poison" has been defined by the lexicographers and law writers as follows: "An agent which, when introduced into the animal organism, is capable of producing a morbid, noxious, or deadly effect upon it." *Webst. Int. Dict.* "Any substance that when taken into the system acts in a noxious manner by means not mechanical, tending to cause death or serious detriment to health." *Stand. Dict.* "A substance of definite chemical composition, which, when taken into the living organism, is capable of causing impairment or cessation of function." *Bouv. Law Dict.* Dr. Wormley defines the term as follows: "Any substance which, when taken into the body, and either being absorbed, or by its direct chemical action upon the parts with which it comes in contact, or when applied externally and entering the circulation, is capable of producing deleterious effects." See *Ewell, Med. Jur.* p. 303. Dr. Taylor, in his work on Medical Jurisprudence, after stating that in a restricted sense the term "poison" is applied only to those substances which destroy life in small doses, observes that this definition is entirely too restricted for the purposes of medical juris-

prudence, and that the quantity required to destroy life, even if it could be always accurately determined, cannot enable us to distinguish a poisonous from a nonpoisonous substance. The author then concludes by defining poison to be "a substance which, when absorbed into the blood, is capable of seriously affecting health or of destroying life." The editor of the work incorporates into this definition a parenthesis to the effect that the poison must operate in the manner stated "by direct action." Tayl. Med. Jur. p. 71. See, also, 15 Am. & Eng. Enc. Law (1st Ed.) 248. Giving to the word "poison" the meaning required by the definitions above quoted, no other conclusion can be reached than that one who introduces into a well of water, in such a quantity as to render the water, when drunk, seriously detrimental to health, and a serious impairment of the organic functions of the body, any substance whatever, is guilty of a violation of the statute under which the accused was convicted. The evidence in the present case warranted the verdict, and there was no abuse of discretion in overruling the motion for a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 226)

SOUTHERN EXP. CO. v. STATE.

(Supreme Court of Georgia. Nov. 16, 1901.)

CRIMINAL LAW—ERROR—REVIEW—INTOXICATING LIQUORS—ILLEGAL SALE.

1. Where upon the trial of a criminal case the defendant neither demurs to the indictment nor moves to quash it, but voluntarily goes to trial upon the merits of the case, this court cannot consider an assignment of error in a bill of exceptions sued out in such case, alleging that the trial court "should have ruled that [the accused] was not indictable at all for the offense charged in the" indictment.

2. Relatively to a package of whisky shipped by express from another state to a named person in a designated city in this state, to be there delivered to him upon his paying to the agent of the express company at that point a stipulated price therefor, the penal laws of this state in reference to the unlawful sale of intoxicating liquors become of force when such package has reached the point of its destination, and is being held by such express agent until the sale of the whisky has been completed in accordance with such directions of the consignor.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Flite, Judge.

The Southern Express Company was found guilty of violating the liquor law, and brings error. Affirmed.

F. G. Du Bignon and R. J. & J. McCamy, for plaintiff in error. Saml. P. Maddox, Sol. Gen., for the State.

FISH, J. The accused, the Southern Express Company, was tried and found guilty

in the superior court of Whitfield county of selling spirituous liquors contrary to law, upon the following state of facts: "A shipper in the state of North Carolina sent a package of whisky containing two gallons through the defendant company, to be delivered to the consignee at Dalton, Whitfield county, Ga., on his payment for the same to the defendant's agent at Dalton, together with the charges thereon. The whisky arrived at Dalton. The consignee called at defendant's office in Dalton, paid defendant's agent for the whisky \$3.70, whereupon it was delivered to the consignee by the defendant's agent in the same package and condition it was shipped from North Carolina, to wit, on the day named in the indictment. The money collected by defendant's agent at Dalton was sent through the defendant company to the shipper of the whisky in North Carolina, and there paid to him. The defendant is a chartered company, being a common carrier of freight, and engaged in the transportation for hire of interstate commerce, and the liquor for the sale of which it is here indicted was received and forwarded by defendant in the usual and ordinary transaction of its business as such common carrier. A sight draft drawn by the consignor on the consignee accompanied the shipment, and was turned over to the consignee by the agent of defendant upon his payment of the amount named in the draft. Defendant is not a railroad company; does not own the railroads over which its freight is transported, but employs various railroad companies to carry freight for it, paying them therefor." The express company sued out a bill of exceptions, and brought the case here for review. It is recited in the bill of exceptions that the accused "contended that a corporation such as it is was not indictable under the sections on which the indictment is framed, and that, under the facts admitted, it was not guilty of any offense, as, in all that was done by it, it was justified under the third clause of section 8 of the first article of the constitution of the United States, conferring on congress the power 'to regulate commerce with foreign nations and among the several states,' and the acts of congress passed thereupon, and that under the provisions of the act of congress of August 8, 1890, commonly known as the 'Wilson Act,' it had power to do all that was shown in the agreed statement of facts, and it was therefore not guilty of any offense." The assignments of error in the bill of exceptions are: "First, that the court should have ruled that it was not indictable at all for the offense charged in the bill; and, second, if indictable, that under the facts it was not guilty of any offense." It will be observed that the first assignment of error is not that the defendant in the court below should have been found not guilty, because the proof showed that it could not commit the offense with which it was charged, but

the assignment is that the court should have ruled that it was not indictable for the offense charged. In *Heaves v. State*, 113 Ga. 750, 39 S. E. 318, this court held: "If an indictment be on its face fatally defective, because based on a statute no longer in force, advantage of the defect should be taken by demurrer, or by motion in arrest of judgment. In the absence of a demurrer, such defect is not ground for asking the direction of a verdict of acquittal, or, in a motion for a new trial, for setting aside a verdict of guilty, as contrary to law." See, also, *Boswell v. State* (this day decided) 39 S. E. 897. The defendant could have invoked a ruling of the court to the effect that it could not legally be indicted for the offense charged, by demurring to the indictment or moving to quash it. Instead of doing so, however, it voluntarily went to trial under the indictment, and now complains that the court did not make a ruling which was not legally invoked. It was too late, after voluntarily going to trial upon the merits, to contend "that a corporation such as it is was not indictable under the sections on which the indictment is framed." The accused did not make this contention in the way and at the time which the law provides. As no ruling of the court below upon the validity of the indictment was legally invoked, this court cannot consider an assignment of error based upon the failure of the trial court to rule in accordance with the contention of the plaintiff in error.

2. The second assignment of error is that, if the defendant was indictable, "under the facts it was not guilty of any offense." This assignment is based on the contention that "in all that was done by it it was justified under the third clause of section 8 of the first article of the constitution of the United States, conferring on congress the power 'to regulate commerce with foreign nations and among the several states,' and the acts of congress passed thereupon, and that under the provisions of the act of congress of August 8, 1890, commonly known as the 'Wilson Act,' it had power to do all that was shown in the agreed statement of facts, and it was therefore not guilty of any offense." Before the passage of the Wilson act such a transaction as that disclosed by the facts in the record before us would have fallen under the protection of the interstate commerce clause of the federal constitution, and the precise question to be determined is whether it falls within the provisions of that act of congress. That act was passed in consequence of the effects produced by the decision of the supreme court of the United States in *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, where it was held that, under the provisions of the constitution of the United States, merchandise imported from a foreign country, or from one state into another, could be sold by the importer thereof in the original packages

in which it was imported, free from the interference of state laws, as until such sale the goods were not commingled with the mass of property in the state to which they were imported, but still retained the character of interstate commerce goods. The effects of this decision were immediate and widespread, and practically annulled the efforts of certain of the states to suppress or restrict the traffic in intoxicating liquors within their limits. "Original package depots and store-rooms," and even "original package saloons," sprang up in states and localities where by law the sale of intoxicating liquors was prohibited and made penal. *Black, Intox. Liqueurs*, § 74. In order that this traffic might be suppressed by the states whose public policy was thus openly set at naught, and to give to all the states a like power, congress passed the Wilson act, the predominant purpose of which was to empower the states to prevent the sale of intoxicating liquors in the original packages in which they were imported. That act provides "that all fermented, distilled or intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313, c. 728. It is impliedly admitted by the plaintiff in error that the agreed statement of facts shows that it sold the package of whisky in question in Whitfield county, Ga., as alleged in the indictment; and this is in accordance with the decision of this court in *Crabb v. State*, 83 Ga. 585, where it was held: "The sale of whisky sent by express, 'C. O. D.,' is not complete until the whisky is delivered and paid for; and the express agent making the delivery and collection in a county where sale is lawfully prohibited is subject to indictment if he acts knowingly in completing the sale." So the contention of the plaintiff in error amounts to simply this: that although it sold the whisky in Whitfield county, Ga., at the time alleged in the indictment, it was guilty of no offense, because the sale was an interstate commerce transaction, which did not fall within the provisions of the Wilson act, subjecting such liquor to the operation and effect of the laws of this state upon its arrival therein. In support of its construction of this act the plaintiff in error relies upon the decision of the supreme court of the United States in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1068. In that case it appeared that a box of intoxicating liquors was shipped by rail from a point in the state of Illinois to Brighton, Iowa, and upon its arrival there

was placed by the trainmen on the platform of the railroad station; and shortly thereafter Rhodes, who was the station agent of the railroad company at that point, in the discharge of his duties, moved the box into the railroad freight warehouse, which was about six feet from the platform where the box had been deposited when taken from the train. Upon this state of facts, he had been tried and convicted of a violation of an Iowa statute, which, briefly stated, prohibited and made penal the transportation by any express company, railroad company, or any person, for any other person or corporation, of any intoxicating liquors from one point or place to another point or place within that state without first being furnished with a specified certificate, which the law of the state provided should be granted under particular and exceptional conditions. The precise question before the supreme court of the United States was whether the Iowa statute which Rhodes was charged with having violated could be applied to his act in moving the box of liquors from the railway station platform into the railroad freight house, without rendering that statute repugnant to the constitution of the United States. The court held that it could not. In reaching this conclusion the court construed the Wilson act, and held that the goods in question had not, within the meaning of that act, arrived in the state of Iowa when they crossed the line of the state, and did not do so until the interstate transportation contracted for by the railroad company which received the package at the point of shipment had been completed by the receipt of the goods at their destination, and delivery to the consignee. The dominant idea seems to have been that the power of the state of Iowa did not attach to the intoxicating liquor while it was in course of transit from the point of shipment to the point of destination, and that the liquor was still in transit, under the contract for interstate transportation, when it was being moved from the railroad station platform in Brighton, Iowa, into the freight warehouse of the railroad company at that place. It is true, the court, in the opinion, said the power of the state did not attach until the goods had been delivered to the consignee; but we think it was unnecessary to go that far in order to rule the question which the court was called upon to decide. The common carrier had contracted to both transport and deliver the goods, and the transportation was complete when the goods had reached the point of destination for which they were intended, whether the consignee ever called for and received them or not. They were then no longer in transit from the shipping point to the point of destination; and it seems to us they had certainly arrived within the state of Iowa, within the meaning of the Wilson act, when they were deposited in the freight warehouse of the railroad company at the terminal point

of the shipment. But, be this as it may, and taking the decision of the supreme court of the United States, construed in the light of the precise question which was involved in the case, to mean that the package of liquor had not, within the meaning of the Wilson act, arrived in the state of Iowa until it had been delivered to the consignee thereof, we still do not think that it controls the case which we have under consideration. No question of a sale of the liquor in Iowa in the original package of its importation was involved in that case. Rhodes was prosecuted for simply moving the liquor from one point to another in the state of Iowa, contrary to the law of that state. In the present case there was a sale of whisky in the city of Dalton, Ga., in the original package in which it had been shipped from the state of North Carolina; and the sole question now before us is whether this sale was, under the interstate clause of the federal constitution, exempt from the operation of a penal law of this state, for the reason that such sale was effected before the consignee received possession of the whisky. It is contended, as we have seen, that it was so exempt, upon the theory that the whisky had not, within the meaning of the Wilson act, arrived in the state of Georgia until it had been delivered to the consignee. Was the sale involved in this case consummated before the arrival of the whisky in Georgia, or after its arrival in this state? We think it was after the arrival of the goods in Georgia. We do not think, in a case of this character, the mere fact that the package had not been delivered by the express company to the person to whom it was addressed by the consignor is sufficient to show that it had not arrived in this state. The purpose of the shipment must be taken into consideration. If that purpose had been simply that the package of liquor, upon reaching the hands of the express company's agent at Dalton, should, upon payment of the express charges thereon, be delivered to the consignee, then, perhaps, under the decision in the Rhodes Case, the package had not arrived until the consignee received it from such agent. But as the whisky was shipped from a point in North Carolina to Dalton, Ga., in order that the consignor might, through the agent of the express company at that point, complete a sale thereof to the consignee, we think it had arrived in this state before such sale was completed and the goods delivered to the consignee. When it reached the office of the express company in Dalton, it was still the property of the consignor, and was to be so held by the express company until the stipulated price named by him should be paid by the consignee. For the purpose of perfecting the sale by the consignor to the consignee, the whisky had arrived in Georgia when it reached and was deposited in the express company's office in Dalton. The consignor could not have escaped the effect of the

Wilson act by shipping the package from North Carolina to an agent of his in Dalton, Ga., and through this agent delivering it there to some one else upon such third person paying a stipulated price for the whisky. Clearly, in such a case, when the package reached the hands of his agent at Dalton it would have arrived in Georgia. It seems to us that the principle is not changed by the mere fact that the consignor addressed the package directly to the party to whom he intended to sell it in Dalton, and made the agent of the express company at that point his agent to effect such a sale. Such was the effect of shipping the whisky to a named person at Dalton, and instructing the common carrier to deliver it to such person when, and only when, he paid a stipulated price for it. When the express company's agent at Dalton, acting for the consignor, sold the whisky to the person to whom the package was addressed, it was in legal effect the same as if the consignor had himself made such sale in Dalton. We are of opinion that when the express company, as the agent of the consignor, effected or completed the sale in Dalton, Ga., to the consignee, it was not shielded by the interstate commerce clause of the constitution of the United States from the operation of a penal law of this state.

Judgment affirmed. All the justices concurring.

(114 Ga. 13)

RUCKER v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

DEFECTS IN INDICTMENT—NEW TRIAL—SWINDLING—INSTRUCTIONS—ARGUMENTS OF COUNSEL.

1. Defects in an indictment or accusation must be taken advantage of either by demurrer before trial, or motion in arrest of judgment after conviction. They furnish no reason for the granting of a new trial.

2. Where one is prosecuted under an accusation charging him with the offense of cheating and swindling, upon the ground that he falsely represented that he was the owner of certain property and that the same was unincumbered, and it appears that at the date of the representation there was outstanding a writing which in law amounted to a lien upon property of the accused, which, though differing in description from that described in the accusation, was shown by parol evidence to be the same, it was not erroneous, after the introduction of this evidence, for the court to charge that the difference in description was explainable by parol evidence.

3. When counsel for the accused in the argument of a criminal case takes a position before the jury which is calculated to make an erroneous impression upon their minds as to the motives of the prosecutor and the character and consequences of the prosecution, it is not improper for the court, in his charge, to refer to the subject-matter of such argument, and relieve the minds of the jury from such erroneous impression, if it exists.

4. While in a prosecution for cheating and swindling under the provisions of Pen. Code, § 658, it is necessary for the state to show by

evidence that the person to whom the false and fraudulent representations were made has sustained injury and damage thereby, such injury and damage is sufficiently shown by proof that the security taken for the payment of the debt upon the faith of such representations is of far less value than it would have been if the representations had been true.

5. The evidence authorized the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Jim Rucker was convicted of swindling, and brings error. Affirmed.

L. O. Van Duzer, for plaintiff in error.
Thos. J. Brown, Sol., and J. N. Worley, for the State.

COBB, J. The accused was prosecuted for cheating and swindling, under the provisions of Pen. Code, § 658; the accusation charging that he did falsely represent to M. E. Maxwell that he was the owner of one sorrel horse mule about 10 years old, named "Jim," one black mare mule about 11 years old, name "Jule," and "one two-iron axle wagon," and that such property was unincumbered, and that he did by such false representations obtain from Maxwell a credit in goods and merchandise of a specified value, to the injury and damage of Maxwell in a specified sum. Upon a verdict of guilty having been returned by the jury, the accused made a motion for a new trial, and the case is before this court on a bill of exceptions in which complaint is made that the judge overruled this motion.

1. In one ground of the motion for a new trial complaint is made that the entire trial was void, for the reason that the accusation upon which the accused was tried was invalid; it being contended that, as the act creating the city court of Elberton did not in terms require that accusations against persons charged with crime in that court should be founded upon oath or affirmation, so much of the act as authorized a trial for crime in that court is unconstitutional and void. Without reference to whether there is any merit in this contention, it is sufficient to say that this defect in the accusation, if it exists, affords no ground for a new trial. If the accusation was void for any reason, the question should have been raised by demurrer before pleading to the merits, or by motion in arrest of judgment after conviction. *Boswell v. State*, 114 Ga. —, 39 S. E. 897.

2. It is alleged that the court erred in giving the following charge to the jury: "You have in evidence before you a note signed by the defendant and others, payable to C. I. Kidd, in which a certain mule was described, and the title thereto retained in said C. I. Kidd. It is claimed by the state that this mule is one of the mules described in the accusation, and it is claimed by the defend-

ant that the description in the note is defective as evidence of title. He claimed that the color of the mule is incorrectly described in the note. On that subject I charge you that an incorrect description of the mule, as to color alone, in the note referred to, would be explainable by verbal testimony in a civil action between Kidd and the defendant respecting the title to the mule, and would not defeat Kidd's title to the mule so retained in the note. Such incorrect description in the note would therefore not avail the defendant as a defense in a criminal action, where he is charged with falsely representing that the property was his own and unincumbered." We see no error in this charge. If in the trial of a civil action between the accused and Kidd it could be shown, as is undoubtedly the case, that the mule described in the Kidd note was the same mule that was referred to in the conversation between the accused and the prosecutor, and thus Kidd could have recovered the mule, and thereby prevented the prosecutor from resorting to the mule to obtain payment of his debt, certainly that would establish the fact that the mule mentioned in the accusation was not the unincumbered property of the accused, and that therefore the representations made by the accused to the prosecutor were false.

3. Complaint is made that the court erred in charging the jury that the prosecution for cheating and swindling was a criminal proceeding in the name and behalf of the state for an alleged violation of a public law, that it is the duty of every good citizen to prosecute for any violation of the penal laws, and that the fact that the prosecution was instituted by the person who was injured by the false representations would not subject him to the criticism of prosecuting a criminal case for the purpose of collecting a debt. It appears from the record that counsel for the accused had argued to the jury that, if he was convicted in this case, it would amount to an imprisonment for debt. In the light of this fact, we see no objection to the charge of the court. When counsel in the heat of argument take a position which is not well founded, and is calculated to create an erroneous impression upon the minds of the jury, it is not improper for the court,

in its charge, to call attention to this fact, and dispel such erroneous impression, if it exists.

4. It was argued that there was no evidence from which the jury could find that the prosecutor had been injured and damaged by the representations of the accused, even if they were false and fraudulent. The statute declares, in effect, that the crime is not complete unless the person to whom the representations have been made has been defrauded; and it has been held that the representations must both deceive and injure the person alleged to be defrauded. *McGee v. State*, 97 Ga. 190, 22 S. E. 589; *Berry v. State*, 97 Ga. 202, 23 S. E. 833. It is not necessary that the person to whom the representations were made should have lost his entire debt. All that is necessary to be shown is that he has lost a portion of his debt, by reason of the fact that the security which he had taken upon the faith of the representations as to the ownership of the property, and that it was unincumbered, is materially less than it was represented to be. Applying this rule to the facts of the present case, it appears that representations were made that certain property was owned by the accused and unincumbered, and upon the faith of these representations a mortgage was taken, and that on account of the existence of other liens upon the property the security thus taken was far less than it would have been had no lien existed,—so much so, in fact, that the person from whom the credit was obtained has really no security for a portion of his debt. See, in this connection, *Culver v. State*, 86 Ga. 197, 12 S. E. 746. It certainly cannot be said that a creditor has not been injured, when he extended credit on the faith of a security which did not exist.

5. While the motion for a new trial contains other grounds than those specifically mentioned in the foregoing discussion, the principles above announced dispose of the questions raised by the other grounds. The evidence authorized the verdict, and the court did not abuse its discretion in refusing to grant a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 126)

CROWLEY v. CROUCH.

(Supreme Court of Georgia. Nov. 7, 1901.)

TRUSTEE—PETITION FOR REMOVAL—QUESTION FOR COURT—CONSTRUCTION OF WILL.

1. In disposing of a petition by a trustee against a cotrustee, both of whom had been appointed by will, in which petition the plaintiff not only prays for the removal of the defendant from his trust, but also sets forth the will, together with a statement of the defendant's rights thereunder as claimed by the plaintiff, and where the defendant sets up in his answer reasons why he should not be removed, denies that plaintiff's construction of the will as to the defendant's rights thereunder is correct, and by cross petition prays for a decree fixing his individual rights in the property in question, the court has before it not only the question of removal or nonremoval, but also that of passing on the prayer of the cross petition.

2. Under the terms of the will in this case, the defendant in error took a life estate in the property in question, subject to be divested in the event such property should be sold by him as trustee.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Mrs. Crowley, as next friend of James Crouch and John Crouch, for the removal of James T. Crouch, cotrustee. From the judgment, Crowley brings error. Reversed.

W. J. Neel and Lipscomb & Willingham, for plaintiff in error. Denny & Harria, for defendant in error.

FISH, J. These material facts we gather from the record in this case: Mrs. Lillie M. Crouch died testate in 1899, her will being executed a few days prior to her death, and written by herself. The portions of it pertinent to the questions presented are: "I * * * give, bequeath, and devise my earthly belongings as follows: * * * Second. My house and lot, with improvements thereon, to my aforesaid children (James Turner Crouch and John Crowley Crouch), to be held in trust for them by their father, James Turner Crouch, and my mother, Mrs. John Crowley; said house, if in their judgment should be sold, proceeds to be invested for their benefit in some other equally paying or better investment. Third. My drug stock and fixtures, with soda fountain and apparatus, likewise held in trust for my two children; and if their father should see fit to dispose of it, or change his investment, that he will make use of proceeds for the children's benefit in some other investment, after outstanding debts of mine are paid. This stock consists of nineteen shares of stock in Hale-Jarvis Drug Company, duly incorporated. All this property is to be enjoyed by my husband as long as he lives, and no one shall have any power to hasten him out of the house or business as long as it is

his pleasure to continue them the same." The will was duly probated in common form. In October, 1900, all the property mentioned in the third item, viz. the stock in the drug company, etc., was sold under an order of court applied for by Mrs. Crowley and James Turner Crouch, as trustees, for the support, maintenance, and education of their cestui que trust, as well as for the purpose of paying off a lien upon the house and lot mentioned in the second item of the will. The property brought \$5,000.—\$1,000 in cash, and the balance in monthly installments of \$100 each, for which the purchasers gave their notes. In March, 1901, Mrs. Crowley, as next friend of James Turner Crouch and John Crowley Crouch, applied to the judge of the superior court for the removal of her cotrustee, James Turner Crouch, her petition charging gross mismanagement and misconduct on his part in reference to his trust, and that since the death of his wife he had become an unfit person to discharge the duties of trustee for the children. The petition alleged, in substance, that under the will of Mrs. Crouch—a copy of which was attached as an exhibit—James T. Crouch was given the right to the use and enjoyment of the property mentioned in the second and third items of the will only so long as it should remain unsold, but that, if sold, the proceeds were to be reinvested for the benefit of the children; and that he was to have no interest in the proceeds or the property in which they might be invested. It also alleged that the property mentioned in the third item of the will had been sold as hereinbefore stated. The prayers of the petition were for the removal of James Turner Crouch as trustee, or that he be required to give a bond for the faithful discharge of the duties of his trust, and for general relief. The respondent, in his answer to the petition, denied that the will only gave to him the use and enjoyment of the property mentioned so long as it should remain unsold, and alleged that the will gave him a life estate in such property, not subject to be terminated by the sale thereof, and that during his life petitioner had no right to use or manage the same. After making certain charges, the answer concluded with the prayers that respondent be authorized to reinvest the proceeds of the sale of the stock in the drug company, etc., in "some other business, as by the will authorized, and respondent be permitted to collect and use the income arising from the rent of the house and the proceeds of the drug store and soda water apparatus and fixtures as respondent deems best for the support of himself and his children, as by the will permitted; and that respondent's interests under the will as life tenant be preserved." The judgment of the court required the respondent to enter into a good bond, within a stated time, and for a given amount, and in default thereof that he be removed

from his trust. The judgment then proceeded as follows: "(2) The court further finds and adjudges that J. T. Crouch, under the will of Mrs. Lillie M. Crouch, is given a life estate in the house and lot and the drug store, soda fount, and store fixtures referred to in said will, and is entitled, during his life, to the income therefrom, after the payment of taxes, insurance, and necessary repairs, which are hereby declared to be a charge upon, and payable from, such income." Mrs. Crowley, as trustee and next friend of the two children, excepted to so much of the judgment of the court as is contained in the second paragraph thereof above quoted.

1. The first ground upon which that part of the judgment of the court excepted to is alleged to be erroneous is that there were no pleadings to authorize the same. There is no merit in this ground. While the petition prayed only for Crouch's removal as trustee, it set out the will of Mrs. Crouch, and undertook to define his rights as to the property in question. His answer denied the construction put upon the will in the petition, and set up what he contended to be his rights in the property under the will, and then, converting his answer into a cross petition, he prayed that his rights as life tenant should be protected by the judgment of the court. The court therefore properly had before it not only the question of removal or nonremoval of Crouch as trustee, but also that of passing upon the prayer of his cross petition.

2. The other ground of exception alleges that the court erred in its construction of the will. Keeping in view the primary rules for the construction of wills that the intention of the testator should be diligently sought by considering and giving force to all parts of the instrument, and that a later clause thereof should not destroy a former, unless the two are incompatible and irreconcilable, we have reached the conclusion that Crouch, the defendant in error, was given, under the will of his wife, a life estate in the property mentioned in the second and third items of such will, to be terminated, however, upon the sale of such property by him as trustee for the children of himself and wife. Item second of the will gives the house and lot to the children of the testatrix, to be held in trust for them by their father, James Turner Crouch, and Mrs. Crowley, and provides that if the property, in the judgment of the trustees, should be sold, the proceeds should be reinvested, for the benefit of the children, in other property that as an investment would pay equally as well or better. The third item provides that the stock in the drug company, the soda water apparatus, etc., should likewise be held in trust for such children, and, if their father should see fit to dispose of it, or change his [this?] investment, he should "make use of proceeds for the children's benefit in some other in-

vestment." So far the children are the sole objects of the bounty of testatrix. All of the property mentioned is to be held in trust for their benefit alone. The house and lot may be sold, if, in the judgment of the two trustees, it should be best; the stock in the drug company, the soda water apparatus, etc., may be sold in the discretion of one of the trustees, James T. Crouch; but in either case the authority to sell is given but for one specific purpose, and that is to reinvest the proceeds for the benefit of the cestui que trustent. Crouch is given no authority to sell the stock in the drug company, the soda fountain, etc., for the purpose of reinvesting the proceeds for his individual use and benefit, but, as already said, such proceeds are required to be reinvested for the use of the cestui que trustent alone. If the clause that provides, "All this property is to be enjoyed by my husband as long as he lives, and no one shall have any power to hasten him out of the house or business as long as it is his pleasure to continue them the same," be seemingly in conflict with the intention of the testatrix so clearly expressed in the preceding clauses, such conflict may be easily reconciled by construing this last-quoted clause as giving to James T. Crouch a life estate in the property so long as it should remain unsold, such estate to be divested when a sale should be had at his instance. Such a construction would give force to all clauses of the will, and, we think, would carry out the intention of the testatrix. The expression, "And no one shall have any power to hasten him out of the house or business as long as it is his pleasure to continue them the same," seems to mean that, while his interest should be divested by a sale of the house or business, it was left entirely with him whether a sale should be had. He was given a life estate in specific property. Whatever power, if any, this gave him to dispose of his life interest therein for his own benefit, it certainly gave him no power whatever to sell the property in which this life estate was created. A tenant for life has no power to dispose of the fee. His power is only over what belongs to him; that is, the life estate. The only power which James Turner Crouch had to sell the property itself was that conferred by the clauses in the will providing for a sale of the property and a reinvestment of the proceeds thereof in other property for the benefit of the cestui que trustent. The power to sell conferred by these clauses was a power to sell for a specific purpose, and could only be exercised for this purpose. This power as to the house and lot was conferred jointly upon both the trustees, Crouch and Mrs. Crowley, and as to the stock in the drug company, the soda fountain, etc., was conferred upon Crouch, trustee, alone. The only purpose for which the power to sell could be exercised being to obtain the proceeds of the property, and re-

invest them in other property for the benefit of the cestui que trustent, the power of sale could not be exercised for the purpose of converting the property into cash, and investing such proceeds in other property for the benefit of Crouch for life, and then for the benefit of the cestui que trustent. The testatrix seems to have realized that a sale of the property under the power conferred by these clauses would terminate the life estate of her husband, and, in order to make sure that his life estate should not be thus destroyed without his consent, she provided that "no one [should] have any power to hasten him out of the house or business as long as it [was] his pleasure to continue them the same." She seems to have apprehended that the cotrustee or the cestui que trustent might undertake to bring about a sale of the property and a reinvestment of the proceeds for the benefit of the cestui que trustent during the lifetime of her husband, without his consent; and to prevent this emphatically declared that no one should have any power to hasten him out of the house or business. Crouch, the defendant in error, was given a life estate in the house and lot, terminable by a sale of such property by the concurrent action of himself and his cotrustee, in execution of the power jointly conferred upon them by the will; and in the stock in the drug company, the soda fountain, etc., he was given a life estate, terminable whenever he, as trustee, should sell such property under the provisions thereof of the will. As this last-mentioned property, viz. the stock in the drug company, the soda fountain, etc., was, with the consent and at the instance of Crouch, sold under the power conferred by the will, his life estate, so far as this property is concerned, was terminated, and the entire interest in the proceeds arising from the sale of this property belonged to his two cestui que trustent. It follows that the portion of the judgment of the court excepted to by the plaintiff in error was erroneous.

Judgment reversed. All the justices concurring.

(114 Ga. 104)

DAVIS et al. v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

HOMICIDE—EVIDENCE—NEW TRIAL.

No error of law was committed, the evidence was sufficient to authorize the verdict, and the newly-discovered evidence was entirely of an impeaching nature. There was therefore no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Laurens county; Jno. O. Hart, Judge.

Frank Davis and others were convicted of voluntary manslaughter, and bring error. Affirmed.

John B. Cooper, W. C. Davis, and B. J. Conyers, for plaintiffs in error. H. G. Lewis, Sol. Gen., for the State.

SIMMONS, C. J. It appears from the record that Fordham, Davis, Webb, and Haskins were indicted for the offense of murder. Fordham was tried and convicted at one term of the court, and at a subsequent term the others were jointly tried and convicted of voluntary manslaughter. They made a motion for a new trial, containing 41 grounds. Many of these grounds deal with matters trivial in their nature, and are not of sufficient importance to require express mention in this opinion. In several different grounds the same ruling is complained of in different phraseology. After a careful consideration of all of the grounds, we find that the points worthy of discussion may be summed up as follows: (1) That the court charged upon the subject of manslaughter, when the evidence showed that the law of manslaughter was not involved in the case; (2) that the court gave in charge to the jury section 73 of the Penal Code, when the evidence showed that there had been no mutual combat, and no mutual intention to fight; (3) that the court charged upon the subject of conspiracy or common intent upon the part of the defendants to kill the deceased, when there was no evidence to warrant such a charge; (4) that the court charged upon the subject of involuntary manslaughter, when the evidence showed that this offense was not involved in the case; (5) that the court gave an erroneous charge with reference to reasonable doubt; (6) that the court refused to give in charge a certain request; (7) that the court, in the charge, failed to restrict the effect of certain admissions, made by Davis after the homicide to the defendant making them; (8) that the court failed to charge upon the subject of confessions.

The evidence discloses, in substance, that the four persons indicted and Ben Cannon and Oscar, his son, met on July 4, 1900, at a "commissary" belonging to Fordham, one of the accused. They commenced throwing "crack-a-loo" for cider. This sport continued for some considerable time. The person losing treated the crowd to a quart bottle of cider. When the game was over, Oscar Cannon claimed to have saved a half of a gallon of his portion of the cider, and when he and his father were ready to leave he placed this cider in his father's buggy. Fordham objected to this, and, going to the buggy, took the cider out and carried it back into the house. Oscar followed him, and a quarrel and fight ensued between them. Oscar was ready and willing to fight, and declined to discontinue the combat on the advice of his father. In this fight the whole crowd became engaged, the four accused persons taking sides against the two Cannons. The father and son were both knocked down. When the father arose

he discovered the four accused persons pursuing Oscar, who seems to have left the house while the father was down. When the father arrived near the place where Oscar had been overtaken, the latter was being beaten by Webb and Fordham. Haskins threw the father down, and Davis threatened to cut his heart out if he breathed. The father became frightened and left the place. When he returned he found his son in a dying condition. This is, in substance, the testimony of the father. Two other witnesses testified that there was a general fight, in which all were engaged, moving from the commissary to the place where the fatal blows were stricken. It was also shown that one of the accused, soon after the fight, remarked in the presence of the others: "We have killed one — Cannon to-day, and * * * if [Ben Cannon] comes down here we will get another."

1. Under the facts shown, we think the trial judge was fully justified in giving in charge the law relating to the offense of manslaughter. The jury were authorized to infer from all the evidence that Oscar Cannon and Fordham mutually intended to fight, and that the father espoused the cause of his son, while the others took part with Fordham, when the fight became general. Fordham and Oscar exchanged blows when Fordham took the elder from the buggy and carried it back into the house. When they fought and the elder Cannon took sides with his son, the others took the part of Fordham and fought the Cannons until Oscar was overpowered and the father became frightened and left. Under such facts the trial judge would not have been warranted in deciding for himself that the law of voluntary manslaughter was not involved in the case, but very properly submitted the question to the jury.

2. It was also contended that it was error to give in charge section 73 of the Penal Code. The assignment of error made in this connection is that there was no evidence of mutual combat or mutual intention to fight, and that this Code section was therefore inapplicable. We think that even a cursory reading of the above facts will show that the combat was mutual from its inception to its end. There was a mutual fight in the commissary between Oscar and Fordham, and subsequently between the two Cannons and the defendants; and, according to the testimony of two of the witnesses, this was continued after the combatants had left the house, and until the end. The motion does not complain that this section (73) was given in immediate connection with section 70. If this assignment of error had been made, a different question would have been presented. That this was done does not appear from the motion, and we must hold that it was not erroneous to give section 73 in charge to the jury.

3. From the statement of the facts it must be apparent that the jury could find that there was an intent common to these defendants

to participate in the fight against the Cannons. Early in the fight Fordham fought with Oscar Cannon, while the other defendants fought with the father. Subsequently the fight became general, the Cannons being pitted against the four defendants. There was therefore no error in charging upon the subject of conspiracy and common intent. Counsel for the plaintiffs in error laid great stress in the argument here upon the fact that no prearrangement or agreement among the defendants had been shown. We understood his contention to be that, before a conspiracy or common intent could be established, it was necessary for the state to show that such agreement or arrangement had been expressly entered into before the fight was begun, and that unless this was shown it was error to charge upon the subject. We think that this contention is not sound. Conspiracy or common intent may be established by proof of acts and conduct, as well as of previous express agreement. *Hudgins v. State*, 61 Ga. 182. It seems to us that, taking as true the testimony for the state, the jury was clearly authorized to find that a common intent existed throughout the fight, and particularly about the time the mortal blows were given. At that time the elder Cannon, according to his testimony, was knocked down, the four defendants went in pursuit of the son, and when the father attempted to follow he was tripped up by Haskins and threatened by Davis; Fordham and Webb in the meantime giving to the son the blows which caused his death. Thus two of the defendants were beating the son while the other two were restraining the father from rendering assistance. If this was true, the acts and conduct of the defendants seem to us to have indicated a common intent. Certainly it was enough to authorize the judge to submit the question to the jury.

4. Whether there was any view of the case in which the jury might have been authorized to find a verdict of involuntary manslaughter, we need not decide. The jury found the accused guilty of voluntary manslaughter, and the charge as to the lower grade of homicide did not injuriously affect them. *Robinson v. State*, 109 Ga. 506, 34 S. E. 1017.

5. Complaint is made that the court erred in charging: "The state is not required to demonstrate with mathematical accuracy and precision the guilt of the accused. The state is bound only to establish their guilt to a reasonable and moral certainty. If the state has done that, then it is your duty to convict the defendants." This court has decided in *Bone v. State*, 102 Ga. 387, 30 S. E. 845, that there was no error in giving such a charge after having correctly charged the law of reasonable doubt. In the present case the part of the charge in connection with which this was given was fuller and clearer than was the charge in the *Bone* Case. Indeed, taking as a whole the charge

upon this subject, there can be no doubt that the jury must have clearly understood that they could not convict unless the guilt of the accused was established beyond a reasonable doubt.

6. Complaint is also made that the court failed to give in charge without qualification the following written request: "If, upon the entire evidence, you should find that there was no combination or joint purpose or action of these defendants with the other, or any of them, indicted with him, then the defendants can be only held responsible for what he himself did at that time. And if in any case you should believe, upon the whole evidence, that it is uncertain or doubtful whether the defendants Jesse Webb, Jack Haskins, and Frank Davis, now on trial, or some other one of said defendants, struck the fatal blow upon the deceased, it will be your duty to find the defendants not guilty." It was said by counsel in his argument here that this request was taken literally from the case of *State v. Westfall*, 8 Am. Cr. R. 349; that in that case such a charge was approved by the supreme court of Iowa. In that case the request to charge which was approved was as follows: "If, upon the entire evidence, you shall find that there was no combination or joint purpose or action of this defendant with the others, or any of them, indicted with him, then the defendant can only be held responsible for what he himself did at that time. And if in such a case you should believe, upon the whole evidence, that it is uncertain or doubtful whether the defendant Benjamin O. Westfall, now on trial, or some other one of said defendants, struck the fatal blow upon the deceased, it will be your duty to find the defendant not guilty." Comparing the request in that case with the one made in this, we find that counsel was mistaken as to having copied it correctly. It is neither a literal nor a substantial copy. Aside from some grammatical confusion in applying the request made in the Iowa case to a case in which several defendants were on trial, counsel made his request much broader by substituting the words "in any case" for the words "in such a case." He sought to apply to any case a principle applicable only to a case where there was no combination or joint purpose or action. This difference is obviously material, and the trial judge did

not err in refusing to give the request in charge without qualifying it.

7. According to the evidence of one of the state's witnesses, Fordham and the three present plaintiffs in error went to a picnic after the homicide had been committed. There some one inquired what the trouble was, and Davis replied, "We have killed one — Cannon to-day, and * * * if [Ben Cannon] comes down here we will get another." It appears that all four of the defendants were present when this remark was made. The evidence was not objected to, but counsel claimed that the court erred in not confining its effect to Davis; that, inasmuch as the homicide had been committed some time prior to the declaration, it could bind only the one who made it. Section 5195 of the Civil Code provides that "acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission." When the three others stood by and heard Davis make the declaration that they had killed "one Cannon," it was incumbent upon them, if the statement was not true, to deny it. Inasmuch as they did not deny it, it was competent evidence against them, as an admission of participation in the homicide.

8. In another ground of the motion it is alleged that the court erred in not charging the jury upon the subject of confessions, the alleged confession being the admission just above set out. In this the court was right. The words of Davis did not amount to a confession of guilt, and the judge would have erred had he charged upon the subject of confessions. The statement of Davis amounted merely to an incriminating admission. After a careful reading of the entire record, we are of opinion that the evidence authorized the verdict. The latter was therefore not contrary to law or the evidence.

The last ground of the motion for new trial sets out certain newly-discovered evidence. An examination of this evidence shows that it is entirely of an impeaching character, and this court will not interfere with the refusal of the trial judge to grant a new trial because of such evidence. On the whole, we are of opinion that the trial judge did not abuse his discretion in refusing a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 90)

HEARD v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

CRIMINAL LAW—WRIT OF ERROR—MOTION TO DISMISS—SUFFICIENCY OF RECORD—ASSAULT WITH INTENT TO MURDER—PROVOCATION—SELF-DEFENSE—INSTRUCTIONS.

1. When, without objection to the correctness of the brief of evidence accompanying a motion for new trial, the motion was heard and determined on its merits by the trial judge, a motion made in this court to dismiss the writ of error, because the brief of evidence was not approved by the judge, will be denied. Nor is a motion to dismiss a writ of error, because the charge of the court (which is specified in the bill of exceptions as a part of the record) does not bear the formal approval of the judge, good when the particular portions of the charge assigned as error are set out in an amendment to the motion, which is satisfactorily identified and approved in the body of the bill of exceptions.

2. On the trial of one charged with assault with intent to murder another by cutting him with a knife, it was error to charge, in effect, that if the prosecutor simply struck the accused with his hand or fist, intending no felony or serious bodily harm, and in answer to that blow the accused used a weapon likely to produce death, he would be guilty of the offense charged. (a) Had death resulted, and the fatal wound been inflicted as the result of passion engendered by a blow amounting to no more than an assault, the accused could not have been legally convicted of murder. (b) Had the assault been provoked by passion so engendered, the defendant might have been convicted of stabbing, or assault and battery, in case the evidence so warranted.

3. When, in a trial for assault with intent to murder, the accused sets up the defense that he inflicted the wounds on the prosecutor to prevent the commission of a felony on his person, and the evidence, both of the state and the accused, is directed to the truth of the issue thus made, it is error to charge the jury, in effect, that, in order for the accused to be justified, it must appear that the danger was so urgent and pressing at the time of the difficulty that, in order to save his own life, it was absolutely necessary to kill. The provisions of that section do not apply in a case of the character indicated.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Enoch Heard was convicted of an assault with intent to murder, and brings error. Reversed.

H. M. Porter and Enoch Heard, for plaintiff in error. J. S. Reynolds, Sol. Gen., for the State.

LITTLE, J. Enoch Heard was indicted for the offense of assault with intent to murder, alleged to have been committed on Dave Walker by cutting him with a knife. He was found guilty, and submitted a motion for a new trial, which being overruled, he excepted. The charge was clearly made out by the evidence introduced on the part of the state, but one of the witnesses for the accused, in giving an account of the circumstances under which it is alleged that the

defendant cut Walker, testified that before he was cut Walker rushed up to the defendant, and struck him on the side of the head with his hand. The defendant in his statement also said that Walker struck him before he was cut.

1. When the case was called in this court, the solicitor general moved to dismiss the writ of error on the grounds that neither the brief of evidence nor the charge of the court was approved by the trial judge, and there was no record that the brief of evidence had been duly filed in the office of the clerk of the court. He also moved to strike from the record the amendment to the motion for new trial for the same reasons. After the call of the case we were furnished with a certified copy of an order dated October 21, 1901 (after the bill of exceptions and transcript of the record had been transmitted to this court), signed by the judge who tried the case in Richmond superior court, in which it is recited that the brief of evidence was regularly submitted to the judge at the hearing, and the amendment to the motion was considered, allowed, and approved by him at the time of the hearing, and that argument was had on the motion under the brief of evidence, and the amendment and brief were both acted upon and considered as approved by the trial judge, but a formal approval was inadvertently omitted, and that the brief of evidence and the amendment be marked approved *nunc pro tunc*. This order cannot be considered by this court. Certificate to the bill of exceptions, and the various orders and explanatory notes made theretofore, were exhaustive of the power of the judge in this regard, and at the time of the passage of the order of October 21st the case was not pending in Richmond superior court, but was in this court, and the record of the case could not at that time have been altered or added to by any order of the superior court of that county. Eliminating, however, all reference to this order, we find a recitation in the bill of exceptions that the defendant made a motion for a new trial in due time, on certain grounds which were set out in the motion for new trial, and "the amendment made thereto on June 28, 1901," and that this motion as amended was heard by the judge pursuant to orders properly taken, and that after hearing the argument of counsel the judge overruled the motion as amended, and refused a new trial. It therefore appears from the bill of exceptions that there was not only a motion for a new trial, but that an amendment was made thereto of a particular date (June 28th), under a proper order. The record contains an order under date of May 17, 1901, in which it is recited that movant had leave to amend his motion (for new trial) at any time at or before the hearing; and the amendment which it is sought to have stricken recites that defendant came, and, under leave of the court which had been previously

obtained, amends his motion, setting out additional grounds by way of amendment. It is true that there is not attached to the amendment any formal verification by the judge of the additional grounds, nor does the formal entry of filing appear, but the recitation in the bill of exceptions, which is certified to be true, distinctly refers to this amendment, and declares that the amendment was considered and heard by the court, in connection with the original motion, on June 28, 1901. We therefore rule that the recitations in the bill of exceptions, as certified by the trial judge, are sufficient not only to identify the amendment, but are also a sufficient approval of the grounds therein taken, without a formal entry; one of these recitations being that the defendant "moved for a new trial upon the grounds set out in the motion and the amendment made thereto on June 28, 1901, which motion as amended was heard by the judge," etc. The formal filing in the clerk's office is not, under these circumstances, indispensable for the consideration of the motion as amended. It also appears in the bill of exceptions that the plaintiff in error specified the brief of evidence filed under the approval of the judge, as well as the charge of the court; and, while it does not appear by any entry on the brief of evidence that the same was filed in office and approved by the judge, it does appear from the body of the bill of exceptions that counsel appeared and argued the motion for new trial. In the record this motion not only appears, but it is accompanied with a brief of evidence. If there were any irregularities in approving the brief of evidence, or any point as to its correctness, questions concerning the same should have been raised at the time of the hearing of the motion. In the case of *Railroad Co. v. Dorsey*, 106 Ga. 826, 32 S. E. 873, this court ruled that it is too late after a motion for a new trial has, without objection to the brief of evidence, been heard and determined on its merits, to raise the question that the brief was not duly filed. Under this ruling, the motion to strike the brief of evidence is not good. Nor can it prevail as to the charge of the court. The bill of exceptions specifies the charge of the court to be made a part of the record. Even if it were necessary that a formal entry of approval of that charge should appear in the record, it is sufficient to say that the court below, and necessarily, therefore, this court, is only called on to pass upon the portions of the charge which are set out in the motion and amended motion, clearly pointing out such errors as it is claimed were committed in the charge; and, inasmuch as both the motion and the amendment thereto are, as we rule, sufficiently identified and verified in the body of the bill of exceptions, the motion to dismiss cannot prevail.

2. Complaint is made in the amended motion for new trial that the judge erred in

his instructions to the jury, as follows: "I further charge you that if the prosecutor, Walker, simply struck him [the accused] with his hand or fist, and you are satisfied from the evidence that no felony or serious bodily harm was intended, and, in answer to that, Enoch Heard used a weapon likely to produce death, then, under the law, he would be guilty of the offense, and you would be authorized to find him guilty." Other grounds of the motion contain practically the same assignment of error. They will not, therefore, be separately considered, as a proper determination of them is involved in the ruling upon the correctness of this portion of the charge. The defendant having been indicted for the offense of assault with intent to murder, it follows that, if he would not have been guilty of murder under the circumstances of the assault had death resulted, then he could not legally have been convicted of the offense of assault with intent to murder, as death did not result. To determine whether the defendant was guilty of the latter offense, under the evidence in this case, it is necessary to some extent, at least, to consider what would have been the grade of the homicide, if the jury had believed that before the cutting the prosecutor had assaulted the accused, if the cutting which was shown had resulted in the death of Walker. The correctness of the charge complained of was material, in view of the conflict in the evidence. Suppose that Walker had died from the effects of the cut, and the defendant had been on trial for murder; then the principle enunciated in the charge is that if Walker simply struck the defendant with his hand or fist, with no intention to commit a felony or serious bodily harm, and in response to that striking the defendant, with a weapon likely to produce death, had killed Walker, under the law he would have been guilty of murder. This is not a correct legal proposition. Under the provisions of section 65 of the Penal Code, an actual assault upon the person killing, or other equivalent circumstances to justify the excitement of passion, are sufficient to reduce the homicide from murder to voluntary manslaughter. Provocation by words could not do so, but an actual assault might. Then, if the defendant had, in response to a blow from the hand or fist of Walker, killed the latter with a weapon, it would not necessarily have been murder, but might have been voluntary manslaughter. If it would not necessarily have been murder, then it follows, where death does not ensue, that the accused would not necessarily have been guilty of assault with intent to murder. If the cutting proven in the present case was done as the result of passion engendered by a blow from Walker, defendant was not guilty of the offense of assault with intent to murder, but he might

have been found guilty of stabbing or assault and battery. This proposition has been expressly ruled in the case of *Malone v. State*, 77 Ga. 767. It was there held that, on a trial for assault with intent to murder by cutting another, "if the defendant stabbed the prosecutor after he was assaulted, or was moved to act, not by malice, but by a sudden and violent impulse of passion, excited by either of the ways mentioned in section 4324 of the Code (Cr. Code 1895, § 64), or by equivalent circumstances, then the case would be reduced to voluntary manslaughter." And if the offense, under particular circumstances, is voluntary manslaughter, the highest offense of which the accused can be found guilty, under the same circumstances, if death did not result, is stabbing, which is an offense committed without malice. A blow inflicted by one upon another in anger is an assault; hence it is apparent that the charge complained of was error, and that, under the hypothesis stated in the charge, the defendant would not necessarily have been guilty of assault with intent to murder. See *Malone Case*, cited supra.

3. It is also urged that the court erred in charging the jury the principles laid down in section 78 of the Code, which are that if a person kill another in his defense it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, it was absolutely necessary to kill, etc. The contention of the state in this case is that the accused, without any provocation from the prosecutor, made an attack on him with a deadly weapon (a knife), and inflicted certain wounds on him. If this contention be true, the defendant is guilty of assault with intent to murder, unless it be made satisfactorily to appear that the intent to kill was wanting. The accused contended that he inflicted the wound to prevent a felony from being committed upon his person, and that the prosecutor first struck him, and made an attempt to use a deadly weapon upon him, and that the cutting was done to prevent the use of such weapon. The issue, therefore, was whether the cutting was done to prevent the commission of a felony on the person of the accused, and it is not essential, under such circumstances, that in order to be justified one can only kill to save his life. Where a felony is attempted by violence or surprise to be committed on the person of another, and this appears under the provisions of the Code above referred to, the person attacked may lawfully kill the attacking party to prevent such felony, and it is not true, as a legal proposition, that he is only justified when he kills to save his own life. He is equally justified if he kills to prevent the commission of a felony upon his person. The principles contained in the charge complained of are not

applicable in a case where the sole defense set up is the one urged in the present case, but are only applicable under certain circumstances always succeeding mutual combat, in the inception of which the defendant willingly entered into that combat. *Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277. It must be ruled, therefore, that the charge given was error, under the two theories raised by the evidence on the trial.

The other grounds of the motion for new trial do not disclose that any other error was committed by the trial judge. As the case goes back for another trial, we do not pass on the general grounds of the motion.

Judgment reversed. All the justices concurring.

(114 Ga. 169)

WESTERN & A. R. CO. v. HERNDON.

(Supreme Court of Georgia. Nov. 8, 1901.)

INJURY TO RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE.

In order for the widow of a deceased employé of a railroad company to recover from the company for the homicide of her husband in a railroad collision, it must appear that the deceased was free from any fault contributing to the accident. The evidence for both the plaintiff and the defendant in the present case showing that the plaintiff's decedent was guilty of negligence, and that this negligence contributed to the homicide, a verdict for the plaintiff was unwarranted, and should have been set aside as contrary to the evidence.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by O. L. Herndon against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. C. T. Ladson and Jones & Martin, for defendant in error.

LEWIS, J. The plaintiff below brought suit to recover for the homicide of her husband, who was in the employ of the defendant company as brakeman. It appears that on the night of the accident a freight train of the defendant, made up partly of cars equipped with air brakes, and partly of cars not so equipped, left Chattanooga for Atlanta, with Herndon, the plaintiff's decedent, as middle brakeman, stationed on the first of the nonair cars. When in the vicinity of Tunnel Hill, a station on the defendant's line of railroad, the train, on account of alleged defects in the coupling apparatus, became separated, or "broke loose," between the last of the air cars and the first of the nonair cars. The rules of the company required that if a train should become parted while in motion all trainmen must use great care to prevent the detached parts from coming in collision, provided that the engineer and

the brakemen of the detached portion should each give "broke-loose" signals, and that the engineer should keep the front part of the train in motion until the detached portion was stopped. It appears that the engineer did give the broke-loose signal as soon as he discovered that the cars had become separated, but received no signal from Herndon, whose duty it was to give such signal. Failing to see any sign of the rear or detached portion of the train, and believing that it had been stopped, the engineer slackened his speed, and sent the front brakeman back to ascertain if any fragments of the broken coupling apparatus were dragging on the ground; directing him to give a "go-ahead" signal in the event that he should discover that the detached portion of the train had not been stopped, and if he should find that it had been stopped, and that the danger of collision was over, to give a "stop" signal. The brakeman found that the rear portion of the train had not been stopped, but was approaching at a high rate of speed. He swears that he gave a go-ahead signal. The engineer swears that he gave a stop signal. The front portion of the train was brought to a standstill, the rear portion came into collision with it, and Herndon was thrown to the ground, receiving injuries from which he subsequently died. Eldson, the front brakeman, who was sent back by the engineer to see if anything was dragging, testified that when the rear portion of the train passed him, just before coming into collision with the front portion, Herndon was standing on the end of a box car, with his hand on the brake, apparently in the act of getting off of the box car into a coal car. The evidence indicates that if Herndon had been alert he could have put on a sufficient number of brakes to have stopped the detached portion of the train, thus preventing the collision. On the trial of the case the jury returned a verdict for the plaintiff for \$5,921 damages. The defendant made a motion for a new trial, which was denied, and it excepted.

It is a well-established principle of our law that, in order for a widow of a deceased employé of a railroad company to recover for the homicide of her husband, it must affirmatively appear that the deceased was guilty of no negligence contributing to his death. The very section of the Code which gives the right of recovery for injuries to railroad employés expressly provides that the injury must be "without fault or negligence on the part of the person injured." Civ. Code, § 2323. The rule laid down in *Prather v. Railroad Co.*, 80 Ga. 427(2), 9 S. E. 530, 12 Am. St. Rep. 263, is as follows: "If the deceased immediately or remotely,

directly or indirectly, caused the injury, or any part of it, or contributed to it at all, his wife could not recover." This doctrine is so well settled that only passing reference need be made to a few of the cases in which that question has been decided. See *Railroad Co. v. Mitchell*, 63 Ga. 174(8); *Prather v. Railroad Co.*, supra; *Banking Co. v. Hicks*, 95 Ga. 302(2), 22 S. E. 618; *Railway Co. v. Hallman*, 97 Ga. 317, 23 S. E. 73; *Walker v. Railroad Co.*, 103 Ga. 823, 30 S. E. 508; *Railroad Co. v. Myers*, 112 Ga. 237, 37 S. E. 439; *Blackstone v. Railway Co.*, 112 Ga. 762, 38 S. E. 79. Applying this principle to the case now under consideration, we are constrained to hold that the recovery against the railroad company was unwarranted by the evidence in the record before us. It is true that the engineer was probably guilty of a violation of the rules of the company, in failing to keep the front portion of the train in motion until he was certain that the rear portion was stopped and the danger of a collision over; and the conflicting evidence as to whether the front brakeman, Eldson, gave a stop signal or a go-ahead signal upon ascertaining that the detached portion of the train was approaching would also indicate either that the brakeman was negligent in giving the signal, or that the engineer was negligent in interpreting it; but it is also undeniably true that Herndon was himself at fault, in failing to promptly give the required broke-loose signal upon hearing the corresponding signal blown by the engineer, for the giving of this signal would have notified the engineer of the whereabouts of the detached portion of the train, and that it was still in motion, and would have prevented the mistake of the engineer which led to the collision between the two portions of the train. The further fact stands forth that Herndon made no appreciable effort to stop the detached portion of the train by applying brakes as required by the rules of the company. It appears from the evidence that at the time of the collision he had put on only one brake, while it is clearly shown that he had time to put on several, and that if he had been thus diligent in the discharge of his duty he could have materially checked the speed of the cars, if not entirely stopped them. It is therefore clear that by his own negligence the plaintiff's decedent substantially contributed to the accident which resulted in his death; and, applying the rule of law announced in the outset of this opinion, it follows that there cannot, under the evidence in the record before us, be a lawful recovery against the defendant company.

Judgment reversed. All the justices concurring.

(114 Ga. 53)

THEUS v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

TAXATION—EMIGRANT AGENT.

One who comes into this state and employs on his own behalf laborers to work for him outside this state is not an "emigrant agent," within the meaning of the law imposing a tax upon such agents.

(Syllabus by the Court.)

Error from city court of Bainbridge; B. B. Bower, Judge.

R. A. Theus was convicted of hiring laborers to be employed without the state, without registration, and brings error. Reversed.

Donalson & Fleming and W. O. Walker, for plaintiff in error. Albert Russell and Hawes & Hawes, for the State.

LEWIS, J. The plaintiff in error was tried in the city court of Bainbridge upon an accusation charging that on a named day he "did engage in hiring laborers in this state, to be employed beyond the limits of the same, without going before the ordinary of said [Decatur] county and registering his name and place of business as required by law." There was no attempt to contradict the witnesses for the state, who swore that the defendant had hired two negro laborers in Decatur county to go to his farm in Alabama and work turpentine for him, and had attempted to hire others for the same purpose. There was no evidence that he was engaged in the business of an emigrant agent, or that he had acted for any person other than himself in hiring the laborers whom he secured and attempted to secure. On this evidence the jury returned a verdict of guilty, and the defendant's motion for a new trial was overruled, and he accepted.

In the case of *Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685, will be found an exhaustive and able discussion of the meaning of the term "emigrant agent," as used in the general tax act of 1893, under which the accusation in this case was brought. An emigrant agent was there defined as "a person engaged in hiring laborers in this state, to be employed beyond the limits of the same." See also, to the same effect, *Varner v. State*, 110 Ga. 593, 36 S. E. 93. To be engaged in a work, in the sense contemplated by acts imposing taxation, would seem to necessarily imply that the person so engaged must make that work his business or occupation. Giving the language this construction, which we think is not only fair, but necessary, the plaintiff in error was not shown to have been "engaged" in hiring laborers in this state, to be employed beyond the limits of the same. It is not claimed that he was an agent at all, nor that he made the hiring of laborers in any sense his business or occupation. The legislative en-

39 S.E.—58

actment imposing a tax upon emigrant agents, and providing a penalty for the failure to register and pay such tax, was clearly intended to apply to persons who, as agents of others, make it their business to hire laborers in this state, to be sent beyond the limits of the state, and there employed by others. To extend its application to a resident of another state, who, being in this state, incidentally employs laborers on his own behalf to work for him beyond the limits of this state, would be entirely unwarranted.

It follows from the foregoing that the verdict finding the defendant guilty was contrary to law and the evidence, and should have been set aside on motion for new trial. Judgment reversed. All the justices concurring.

(114 Ga. 65)

GRIFFIN, Sheriff, v. EAVES.

(Supreme Court of Georgia. Nov. 6, 1901.)

HABEAS CORPUS—QUESTIONS NOT RAISED AT TRIAL—GENERAL AND SPECIAL STATUTES—CONSTITUTIONAL LAW.

1. One indicted, convicted, and sentenced under a repealed statute may be discharged by habeas corpus, if on the trial the question of the validity of such statute was not made and adjudicated against him. (a) On the trial in which the applicant for habeas corpus in the present case was convicted, the question whether or not the general statute making it an offense to retail or sell intoxicating liquor without license was operative in Bartow county was not made or passed upon.

2. The special local act of 1894 for Bartow county, if valid and constitutional, suspended as to that county the general statute above mentioned. (a) The question of the constitutionality of this Bartow county special act was not made on the trial wherein defendant in error was convicted.

3. The act, however, according to the principle ruled in *Papworth v. State*, 31 S. E. 402, 103 Ga. 36, and subsequent cases, is not constitutional, because it conflicts with the general domestic wine act of February 27, 1877, and is violative of that clause of the constitution which prohibits special legislation in any case for which provision has been made by an existing general law. This special act differs from the special act dealt with in *Smith v. State*, 37 S. E. 441, 112 Ga. 291.

4. It results from the foregoing that, inasmuch as the applicant in the proceeding under review was indicted and convicted under the general act first above mentioned, which is still of force in the county of Bartow, his conviction and sentence were legal, and consequently the court erred in discharging him from custody.

Little and Lewis, JJ., dissenting.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action by W. H. Eaves for writ of habeas corpus directed to R. L. Griffin, sheriff. From a judgment granting the writ, the sheriff brings error. Reversed.

Sam P. Maddox, Sol. Gen., and T. O. Miller, for plaintiff in error. J. M. Neel, for defendant in error.

FISH, J. The first question presented for our consideration is whether one indicted, convicted, and sentenced for an act made penal by a statute repealed prior to the date the offense is alleged to have been committed can be discharged from custody by habeas corpus. This question has been practically answered in the affirmative by the decision of this court in *Moore v. Wheeler*, 109 Ga. 62, 35 S. E. 116. In that case Moore pleaded guilty to an indictment based upon an unconstitutional statute, and, after sentence, sued out a writ of habeas corpus to be discharged from custody. On the hearing he was remanded, but this court held, in reversing such ruling, that the court below erred, for the reason that, as the statute under which the indictment was framed was unconstitutional, the sentence was a mere nullity. In delivering the opinion, Presiding Justice Lumpkin said: "It seems to be now well settled that, where one is indicted and tried under an unconstitutional statute, he may, even after final conviction and sentence, obtain his discharge from custody on a writ of habeas corpus." A number of authorities were cited in support of this proposition. The reason for the rule is that an unconstitutional statute cannot make an act criminal. Such a statute is void, and is as no law. "A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." A court has no power or jurisdiction to render a judgment punishing one for an act sought to be made criminal by an unconstitutional statute. *Church, Hab. Corp.* §§ 362, 368. If one indicted and tried under an unconstitutional statute may, after conviction, be discharged on habeas corpus, he may, for the same reason, be so discharged after conviction and sentence under an indictment based upon a statute repealed prior to the commission of the alleged offense. *Church, Hab. Corp.* § 374; *In re Wright* (Wyo.) 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94. See, also, 9 Enc. Pl. & Prac. 1046. Counsel for plaintiff in error, in support of his contention that the defendant in error cannot be discharged from custody under habeas corpus, relies upon *Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120, wherein it is held: "After a judgment of conviction for felony has been affirmed by the supreme court on writ of error brought by the convict, the legality of his conviction cannot be drawn in question by a writ of habeas corpus sued out by him, or by any other person in his behalf, save for want of jurisdiction appearing on the face of the record as brought from the court below to the supreme court. Such affirmance implies that he was tried by a court of complete jurisdiction legally constituted, and nothing to the contrary can be shown otherwise than by inspection of the record." We do not think that decision is in conflict with the ruling made in *Moore*

v. Wheeler, supra, or contravenes anything we have said in the present case. While it is an elementary principle that errors and irregularities, not jurisdictional, cannot be examined or inquired into on habeas corpus; that on questions of law and fact within the court's jurisdiction its decision is conclusive, and, however erroneous its judgment may be, it cannot be reviewed collaterally on such writ,—yet, as we have seen, it is firmly established that, where one is convicted and sentenced under an indictment founded upon an unconstitutional or repealed statute, the court has no jurisdiction to render the particular judgment, and a discharge may be granted on habeas corpus, where the invalidity of the statute appears from the face of the indictment. The court in *Daniels v. Towers*, supra, recognized the rule that the legality of a conviction could be drawn in question by habeas corpus when the want of jurisdiction in the court appeared on the face of the proceedings. In *Collins v. Hall*, 92 Ga. 411, 17 S. E. 622, it was held that a judgment of conviction void on its face conferred no authority for detaining in prison the person convicted, and was no obstacle to his discharge on habeas corpus. The indictment upon which defendant in error was convicted charged him with violating the general statute against retailing or selling intoxicating liquor without license, and, as the court is bound to take judicial cognizance of the existence of the local statute seeking to repeal the general law, if the general law was repealed the indictment framed under it showed upon its face that it charged no crime. Where the accused, upon the trial, brings in question the validity of the statute under which he had been indicted, and the point is decided against him, it then, of course, becomes *res adjudicata*, and cannot be reviewed collaterally on habeas corpus. The defendant in error in the case under consideration did not, upon his trial, make the question that the general statute making it an offense to retail or sell intoxicating liquor without license was inoperative in Bartow county, nor was it then passed upon. It is true that he then sought to make the point, by requesting the court to instruct the jury that a conviction could not be had under the indictment, because the general law upon which it was based had been repealed by the local law; but the court refused to give such request, and in the motion for a new trial error was assigned upon such refusal. When the case came here for review, this court ruled that the question was never properly raised in the court below, and that, if the indictment was fatally defective, the accused did not want a new trial under that indictment.

2, 3. The general law, as contained in section 433 of the Penal Code, makes it a misdemeanor for any person to sell spirituous,

vinous, or malt liquors in any county or village in any quantity, without first obtaining a license from the authorities authorized by law to grant license for the sale of such liquors by retail. In 1884 an act was passed "to submit to the qualified voters of the county of Bartow the question of the sale and furnishing of intoxicating, alcoholic, spirituous, vinous or malt liquors, and to prohibit the same from being sold or furnished after said election if a majority of those voting [should] so determine, and to provide penalties for such sale and furnishing." Acts 1884-85, p. 503. The prohibitory portion of this act made penal the sale by any person of "any intoxicating, alcoholic, spirituous, vinous or malt liquors within the limits of" Bartow county, but provided that nothing in the act should be "construed to prevent the sale or furnishing by the maker of any domestic wine, beer or cider made in said county." If valid and constitutional, this special local act, when its prohibitory provisions went into effect, superseded, as to Bartow county, the general statute above mentioned, on which the indictment was based under which the defendant in error was tried, convicted, and sentenced; and the result, then, would be, as we have seen, that he should have been discharged upon the writ of habeas corpus sued out by him, it not appearing from the record that the question of the constitutionality of the local act was made on the trial when he was convicted. This special act, however, according to the principle ruled in *Papworth v. State*, 103 Ga. 36, 31 S. E. 402; *O'Brien v. State*, 109 Ga. 51, 35 S. E. 112; *Embry v. State*, 109 Ga. 61, 35 S. E. 116; *Tinsley v. State*, 109 Ga. 822, 35 S. E. 303,—is not constitutional because it seeks to vary the provisions of the general domestic wine act of February 27, 1877 (Acts 1877, p. 33), legalizing the sale of domestic wines, by the manufacturers thereof, in quantities of not less than one quart, anywhere in the state. The special act undertakes to make it unlawful for any person to sell "any intoxicating, alcoholic, spirituous, vinous or malt liquors within the limits of [Bartow] county," and provides that nothing in the act "shall be construed to prevent the sale * * * by the maker of any domestic wine, beer or cider made in said county." The proviso in this special act does not save it from conflict with the general domestic wine act, for it exempts from the operation of the act the sale, by the maker, of such domestic wine only as is made in Bartow county, leaving the act operative as against the manufacturers of domestic wines made in other counties of this state, who might sell the same, in quantities of not less than one quart, in that county. This special act materially differs from the special act for the counties of Thomas and Cobb (Acts 1883, pp. 605, 606), dealt with in *Smith v. State*,

112 Ga. 291, 37 S. E. 441. The special act under consideration in that case, while making it unlawful to sell "intoxicating, spirituous, vinous or malt liquors of any kind and in any quantity" in the counties named, contained a proviso that nothing therein should "be so construed as to prevent any person from selling domestic wines and cider made by them in said county." This court held that the words "in said county," as used in the proviso, related to the place of sale, and not to the place of manufacture, and that, therefore, that special act did not affect or modify the operation of the general domestic wine act of 1877, and was, therefore, not violative of that clause of the constitution which prohibits special legislation in any case for which provision has been made by an existing general law. The question of the constitutionality of the Bartow county special act was not made on the trial wherein the defendant in error was convicted.

4. It results from the foregoing that, inasmuch as the applicant in the habeas corpus proceeding under review was indicted and convicted under the general law contained in section 433 of the Penal Code, which is still in force in Bartow county, it not having been, as to that county, repealed by the unconstitutional special act of 1884 for such county, his conviction and sentence were legal, and consequently the court below erred in discharging him from custody.

Judgment reversed.

LITTLE and LEWIS, JJ., dissenting; LITTLE, J., saying: In my opinion, the local act passed by the general assembly for Bartow county, prohibiting the sale or furnishing of liquor, in 1884, simply had the effect to suspend the operation of the general law prohibiting the sale of spirituous liquors without a license, and under its provision the terms of the general law would become operative *ex vi termini*, in the event the local law for any reason ceased to apply. But the local act in no sense repealed the general law. That local act was perfectly constitutional, and was a proper exercise by the general assembly of its vested power. The indictment was framed under the provisions of the general law, which, being inoperative in Bartow county, would not (because of the existence of the local law) support the indictment; and, inasmuch as the question of the validity of the local law was not made and passed upon at the former trial, when the defendant was found guilty, the judge had the power to determine that question on the hearing of a writ of habeas corpus. In determining, as he did, that the local act was constitutional and valid, and that no offense against the laws of the state was charged in an indictment charging the accused (in Bartow county) with a violation of the general law in relation to the sale of liquor, the judge ruled

(114 Ga. 86)

REEVES v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

**HOMICIDE—SELF-DEFENSE—INSTRUCTION—
ERROR—REVERSAL OF JUDGMENT
—PROPRIETY.**

1. When in the trial of a murder case there was a theory presented by the prisoner's statement which would have authorized the killing of the deceased, whether he was at the time advancing upon the accused or not, it was error requiring the grant of a new trial for the court to so charge the jury as to leave the impression upon their minds that the killing was not justifiable, under any circumstances, unless the deceased was at the time of the killing advancing upon the accused.

2. The judgment refusing a new trial in this case is less reluctantly reversed because it is clearly apparent from the record that the entire truth of the transaction under investigation has not been brought to light.

(Syllabus by the Court.)

Error from superior court, Dodge county; E. J. Reagan, Judge.

Jim Reeves was convicted of murder in the first degree, and brings error. Reversed.

Herrman & Highsmith, for plaintiff in error. J. F. De Lacy, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

COBB, J. The accused was convicted of murder, and sentenced to be hung. Having made a motion for a new trial, which was overruled, he excepted.

1. Complaint is made that the court erred in giving the following charge: "If you believe that at the time of the killing the deceased was advancing upon the accused, the killing would be justifiable." This charge was error, for the reason that it was calculated to impress upon the minds of the jury that the accused would not be justified in taking the life of the deceased unless the deceased was advancing upon him, when there were circumstances referred to in the statement of the accused which, if believed by the jury, would have authorized the killing of the deceased, notwithstanding the fact that at the time of the killing the deceased was not advancing upon the accused. The judge having on his own motion, without any request so to do, undertaken to charge the law applicable solely to a theory of the case as raised by the prisoner's statement, the charge so given should have been accurately adjusted to the facts of the case as made in the statement. *Ragland v. State*, 111 Ga. 211, 63 S. E. 682.

2. It is always with reluctance that this court orders the verdict of a jury set aside, but we do so in this instance with less reluctance because it is clearly apparent from the record that the entire truth of the transaction has not been brought to light. There is so little evidence as to the real reason and motive which actuated the accused in killing the deceased, and the knowledge of the eyewitnesses, who were some distance

y, was so limited as to this matter, that

we cannot help but feel that, whether the accused is guilty of murder or not, something yet remains to be told. We send the case back for a new trial, in the hope that the real truth of the matter may be fully developed.

Judgment reversed. All the justices concurring.

(114 Ga. 79)

BATTY v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

**INTOXICATING LIQUORS—SALE WITHOUT
LICENSE.**

One cannot be legally convicted of selling spirituous liquors without a license, in violation of Pen. Code, § 431, in a county in which the sale of such liquors is prohibited altogether under the terms of the general option liquor law, embodied in Pol. Code, § 1541 et seq., the provisions of which have been adopted and are of force in that county.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Willis Batty was convicted of selling liquor without a license, and brings error. Reversed.

Wm. H. Beck, for plaintiff in error. O. H. P. Slaton, and F. Dismuke, for the State.

COBB, J. The accused was placed upon trial in the city court of Griffin upon an accusation charging that he did on the 1st day of March, 1901, sell by retail spirituous liquors to a named person, and to other persons to the accuser unknown, without first having obtained a license from the proper authorities of the county, and without having taken the oath prescribed by law. It appeared from the evidence that the accused had sold a quart of whisky to the person named in the accusation in October or November, 1900, and that he had sold a quart of whisky to another person some time in the fall of that year. There was no evidence of any other sales by the accused. There was a verdict of guilty, and the case is here upon a bill of exceptions assigning error upon the refusal of the judge to grant a new trial.

On March 1, 1901, the county authorities of Spalding county were authorized to grant licenses to persons to sell spirituous liquors by retail. It is manifest from the terms of the accusation that it was the intention of the pleader to charge the accused with a violation of the general law of the state which prohibits the sale of liquors by retail without license from the proper authorities of the county; the offense charged being clearly a violation of Pen. Code, § 431. At the time that the sales shown by the evidence took place (that is, in the fall of 1900), the sale of liquors by retail was prohibited altogether in Spalding county under the terms of the general local option liquor law of the state, the provisions of which were of force in

Spalding county, and continued of force in that county until January 21, 1901. The accusation was a good accusation upon its face, and a proof of a sale without a license at any time between the date that the general local option law became inoperative and the date of the filing of the accusation would have authorized a conviction. But, so long as the sale of spirituous liquors was prohibited altogether under the operation of the general local option law, there could be no conviction for the offense of selling liquor without a license; there being no authority during such time for liquor to be sold by license or otherwise within the limits of the county. *Patton v. State*, 80 Ga. 714, 6 S. E. 273; *Brown v. State*, 104 Ga. 525, 30 S. E. 837. It is argued by the solicitor of the city court that the conviction should be sustained for the reason that as the accusation charged a sale of liquor, and, as a sale of liquor was a violation of the general local option law, the accusation was sufficient, under such law, if all the allegations in the accusation referring to the subject of license and oath be treated as mere surplusage. The date of the sale alleged in the accusation and the language of the charge therein embraced make it so manifest that it was the intention of the pleader to charge the accused with a violation of the general law of the state in reference to the sale of liquors without license, that it is impossible under any rule of law of which we are aware to treat as mere surplusage and eliminate from the accusation all allegations therein contained except those referring to the sale itself. The offenses charged in the two laws are entirely different. The general law under which the accusation was evidently framed presupposes the right to sell liquor after compliance with certain prescribed terms, whereas, when the sale has been prohibited under the terms of general local option law, no sale of whisky, either by license or otherwise, is permitted. Consequently an indictment or accusation framed under one law cannot be construed to embrace the provisions of the other. As at the time of the date of the sale, as shown by the evidence, it was not legally possible for the accused to have been guilty of the offense of retailing spirituous liquor without license, the verdict finding him guilty of this offense was unauthorized, and the court erred in not granting a new trial.

Judgment reversed. All the justices concurring.

(114 Ga. 81)

MILLER v. STATE.

SAMS v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—REVIEW.

These cases are controlled by the decision this day made in the case of *Batty v. State*, 89 S. E. 918.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Walter Miller and Tom Sams were convicted of crime, and bring error. Reversed.

Wm. H. Beck, for plaintiffs in error. O. H. P. Slaton and F. D. Diamuke, for the State.

PER CURIAM. Judgment reversed.

(114 Ga. 124)

LANE et al. v. WILLIAMS.

(Supreme Court of Georgia. Nov. 7, 1901.)

FORCIBLE ENTRY—BONA FIDES.

In a proceeding to eject intruders, instituted under section 4808 et seq. of the Civil Code, the sole question for determination is whether or not the defendants in good faith claim the right to be upon the land; and when, by undisputed evidence, they establish their bona fides, it is erroneous to direct a verdict in favor of the plaintiff.

(Syllabus by the Court.)

Error from superior court, Catoosa county; A. W. Fite, Judge.

Action by T. H. Williams against Josie Lane and others. Judgment for plaintiff, and defendants bring error. Reversed.

Andrews & Smith, for plaintiffs in error. Payne & Payne, for defendant in error.

LEWIS, J. Under the provisions of section 4808 et seq. of the Civil Code, the plaintiff filed with the sheriff of Catoosa county an affidavit for the purpose of ejecting the defendants from certain land in that county alleged to belong to the plaintiff. The defendants filed their counter affidavit as provided by law, and the issue thus formed was tried in the superior court of Catoosa county. The plaintiff introduced in evidence his chain of title, beginning with a certified copy of a deed made by Thomas Russell, administrator cum testamento annexo of M. C. Dyer, dated November 7, 1870, and certain oral evidence tending to show the legality of his title. The defendants introduced a certified copy of the will of M. C. Dyer, their grandfather, under whom they claimed, dated September 24, 1858, and probated July 14, 1866. They also proved that their going upon the land in dispute was the result of the advice of their attorneys, who were men of standing and long experience in their profession, and who assured them, after careful investigation, that they had good title to the land, and were entitled in law to enter and take possession of it. In the will of M. C. Dyer the testator named his two sons as his executors, and it appears that one of these sons qualified according to law. It does not appear how Thomas Russell, the grantor in the first link of the plaintiff's chain of title, became the administrator of the estate of M. C. Dyer. Upon this evidence the court, on motion, directed a verdict for the plain-

tiff, and the defendants Josie Lane and Amanda Baxter excepted.

Under the settled rulings of this court, it is not necessary for the defendant, in actions such as the one under consideration, to show a title paramount to that of the plaintiff. It is only required that he shall show that he is not an intruder, but in good faith claims the right to go upon the land. The sole point to be decided is the bona fides of the defendant. "The question is not, does he have a right, but does he in good faith claim it?" *McHan v. Stansell*, 39 Ga. 199. See, also, to the same effect, *Poulan v. Sellers*, 20 Ga. 228; *Russel v. Chambers*, 43 Ga. 478; *Nichols v. Chandler*, 46 Ga. 479; *Pratt v. Fountain*, 73 Ga. 261; *Thorpe v. Atwood*, 100 Ga. 597, 28 S. E. 287; *Coffey v. Pace*, 106 Ga. 293, 32 S. E. 115. The case of *Thorpe v. Atwood*, supra, cited in the brief of counsel for the defendant in error, seems to us to be one of the strongest cases tending to establish the contention of opposing counsel that the sole question for decision in the court below was the bona fides of the defendant. In that case the defendant entered and claimed the right of possession of the land by virtue of a deed which it was alleged he had forged. The admission of evidence tending to establish the forgery was upheld by this court, not as affecting the title to the land, but as going to show the bad faith of the defendant. The court says: "Upon the trial of issues of this class, title to the premises in dispute is not involved, except in so far as it bears upon the question of possession and the bona fides of the entry." Our law has laid down certain well-defined methods for trying issues involving the title to land. This is not one of those methods. The remedy prescribed in section 4808 et seq. of the Civil Code was intended to apply only to intruders, squatters, or disseisors, who enter in bad faith, and without any claim or shadow of right. The defendants below made a clear showing of good faith. They introduced the will of their grandfather, under which, in the absence of a counter showing, they would be entitled to enter upon the land in dispute. This will and its probate antedate by several years the first deed in the abstract of title introduced by the plaintiff, and it is worthy of note that no evidence appears in the record throwing any light upon the manner in which the grantor in that deed attained the official capacity in which it was executed. No serious attempt seems to have been made by the plaintiff to prove bad faith on the part of the defendants, and certainly, upon the face of the record, no such bad faith appears. The claim of title made by the defendants may be wholly without merit. That is not for us to say. It is sufficient that they set up in the court below ample evidence of their good faith, and hence should not have been

ejected as intruders. It follows that the direction of a verdict for the plaintiff by the trial court was error.

Judgment reversed. All the justices concurring.

(114 Ga. 185)

PEOPLES SAV. BANK v. SMITH et al.

(Supreme Court of Georgia. Nov. 9, 1901.)

VERDICT — UNCERTAINTY — KNOWLEDGE OF AGENT — LIABILITY OF PRINCIPAL — PLEDGE OF PARTNERSHIP CREDIT — NEW TRIAL.

1. Viewed in the light of the pleadings filed in the present case, the verdict of the jury was not void for uncertainty.

2. When the holder of a promissory note surrenders to the maker thereof collaterals given to secure its payment, in order that the latter may sell the same and apply the proceeds to the payment of his indebtedness, the relation of principal and agent exists between them, in so far as third persons are concerned. It follows that where the maker of the note subsequently reports that he has sold the collaterals to a partnership of which he is a member, and, relying upon this representation, his principal accepts as the proceeds of the collaterals a promissory note executed in the name of the partnership, it cannot be held liable thereon if, in point of fact, it never became the purchaser of the collaterals or derived any benefit therefrom. The principal had, or was, in law, chargeable with, knowledge of all facts known by the agent.

3. That a partnership may frequently have drawn checks against its funds in bank for the purpose of discharging the individual debts of its members would not constitute such "a course of dealing" as would justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its promissory note in satisfaction of a debt due by one of the partners to the bank. In no event could such "a course of dealing" be set up by the bank if it did not, as matter of fact, act upon the faith thereof.

4. That the court may have committed error in charging the jury, or in refusing to give them certain instructions, or in denying to the losing party the right to open and conclude the argument, affords no cause for ordering a new trial, when, as in the present case, the verdict returned by the jury was demanded by the evidence.

(Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by the People's Savings Bank against Henry G. Smith and F. H. Rounsaville. Judgment for defendants, and plaintiff brings error. Affirmed.

Fouché & Fouché, for plaintiff in error. J. Branham and McHenry & Maddox, for defendants in error.

LUMPKIN, P. J. The People's Savings Bank filed in the city court of Floyd county a petition in the following words: "The petition of the People's Savings Bank, a corporation, sheweth: First, that Henry G. Smith and F. H. Rounsaville, partners using the firm name and style of Henry G. Smith & Company, of said county, are indebted to the petitioner in the sum of three hundred and

twenty-four dollars and five cents, besides interest, upon a certain promissory note, a copy of which is hereto attached; second, said Henry G. Smith & F. H. Rounsaville, partners as aforesaid, [are] also indebted to petitioner in the sum of ten per cent. upon said principal and interest for attorney's fees upon said note in the event of the filing of an unsuccessful defense to this suit; third, said amounts of principal, interest, and attorney's fees are due and unpaid, and said defendant refuses to pay the same. Wherefore petitioner prays—First, judgment against said defendant for the amounts alleged to be due; second, that process may issue, requiring said defendant to be and appear at the next city court to answer petitioner's complaint. Fouché & Fouché, Plaintiff's Attorneys." Attached to the petition was a copy of an unconditional promissory note, purporting to have been signed by Henry G. Smith & Co., payable to the First National Bank of Rome, Ga., and indorsed to the People's Savings Bank. The petition was served personally upon Henry G. Smith and F. H. Rounsaville. The former filed no defense. The latter on September 11, 1900, filed an answer denying the first, second, and third paragraphs of the petition. Subsequently he filed an amendment in the following words: "The defendant F. H. Rounsaville further says that the partnership of H. G. Smith & Co. is not liable for the note sued on, nor is he, for the reason that said note was not given in the course of the business of the partnership, or on account thereof, but the same was given for the individual debt of H. G. Smith, which the said Smith owed said plaintiff and the First National Bank of Rome, and that the proceeds of said note was so applied, and of these facts the said plaintiff had notice at the time said transaction took place. J. Branham, Deft's Atty." Still later Rounsaville filed another amendment, reading thus: "And now comes the defendant Fred H. Rounsaville, and withdraws so much of his plea filed on the 11th of September, 1900, as denies the allegations contained in the third paragraph of the petition; and admits that the note sued on was signed in the firm name by Henry G. Smith during the existence of the partnership of Henry G. Smith & Co., and that the plaintiff was the holder and owner of the note sued on at the time this suit was brought. J. Branham, McHenry & Maddox, Att'ys for Rounsaville." The case went on trial on these pleadings, and the jury returned the following verdict: "We, the jury, find for the defendant." Thereupon the plaintiff made a motion for a new trial, which was overruled, and it excepted.

1. One of the grounds of this motion was as follows: "Because the verdict is contrary to law, in that it fails to find for the plaintiff against either of the defendants, and is uncertain as to which defendant the finding

is for." A consideration of this ground involves a construction of the pleadings, which present a fair illustration of the difficulty and embarrassment with which this court is too frequently confronted. It is remarkable, to say the least, that the plaintiff should complain of a verdict in favor of "the defendant," for the reason stated, when its own petition alleged that "said defendant refuses to pay" the promissory note declared upon, and prays for process requiring "said defendant" to appear and answer its complaint. In view of this averment and prayer, and of the fact that the note sued on was executed in the name of Henry G. Smith & Co., a partnership, with the name of Rounsaville nowhere appearing thereon, we are forced to the conclusion that it was the intention of the pleader to bring an action against the partnership itself, and not against the individuals composing it. It would seem, also, that the counsel managing the defense thought they were called upon to meet an action of such a character; for, while the original answer and both amendments were filed in the name of Rounsaville as "defendant," these pleadings set up a defense which could be appropriately made only by the partnership itself, and disclose a purpose on the part of Rounsaville to file a defense in its behalf, which, if successfully established, would necessarily protect him also. At any rate, the plaintiff did not demur to the answer as amended, but treated it as responsive to the petition, and allowed the case to be tried upon the theory that the "defendant" therein referred to had duly appeared and made answer to the complaint which it sets forth. As Henry G. Smith filed no answer, and as the note sued on was an unconditional contract in writing, there certainly was no issue to be passed upon by the jury as between him and the plaintiff, even if its petition was such as to warrant a judgment being taken against him individually as a partner. Under these circumstances, the best we can do with such loose and indefinite pleadings is to hold, as we do, that the issue the jury was called upon to try was whether or not the partnership of Henry G. Smith & Co. was liable to the plaintiff upon the note sued on. Our conclusion, therefore, is that the verdict in favor of "the defendant" should not be treated as void for uncertainty.

2. A careful examination of the brief of evidence convinces us that this case, viewed in the light of facts as to which there was no dispute, falls within the principle announced in the second headnote, the correctness of which is not open to serious question, and is supported by the decision in *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350. These facts required a verdict against the plaintiff. It was conceded that the savings bank had knowledge of all the facts respecting the note sued on which the National Bank knew,

or with knowledge of which the latter was chargeable, when the former took that note.

3. The court rejected certain evidence tending to show it was the custom of the firm of Henry G. Smith & Co. to draw checks against its deposit in the First National Bank in payment of debts due by the individual members of the firm. This evidence was offered for the purpose of showing that there had been such a course of dealing between the partnership and that bank as to justify the latter in assuming that it was within the scope of the partnership business to give promissory notes in satisfaction or settlement of the individual indebtedness of its members. We are clearly of the opinion the evidence was properly rejected, and have undertaken in the third headnote to formulate our view of the law governing this matter. We assume that what is there laid down will be readily accepted as sound doctrine, and do not feel called upon to submit any argument in support thereof. However this may be, the evidence was properly rejected for the reason that it clearly appears from the uncontroverted evidence that the action of the bank in accepting the note sued on was not predicated upon any such alleged course of dealing.

4. Error is also assigned upon certain instructions given to the jury, upon the refusal of the court to give in charge certain requests presented in writing, and upon its ruling that the plaintiff was not entitled to open and conclude the argument before the jury. It would be unprofitable to deal with any of the questions thus presented; for, as stated above, a verdict in favor of the defendant was demanded by the evidence, and, this being so, the finding of the jury should be allowed to stand, even if the court did, as contended, commit error in making the rulings just referred to.

Judgment affirmed. All the justices concurring.

(114 Ga. 159)

SOUTHERN RY. CO. v. WOOD.

(Supreme Court of Georgia. Nov. 8, 1901.)

CARRIERS—CONTRACT WITH PASSENGER—BREACH.

The evidence authorized the verdict, and none of the grounds of the motion for a new trial contain assignments of error which required the trial judge to set aside the verdict of the jury and award a new trial.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by Mrs. P. L. Wood against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

& Maddox, for plaintiff in error.
Martin, for defendant in error.

COBB, J. Mrs. Wood sued the railway company for damages which she had sustained on account of certain alleged tortious acts committed by the defendant. Her petition made in brief the following case: Desiring to go from Dalton, her home, to a certain point in Texas, she opened negotiations with the agent of the defendant at Dalton for the purchase of through tickets for herself and her three minor children to the point in Texas to which she desired to go. In consideration of the purchase by plaintiff of tickets over the defendant's line, its agent agreed to send to petitioner's house and transport her baggage to the depot, and bring to her house the tickets and checks for her baggage. The agent did send a dray, and have the baggage transported, but did not send the tickets and checks. When petitioner arrived at the depot, she was handed the tickets, for which she paid the sum of \$78.23, and also the checks for her baggage. Subsequently, however, the agent refused to transport as baggage one of her boxes, and demanded the return of the check for this box; and petitioner, being ignorant of her rights, surrendered the check upon the agent's agreeing to forward it by next freight train to her point of destination. Petitioner charges that all of her baggage did not weigh more than the number of pounds allowed to her tickets, but that, if it did, the defendant company had no right to rescind the contract which they had made to transport her baggage on these tickets. After receiving her tickets and checks, petitioner learned for the first time that her train was behind time, which fact was well known to the agent before he sold the tickets, and the information was wrongfully and fraudulently withheld from petitioner. Upon petitioner's complaining to the agent, and offering to surrender her tickets, he agreed that he would wire the defendant's connection at Chattanooga to hold the train for her, and that the train would be held. Petitioner charges that the agent willfully and fraudulently represented his willingness and ability to do something which he could not do, and which it is alleged he never attempted to do. It is alleged that the box which the agent agreed to send by freight to her was not sent promptly, but was allowed to remain exposed to the weather, and get wet, from which the contents of the box were damaged. It is further alleged that petitioner was damaged by reason of being deprived of the bedding which was contained in this box, the weather being very cold, and petitioner being unable to buy more. When petitioner reached Chattanooga, the train over which her tickets read had gone, and petitioner was damaged by reason of delay and expense incident to this fact. Petitioner paid full fare for herself and children, and was entitled to proper accommodations. When, however, she board-

ed the train in Chattanooga, and exhibited her tickets to the conductor, she was informed by him that her tickets were second-class, and she was forced to go forward into a dingy, dirty, smoking car occupied by men only, many of whom were smoking; and because of the extreme cold no ventilation was or could be given, and the smoke and fumes from the tobacco made petitioner very sick, and one of her children was made very sick, and never recovered, but finally died some months thereafter. Petitioner charges that she did not know she had second-class tickets; that she had never heard of one before; and that she would not have bought them if defendant's agent at Dalton, as it was his duty to do, had advised her as to the character of the tickets. She sues for damages on account of the treatment of her and her children, on account of the detention of her baggage, loss of time, expense incurred, sickness produced, and the death of son. In reference to the baggage the defendant denies making any contract to carry all of it, but avers that the box left weighed a number of pounds in excess of the amount which could be transported on the tickets bought by plaintiff, who requested the agent to keep the box until she could forward the money to pay for its transportation. The defendant denies that its agent made any agreement to hold the train at Chattanooga, and denies that he knew the Dalton train was behind time when he sold the tickets. In reference to the character of tickets, it is averred that the plaintiff requested the cheapest tickets that could be sold to her destination, and that she was carried safely and comfortably in the car in which these tickets entitled her to ride. It denied that it or its agents were guilty of any conduct which conduced to the sickness of petitioner and her child, or to the death of the latter. The trial resulted in a verdict in favor of the petitioner for \$250, and, defendant's motion for a new trial having been overruled, it excepted.

The main issue in the case as it was tried below seems to have been whether the plaintiff had contracted for second-class tickets. It seems from the evidence that during the negotiations for the tickets nothing was said either by the plaintiff or the agent about second-class tickets, but that plaintiff stated to the agent that she desired to purchase tickets as cheaply as possible. The plaintiff testified that she had never heard of second-class tickets, and that she never intended to buy them; that, while she wished to purchase her tickets at as low a rate as possible, she never asked for, and never expected to obtain, other than first-class accommodations. Viewing the entire evidence as to what transpired between the agent and the plaintiff on this subject, we are not prepared to say that the agent was warranted in assuming that the plaintiff wished to travel second-class. The

mere fact that she stated that she desired to buy tickets as cheaply as possible would not justify this inference. This desire and the desire for first-class accommodations are not necessarily inconsistent. A person may, and we should say generally does, want the best that can be had for as little money as the seller will take for it. There is, however, a theory of the case different from this on which a recovery on this branch of the case was warranted. That is, that, even conceding that the plaintiff contracted for second-class tickets, she was certainly entitled to ride on such a car as is usually provided for persons holding that class of tickets. There was ample evidence to sustain a finding that she was not given such accommodation as she was entitled to receive under her contract as evidenced by her tickets. The description of such a car as is usually provided for persons holding second-class tickets, as given by the defendant's witnesses, and the description by the plaintiff of the car in which she was required to ride, are totally dissimilar, and from this latter description it can be gathered that the plaintiff was required to go into a dirty, nasty smoking car, with little ventilation, with no cushions on the seats, filled with men smoking and chewing, and in which no other ladies were riding, the only female besides herself being a negro. According to the testimony of the conductor, the second-class car of the train on the day in question was one with cushioned seats, in which there was no smoking, so far as he knew; and there was evidence that there was very little difference between a first and second class car, one witness saying that the only difference was that one holding a second-class ticket could not go into a sleeping or dining car. It is manifest from this testimony that the plaintiff was not given the accommodations which a second-class ticket entitled her to have, and she has a right to recover whatever damages she sustained on this account. Under this view, if upon no other, the evidence fully warranted the verdict upon this branch of the case. The jury were fully authorized to find that the conductor compelled her to ride in the car in which she was placed, and her so doing cannot be considered as waiving her right to claim damages for not being furnished with the accommodations which her ticket, treated as a second-class ticket, entitled her to.

Upon the question of damage to baggage, the evidence, while conflicting, tended to establish the plaintiff's theory that her baggage had been negligently exposed to the weather, and had been damaged in consequence thereof; that the agent agreed to send the box by freight the next morning, and let the plaintiff pay the freight upon its arrival at her destination; and that he did not do so. We think, therefore, that the jury were authorized to award some damages on account of detention of and damage to the baggage.

The judge, in his charge, eliminated from the case all the allegations of damage growing out of the sickness and death of the plaintiff's son; and we are of opinion that a recovery was warranted for whatever damage the plaintiff reasonably and naturally sustained as a result of the failure of the company to provide her with proper accommodation on the train from Chattanooga, and also for the damages sustained by reason of the detention of and damage to her baggage. The motion for a new trial complains of a number of extracts from the judge's charge to the effect that, if the agent gratuitously, and on his own motion, furnished plaintiff with second-class tickets, without any request from the plaintiff, and without knowledge on her part that she was receiving this class of tickets, she would be entitled to ride in a first-class coach, and receive first-class accommodations. It is complained that these charges were not authorized by the evidence, but we do not think they are subject to this criticism. It was shown that the plaintiff did not ask for a second-class ticket, and that she did not know she had received such tickets until informed by the conductor of this fact after she left Chattanooga; so that the objection to the charges is not well taken, and we are not called on to decide whether they stated correct propositions of law in the abstract or not. Further complaint was made that the judge charged the jury to consider whether the agent at Dalton "guaranteed" that there would be a connection in Chattanooga. It is contended that there was no evidence to authorize this charge. It is true that, if the word "guaranty" be given its strict legal signification, there was no evidence of a guaranty. The plaintiff, however, did testify that when she offered to surrender her tickets, and go by another route, "they told me that the other train would be held in Chattanooga until I got there; that I need not be uneasy." In view of this evidence, and in view of the entire record, we do not think the inaccuracy in the foregoing charge of sufficient moment to require a new trial. We have carefully read the entire record, and have reached the conclusion that the trial judge has not abused his discretion in refusing to grant a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 81)

DERRICK v. SAMS et al.

(Supreme Court of Georgia. Nov. 6, 1901.)

NOTE—CONSIDERATION—ERROR—EXCEPTIONS—EXCLUSION OF EVIDENCE—DIRECTING VERDICT.

1. Where D. sold and conveyed land to H., taking his note for the purchase money, and, after judgment had been rendered in favor of D. upon such note, H. sold and conveyed the land to S., and, subsequently to this, in settlement of the judgment, H. and S. gave to D. their joint note and a mortgage to secure the land, relatively to S., the consideration of the joint note was not the purchase

money due to D. for the land; and where, upon the death of S., the land was set apart as a year's support for the benefit of his family, it was not subject to an execution issued upon the foreclosure of the mortgage.

2. An exception to the effect that the court erred in ruling that the plaintiff could not attack a designated deed as fraudulent will not be considered when it is not alleged what specific fraud was sought to be proven.

3. Alleged error in refusing to permit a witness to answer a specified question cannot be considered when it does not appear what the answer to such question would have been.

4. The other evidence which it is alleged the court erred in rejecting was immaterial.

5. There was no error in directing a verdict finding the property not subject.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. B. Estes, Judge.

Action by J. E. Derrick against A. B. Sams and others. Judgment for plaintiff, and Sarah L. Sams and others interpose a claim. Judgment for claimants, and plaintiff brings error. Affirmed.

R. E. A. Hamby and W. S. Paris, for plaintiff in error. Robt. McMillan and H. H. Dean, for defendants in error.

FISH, J. J. E. Derrick sold and conveyed certain land to J. L. Henson on January 15, 1891, and took his notes for the purchase money. The deed was recorded two days subsequently. After Derrick had obtained judgments on all the purchase-money notes except one, on which suit was pending, Henson, on December 29, 1892, sold and conveyed the land to A. B. Sams, Sr. On January 24, 1893, Derrick, in settlement both of the judgment which he held against Henson and the note on which suit was pending, took the four joint notes of Henson and Sams and their joint mortgage on the land to secure such notes. Subsequently Sams died, and the land was set apart to his family as a year's support. A. B. Sams, Jr., was appointed administrator on the estate of A. B. Sams, Sr. Derrick foreclosed the mortgage against Henson and Sams, administrator, and the mortgage *fi. fa.* was levied on the land as the property of Henson and the estate of A. B. Sams, Sr., in the hands of A. B. Sams, Jr., as administrator, to be administered. Sarah L. Sams, the widow of A. B. Sams, Sr., for herself and as next friend of certain minor children of herself and A. B. Sams, Sr., interposed a claim to the land, claiming it as their year's support. Upon the trial of the claim case the court, after the evidence was submitted, directed a verdict finding the land not subject, to which ruling Derrick, the plaintiff, excepted by a direct bill of exceptions.

1. Plaintiff in error contends that the land was subject to his mortgage *fi. fa.*, under the act of September 16, 1891, embodied in section 3472 of the Civil Code, which provides: "Whenever the vendor of land shall make a

deed thereto, and take a mortgage to secure the purchase money thereof, neither the widow nor children of the vendee shall be entitled to a year's support in said land as against said vendor, his heirs, or assigns, until the purchase money is fully paid." This contention is not sound. The facts of the case do not bring it within the operation of the statute just quoted. Derrick sold and conveyed the land to Henson in January, 1891, before the passage of the statute, which was in September of that year. Moreover, he took no mortgage from Henson, his vendee, for the purchase money, and it is not the widow and children of his vendee who are setting up a year's support in the land; but the claimants under the year's support are the widow and children of A. B. Sams, Sr., who was not the vendee of Derrick, but of Henson. But we place our judgment on another ground. When Derrick, in full settlement of the judgments and the note on which suit was proceeding, which he held against Henson for the purchase money of the land, took the joint notes of Henson and Sams and their joint mortgage on the land to secure such notes, the joint notes of Henson and Sams, with their mortgage to secure the same, were substituted for the judgments and the note which Derrick held against Henson. The transaction operated as a novation. Relatively to Sams, at least, the consideration of the joint notes of himself and Henson was not the purchase money of the land, but the extinguishment of the judgment and notes which Derrick held against Henson. Sams owed Derrick no purchase money, nor did he become Henson's surety for the purchase money, but he signed the four notes as joint principal with him. From the foregoing it follows that the year's support was superior to the mortgage, and that the land was not subject to the *fi. fa.*

2. The bill of exceptions recites that: "When plaintiff commenced to offer testimony in rebuttal, his attorney stated that he proposed to show a fraudulent scheme between Henson and Sams to defraud plaintiff out of his purchase money, and that the deed from the former to the latter was void because of such fraud. Claimant's attorney insisted this could not be done, for two reasons: (1) Because, as he alleged, Derrick took a mortgage from Sams, and held under him, and that, therefore, plaintiff was estopped; (2) because plaintiff could not make an attack on a deed without making both the

grantee and grantor parties. The court replied, 'I think that is the law,' and so ruled." The assignment of error upon this ruling is in the following language: "The court erred in ruling that plaintiff was estopped from showing that the deed from J. L. Henson to A. B. Sams, Sr., was made as part of a fraudulent scheme to prevent plaintiff from collecting his purchase money for the lands in dispute and in holding that such proof could not be made without making the grantee and grantor in the deed parties." It will be seen that the real exception is that the court erred in excluding evidence to prove that the deed from Henson to Sams was fraudulent without alleging what such evidence was. As has been frequently ruled, this is not a good exception. Whether the reason which prompted the court to exclude the evidence was valid or not cannot affect the rule that alleged error in refusing to admit evidence cannot be considered when it does not appear what the rejected evidence was. If the evidence had been set out in the exception, it might appear that it was inadmissible for reasons other than those which moved the court to exclude it, and, if the ruling were correct, the reason given for it would be immaterial.

3. Another exception is that the court erred in refusing to allow the witness F. A. Bleckley to answer certain questions propounded by plaintiff's counsel. It does not appear what the answers to such questions would have been, and for that reason, as frequently decided by this court, the assignment of error cannot be considered.

4. Complaint is made that the court erred in refusing to allow plaintiff to put in evidence the judgments which Derrick obtained against Henson on the purchase-money notes. We do not see how they were material, and, besides, Derrick was permitted to testify all about them.

5. Plaintiff contended that the land set apart as a year's support did not appear to be the same as that levied upon, and which was sold by Derrick to Henson and by Henson to Sams, and upon which Derrick held the mortgage. After carefully examining all the evidence in the record, we think that it clearly appears that it was all the same land. The evidence demanded a verdict finding the land not subject, and there was no error in the court so directing.

Judgment affirmed. All the justices concurring.

(114 Ga. 61)

TUCKER v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

HORSE STEALING—INDICTMENT—DEMURRER—INSTRUCTIONS—ALIBI.

1. A demurrer to an indictment for the offense of horse stealing, which, under section 157 of the Penal Code, must be "charged as simple larceny," does not, when it sets forth no objection to the indictment, other than that it "does not describe the property alleged to have been stolen with the accuracy and fullness that the statutes require," present with sufficient distinctness any question for decision.

2. It is not, in a trial for such an offense, erroneous to omit giving in charge to the jury section 225 of the Penal Code, which makes it a misdemeanor to "wilfully ride or drive any horse or mule belonging to another, without his consent."

3. An instruction good in itself is not rendered erroneous by a failure to charge some other appropriate instruction. (a) The charge on alibi in this case was free from error.

4. It is not erroneous for a judge, when charging a jury in a criminal case, to "keep the evidence distinct from the statement" of the accused, "and shape the general tenor of the charge by the evidence alone and the law applicable to it," taking care, however, to give appropriate instructions respecting the statement.

5. There was sufficient evidence to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Henry Tucker was convicted of horse stealing, and brings error. Affirmed.

J. B. Hudson, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LUMPKIN, P. J. The plaintiff in error was indicted for, and convicted of, the offense of simple larceny; the subject-matter of the alleged theft being, as charged in the indictment, "a certain horse, to wit, a black mare, with white spots in her face, of the personal property of J. R. Pilcher, and of the value of one hundred dollars." The bill of exceptions assigns error upon the overruling of a demurrer to the indictment, and also upon the refusal of the court below to grant a new trial.

1. The objection set forth in the demurrer was "that the indictment in said case does not describe the property alleged to have been stolen with the accuracy and fullness that the statutes require." Section 156 of the Penal Code declares that "horse stealing shall be denominated simple larceny, and the term 'horse' shall include the mule and ass, and each animal of both sexes, and without regard to the alterations which may be made by artificial means." Section 157 provides that, "The offense shall, in all cases, be charged as simple larceny, but the indictment shall designate the nature, character and sex of the animal, and give some other description by which its identity may be ascertain-

ed." It will thus be seen that, as to the matter of description, every indictment must contain sufficiently full and accurate information with regard to four particulars, viz. the nature, the character, the sex, and the identity of the animal alleged to have been stolen. Wherein the indictment now under consideration falls short of compliance with the law as to "accuracy and fullness" of description is not pointed out by the demurrer. That is to say, it is impossible to determine with respect to which one or more of the four particulars mentioned the pleader regarded the indictment as defective; and, this being so, the demurrer is obviously more lacking in certainty than the indictment which it seeks to attack. In the brief of counsel for the plaintiff in error the objection is urged that "the indictment did not allege anything but 'a black mare, with a white spot in her face,' " and that "'a black mare' does not indicate whether the black mare belongs to the horse, mule, or ass species. The word 'horse,' in the beginning of the indictment, is generic, and applies to mules and asses as well as horses." We are not, however, at liberty to pass upon the interesting question thus brought to our attention, for the simple, though all-sufficient, reason that no such point is even hinted at in the demurrer. Whether, upon the argument thereon before the trial judge, this question was made and passed upon, is a matter purely of conjecture; there being nothing in the record before us disclosing what may be the truth in this regard. The objection to the indictment which is insisted upon by counsel for the accused should have been presented by the demurrer, and not by way of oral argument in the court below, or by brief upon the hearing of the case in this court. We take occasion to repeat that the office of a demurrer is to distinctly point out alleged defects in pleadings, not merely to suggest in general terms that, for some reason or reasons undisclosed, the party relying on the demurrer is of the opinion that the pleadings assailed do not conform to the prescribed rules.

2. In one ground of the motion for a new trial complaint is made that the court failed to give in charge section 225 of the Penal Code, which makes it a misdemeanor to "wilfully ride or drive any horse or mule belonging to another, without his consent." The law embraced in this section was in no way involved in the case on trial. The court might with propriety have instructed the jury that if the accused merely rode or drove the mare, with no intent to steal her, he would not be guilty of simple larceny, but to do this certainly did not require a reading of the section last mentioned. The proposition embraced in such an instruction would have been sound without any reference to this section.

3. 4. In another ground, exception is taken to a charge on the subject of alibi. This charge was fully in accord with the well-settled rules

bearing on that subject. One complaint of it was that the court, after instructing the jury that the accused was not required to establish the alibi beyond a reasonable doubt, should have added that it was only necessary for him to prove the alibi "to the reasonable satisfaction of the jury." This exception is bad for two reasons: (1) It illogically asserts that a perfectly proper charge was erroneous because some other and additional instruction was not given in connection with it (*Keys v. State*, 112 Ga. 397, 37 S. E. 762); and (2) the instruction given necessarily implied that the accused need do no more than to establish his defense of alibi to the reasonable satisfaction of the jury.

5. Another criticism upon the charge just referred to was that the court instructed the jury, in passing upon this branch of the case, to take into consideration the sworn testimony, and weigh it carefully and impartially, without at the same time directing the jury to consider in this connection the statement of the accused. There is no merit in this criticism. *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64; *Lacewell v. State*, 95 Ga. 346, 349, 22 S. E. 546.

6. What is said above disposes of all questions properly raised by the motion for a new trial, save only a general complaint that the verdict was contrary to law and the evidence. As there was ample evidence to sustain the conviction of the accused, we find no cause for granting him a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 30)

DOWNING v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

CRIMINAL LAW—NEW TRIAL—DISQUALIFICATION OF JUROR—HOMICIDE—INSTRUCTIONS.

1. A new trial will not be granted in a criminal case because of the relationship within the prohibited degrees of a juror to the accused defendant, although such relationship was unknown to the accused and his counsel until after verdict.

2. On prosecution for murder or manslaughter it is not error to charge that the accused would not be relieved of responsibility for the death of the deceased because of negligence in the treatment of a mortal wound, or of unskillful treatment of a wound which was not necessarily mortal, but which was the primary cause which produced other and secondary causes, from which the death of the deceased resulted.

3. In the absence of a request to charge, a new trial will not be granted because of the failure of the trial judge to give the jury instructions as to the impeachment of witnesses.

4. There was no error in any of the charges of which complaint is made, the request to charge was fully covered by the general charge, there was no material error in admitting evidence, and the evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Jittlejohn, Judge.

O. L. Downing was convicted of murder, and brings error. Affirmed.

Busbee & Busbee, J. M. Du Pree, and J. H. Martin, for plaintiff in error. F. A. Hooper, Sol. Gen., D. A. R. Crum, and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. Downing was tried for the offense of murder, and was convicted. He moved for a new trial upon many grounds. The motion was overruled, and he excepted. The foregoing headnotes deal with the principal points relied upon here by counsel for the plaintiff in error.

1. One ground of the motion alleged that the verdict was vitiated by the fact that one of the jurors was related to the accused within the prohibited degree. Leave was asked to review the cases of *Wright v. Smith*, 104 Ga. 174, 30 S. E. 651, and *Sikes v. State*, 105 Ga. 592, 31 S. E. 567. We declined to grant the request, believing that the principle announced in those cases is sound and correct. This ground is controlled by those cases, and cannot be sustained.

2. Complaint is made that the trial judge gave the charge which is substantially set out in the second headnote. It was argued that this charge was erroneous, and did not give the accused the benefit of his contention that the death of the deceased was produced by the failure of the surgeons to extract promptly certain foreign matter from the wound inflicted by the accused upon the deceased, that the wound was not necessarily mortal, and that the deceased would have recovered if skillfully treated. Whether there is any evidence which would authorize such a contention we need not decide, for the charge complained of was not erroneous. The principle therein announced is as old as the Year Books, and, as far as we know, has never before been questioned in this state. Lord Hale, in his *Pleas of the Crown* (margin, p. 428, 1st Am. Ed.), as early as 1660, says, "And so it hath been always ruled." The same principle is announced in 2 Archb. Cr. Prac. & Pl. 210; 2 Bish. New Cr. Law, 635 et seq.; 1 Clark & M. Crimes, 484 et seq.; and in other works on criminal law. We deem it unnecessary to further elaborate the subject, or give at length the reasons for this rule of law.

3. Complaint is also made that the trial judge failed to instruct the jury on the subject of the impeachment of witnesses. It is contended that the judge thereby failed to charge the jury the whole law of the case. It is established by the decisions of this court that a failure to charge the jury upon the law relating to the impeachment of witnesses is not, in the absence of a request to so charge, a ground for a new trial. There was no such request in the present case, and, according to *Joiner v. State*, 105 Ga. 646, 31 S. E. 556, and cases cited, the failure to

charge upon the subject of impeachment will not require a new trial.

4. Other grounds of the motion complained of certain instructions given the jury, of the refusal to give a certain charge as requested, and of the admission of certain evidence. The charges complained of were not erroneous, and, as they do not announce any new or novel principles of law not heretofore fully dealt with by this court, we deem it unnecessary to set them out, or to deal with them seriatim. The substance of the request to charge was fully covered by the general charge of the court. The evidence as to the admission of which complaint is made, was not material, and could have done the accused no injury. Considering the case as a whole, we conclude that there was no material error committed by the trial judge in charging or in refusing to charge, or in the admission of evidence. The evidence was sufficient to warrant the verdict, and the judge did not err in refusing a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 35)

HARRIS v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—INSTRUCTIONS—NEW TRIAL.

1. The court charged generally as to the impeachment of witnesses, and, if more specific instructions were desired, a proper request to that effect should have been made. *Downing v. State*, 39 S. E. 927, 114 Ga. —.

2. A new trial will not be granted because of newly-discovered evidence, when that evidence is merely impeaching in its character.

3. The evidence amply supported the verdict, and the trial judge did not abuse his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Walton county; R. B. Russell, Judge.

Peter Harris was convicted of crime, and brings error. Affirmed.

E. F. Weems, for plaintiff in error. C. H. Brand, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 43)

KNIGHT v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—EVIDENCE—CONVERSATIONS BETWEEN HUSBAND AND WIFE—INSTRUCTIONS—MANSLAUGHTER.

1. A conversation between a husband and wife, though intended to be confidential, may, whenever relevant, be proved by one who overheard it; and it is relevant in a trial for murder when it discloses that the wife charged the husband with having committed the homicide, and that he made a reply which reasonably be construed as an admission did the killing.

The admissibility of testimony as to

the making of a given declaration depends upon whether or not it was heard by a party to the case on trial, and this, under the evidence, is a matter of doubt, it is not erroneous to allow proof of the declaration, and instruct the jury to disregard it if they believe the party did not hear it. (a) Aside from what is said above, the declaration here referred to was apparently admissible as a part of the res gestae.

3. A witness sought to be impeached by proof of contradictory statements cannot be supported by proof that he made elsewhere other statements in harmony with his testimony on the stand.

4. Though, in a given case, it may not be appropriate to charge upon the law of alibi, so doing is not cause for a new trial, when it appears that the accused was not thereby injured.

5. It is proper not to charge upon the law of confessions when there is no proof that a confession was made.

6. Failure by the judge to apply a rule of evidence to the testimony of a particular witness is not, in the absence of a request so to do, erroneous.

7. There was, in the present case, nothing calling for a charge upon the law of manslaughter.

8. A judge should not, in charging upon the prisoner's statement, say to the jury, "That statement is in no sense binding on you;" but the use of this expression will not be treated as cause for a new trial when the charge on this subject is in other respects full, clear, and accurate, and it is manifest that the jury correctly apprehended what were, under the statute, their right and duty with respect to the statement.

9. There was ample evidence to warrant the verdict, and the grounds of the motion for a new trial predicated on newly-discovered evidence do not, under the established rules, authorize the granting of another hearing.

(Syllabus by the Court.)

Error from superior court, Meriwether county; S. W. Harris, Judge.

Enos Knight was convicted of homicide, and brings error. Affirmed.

W. S. Howell, Allen & Tisinger, and McLaughlin & Jones, for plaintiff in error. J. R. Terrell, T. A. Atkinson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. The plaintiff in error was convicted of the murder of Sol Owens, made a motion for a new trial, and excepted to the overruling thereof. It was insisted in behalf of the accused that the killing, which was done with a pistol, was not his act, but that of one Alex Finley.

1. The court admitted, over the objection of counsel for the accused, the testimony of certain witnesses to the effect that the wife of the accused said to him, shortly after the killing, "You have shot big Bud" (meaning the deceased), to which he replied, "He wasn't hurt much." This testimony was objected to on the ground that it related to a confidential communication between husband and wife, and that her sayings were not admissible against him. It is true that Civ. Code, § 5198, declares "There are certain admissions and communications excluded from public policy," and, among them, "communica-

tions between husband and wife." But the meaning of this provision simply is that neither of the married pair will be permitted to testify as a witness concerning such communications, or to furnish to another, for the purpose of being introduced in evidence, writings of any kind received under the seal of confidence during coverture. This section of our Code was not intended to forbid one who overhears a conversation between husband and wife from testifying with respect to the same. If they are unsuccessful in keeping secret that which they intend each other shall so regard, the mere fact that they did so intend will not render incompetent the testimony of an outsider. See, in this connection, 19 Am. & Eng. Enc. Law, 154; 1 Whart. Ev. (3d Ed.) § 427; 1 Greenl. Ev. (18th Ed.) p. 392, § 254. The wife was not, in the present instance, competent to testify for or against her husband. Pen. Code, § 1011, par. 4. But an admission of an incriminating nature made by the husband to and in the presence of the wife, in response to something said by her to him, was certainly relevant; and any stranger who overheard the conversation was competent to testify in regard thereto. She charged him with the commission of the homicide, and his reply, "He wasn't hurt much," is susceptible of the construction that he practically admitted the shooting. What she said was clearly relevant, as tending to explain the meaning of his response thereto.

2. Error is assigned upon the refusal of the court to rule out the testimony of a witness that, "immediately after the pistol fired, Sol Owens asked, 'Who in the hell was that shot me?' and Will Strahan spoke, and says that it was Enos Knight shot." A review of all the evidence in the case leaves it uncertain whether the remark of Strahan was or was not made in the hearing of the accused, though the jury might properly have inferred that he heard it. With regard to this matter the court instructed the jury that, unless they believed the accused did hear what Strahan said, they should not consider the testimony above mentioned. We cannot, therefore, see that any injury to the accused resulted; and, moreover, the exclamation of Strahan was, apparently, admissible as a part of the res gestæ of the homicide.

3. During the progress of the trial the state undertook to discredit the testimony of one Lee Dixon by showing that he had made statements contradictory to what he testified to on the stand. The defense sought to support this witness by proof that he had made statements elsewhere which were in harmony with his testimony. The court was clearly right in refusing to allow this to be done.

4. A correct charge on the law of alibi was given by the judge. The complaint is made, however, that there was no evidence calling for such a charge, and that the accused did not set up alibi as one of his de-

fenses. The record discloses that there was some testimony tending to show that at the time the fatal shot was fired the accused was 25 or more yards distant from the exact spot where the shooting took place. This was, we think, hardly sufficient to warrant a charge on the subject of alibi, but we fail to perceive how the giving of the instruction complained of could have operated to the prejudice of the accused. The main and controlling issue in the case was whether or not he or Alex Finley fired the fatal shot. At least four witnesses testified positively that the shooting was done by the accused, and a number of witnesses introduced in his behalf testified it was done by Finley. The jury evidently believed the witnesses for the state, and we have no reason to fear that in reaching this conclusion the jury was misled or improperly influenced by the charge of the court upon the law of alibi.

5. Error is assigned upon the failure of the court to charge as follows: "All admissions should be scanned with care, and confessions of guilt should be received with great caution. A confession, uncorroborated by other evidence, will not justify conviction." There was no evidence of any confession; none, indeed, of an incriminating admission, save the reply of the accused to the charge made against him by his wife, commented upon above. If, therefore, the judge had given such a charge as that quoted, he would have committed grave error, and doubtless counsel for the plaintiff in error would be here complaining of the same.

6. The brief of evidence discloses that the accused made an effort to impeach certain witnesses testifying against him, and that the state offered testimony with a view to discrediting other witnesses introduced in his behalf. The presiding judge, in his charge to the jury, correctly stated to them the law with reference to the impeachment of witnesses. Complaint is made that the court did not, of its own motion, go further, and expressly caution the jury not to consider evidence introduced by the state to impeach one William Dixon, a witness for the accused, for any purpose other than to determine "what credit his evidence was entitled to." A similar complaint is made with reference to the failure of the court to charge concerning certain evidence offered on the part of the state to impeach another witness testifying in behalf of the accused. Clearly, it was not incumbent upon the court, in the absence of a special request, to undertake to apply to the testimony going to the discredit of these particular witnesses the rules of law which had been given with reference to the impeachment of witnesses generally. Doubtless, if a request so to do had been presented, it would have received proper attention.

7. It is further insisted that "the court erred in not charging the law of voluntary

manslaughter and the different grades of manslaughter." A careful examination of the brief of evidence discloses that the person who actually committed the homicide was guilty of no less a crime than that of murder. Indeed, there was in proof not the slightest circumstance upon which a jury could properly base a finding of manslaughter, voluntary or involuntary.

8. Exception is taken to the following charge of the court: "The defendant denies in this case that he killed Sol Owens. In support, gentleman, of his defense, he has submitted to you, under the permission of the law, a statement which is not under oath, and that statement is in no sense binding upon you. The law declares you may deal with his statement as you, the jury, see proper,—as you think right. You are authorized, gentlemen, to believe the entire statement of the defendant, if you think it is right; or, on the other hand, you are authorized to totally disbelieve every word of it, if you think that is right. You may believe one part of his statement and disbelieve the other part, if you think that is the right way to deal with it; and you may believe the statement of the defendant in preference to the sworn testimony, if you think that is right." One expression only in this charge is alleged to be erroneous, to wit, "that statement is in no sense binding upon you." While we do not think this expression should have been used, we cannot agree with counsel that its effect was to "practically withdraw from the jury the consideration" of the prisoner's statement. Evidently, the judge only meant, and the jury must have understood, that this statement was not binding upon them in the sense that they were obliged to base their finding upon it. They were distinctly informed that they were at liberty to believe the whole or any part of it, if they saw proper, "in preference to the sworn testimony"; and we entertain no doubt that they fully understood how they were authorized by law to regard it. Nevertheless, we take this occasion to repeat that it would be better practice if our brethren of the trial bench, in charging upon this subject, would confine themselves to the language of the statute with reference thereto.

9. We have dealt with all of the grounds of the motion for a new trial which are verified by the judge's certificate, save only the general grounds, and certain others predicated upon newly-discovered evidence. In view of the fact, mentioned above, that at least four witnesses testified they saw the accused fire the fatal shot, the conclusion reached by the jury that he was the person who committed the homicide was fully supported by evidence; and, as has been said, the circumstances under which the killing was done made the crime one of murder. The newly-discovered evidence related ex-

clusively to the impeachment of witnesses, and, moreover, was met by an amply satisfactory counter showing. On the whole, we find, after a careful study of the case, no cause for setting aside the judgment denying the accused a new trial.

Judgment affirmed. All the justices concurring.

(114 Ga. 137)

SATTERFIELD et al. v. SPIER et al.

(Supreme Court of Georgia. Nov. 7, 1901.)

ACTION ON NOTE—DEFENSES—SALE OF LAND
—ABATEMENT OF PRICE—RES JUDICATA
—PLEA BY SURETY.

1. A plea filed by the maker of a promissory note given for the purchase price of land to a suit on the note brought by the payee thereof, setting up that the plaintiff gave to the defendant a bond for title, in which the land was described as a given number of acres of a specified quality, to be laid off in a given shape and in a particular locality, and that the consideration of the note had partially failed for the reason that the maker of the bond for titles, on account of conveyance of land to other parties, could not comply with his contract as to the shape and quality of the land sold, sets forth a good defense. In such a case, there being in the plea a proper prayer to that effect, the purchase price of the land should be abated to the extent of the difference in value between the land contracted to be sold and the value of that which the maker of the bond was able to convey.

2. In the trial of such a suit as that above indicated, brought against both the maker of the note and a person who signed the same as security, a plea by the latter setting forth the foregoing facts, and alleging that by reason of misrepresentations as to the shape and quality of the land, made to him by the plaintiff, he was induced to sign the note as security, and that by reason of such misrepresentations his risk has been so materially increased as to discharge him from liability on his contract of suretyship, sets forth a good defense to the suit against him.

3. Where a debtor brings an equitable petition against his creditor, seeking to compel him to anticipate his right of action, and set up the same in the equitable proceeding, and alleging that the debtor has certain defenses to the action, a judgment sustaining a general demurrer to such a petition on the ground that no reason is set forth therein for either legal or equitable relief, will not operate as a bar to the right of the debtor to set up such defenses in a suit subsequently brought by the creditor on his demand.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

Action by Mary Spier and others against George W. Satterfield, administrator, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Thos. W. Milner & Sons, for plaintiffs in error. John W. Akin, for defendants in error.

COBB, J. J. H. Spier brought suit against George W. Satterfield, as administrator of Mrs. Emily P. Stegall, as principal, and George W. Satterfield, individually, as securi-

ty, on two promissory notes. Pending the suit the plaintiff died, and his executrix, Mary Spier, was made a party plaintiff in his stead. To the action Satterfield, as administrator, filed the following defenses: (1) There is now a suit pending between the same parties relating to the same subject-matter, which at the date of the plea was pending in the supreme court on writ of error. (2) The consideration of the note sued on was the purchase money of land described in a bond for titles given by Spier to Mrs. Stegall, and the bond did not correctly describe the land purchased. (3) The consideration of the notes sued on has partially failed, for the reason that the notes were given in part payment of the purchase money of land bought by Mrs. Stegall from Spier, and it was represented by him that she was to have, in connection with an 8-acre tract on the west side of the Etowah river in Cherokee county, Ga., 40 acres of good bottom land, to be surveyed off in a square, as nearly as practicable, on the east side of the river; and when the land referred to in the bond for titles was attempted to be laid off by the surveyor it was found that it was not practicable to lay off the same in a square on account of conveyances which Spier had made to other parties of land which he owned on the east side of the river, and the only land which he owned on the east side of the river which could be conveyed to Mrs. Stegall was a tract in the shape of a triangle, very poor, and made of little value by washes and ditches. It is alleged in the plea that the representations made by Spier to Mrs. Stegall with reference to his ability and willingness to convey the 40 acres of land in the shape of a square on the east side of the river were false and fraudulent, and such a mistake on the part of Spier as amounted to a fraud upon Mrs. Stegall, and that she signed the notes upon the faith of the representations so made. It is further alleged that the difference between the land which Spier represented himself as owning and intending to convey and the land which he was able to convey amounted to \$1,000. The prayer of the plea was that the balance due upon the purchase money of the land might be reduced by whatever sum should be found by the jury to be the difference between the value of the land bargained and the value of the land which Spier was able to convey. Satterfield, as an individual, pleaded that he was induced to sign the notes as security by the fraudulent representations of Spier that Mrs. Stegall would have when the land was surveyed off 40 acres of good bottom land on the east side of the Etowah river in the shape of a square; that the 40 acres of land so agreed to be conveyed was very valuable, being worth from \$30 to \$40 per acre; and that with the understanding that this land was to be described in the bond for titles, and afterwards conveyed to Mrs. Stegall by Spier, he signed his name to the notes as security. It is alleged that

since the notes were signed defendant has made an effort by a competent surveyor to lay off on the east side of the Etowah river a tract of land according to the description in the bond for titles, and has found that it is impossible to lay off 40 acres of land belonging to Spier of the character represented by him, and that the only land belonging to Spier on the east side of the river at the place mentioned in the bond for titles is about 40 acres of land in the form of a triangle, of very inferior quality, covered with washes and ditches, and of much less value than the land he understood to have been bargained to Mrs. Stegall. The plea alleges that there was a plain and distinct representation by Spier to Satterfield that the 40 acres to be conveyed to Mrs. Stegall was to be good bottom land, and would be laid off in a square, and that this representation not only induced Mrs. Stegall to purchase the land, but also induced Satterfield to sign her notes as security; and this conduct on the part of Spier is alleged to be fraudulent. For these reasons Satterfield, as security, insists that his risk has been increased, and that, therefore, he is discharged from all liability on account of his contract of suretyship. Attached to the plea, was a copy of the record in the case of Satterfield against Spier, referred to in the first paragraph of the plea filed by the defendants, which was pending in the supreme court on writ of error at the time the plea was filed. This proceeding appears to have been an equitable petition brought by Satterfield individually and as administrator of Mrs. Stegall against Spier and others, in which it was prayed that the court construe the bond for titles to mean that 40 acres should be laid off in a described way set forth in the prayer, and, if the court should not be able to so construe the bond as it was written, that it be so reformed as to amount to a contract on the part of Spier to convey 40 acres in the manner described; and that, if 40 acres can be laid off only in land embraced in a triangular shape, petitioner be held to be discharged from liability as surety on the notes, and that a failure of consideration, to an amount stated, be adjudged in favor of his intestate's estate, and deducted from the notes; that Spier be enjoined from prosecuting any of the notes, except as he may set up the same in his answer to the petition. There was also a prayer for general relief. To this petition the defendants interposed a demurrer upon the following grounds: No cause of action is set forth; no reason is shown in law or in equity why the defendants should not be allowed to proceed to collect the past-due indebtedness; no cause for injunction is shown; there is no allegation of insolvency; and there is no reason set forth in the petition for the granting of either legal or equitable relief. This demurrer was sustained, and the case was brought on writ of error to the supreme court, where the judgment was affirmed. See Sat-

tiff, and the defendants Josie Lane and Amanda Baxter excepted.

Under the settled rulings of this court, it is not necessary for the defendant, in actions such as the one under consideration, to show a title paramount to that of the plaintiff. It is only required that he shall show that he is not an intruder, but in good faith claims the right to go upon the land. The sole point to be decided is the bona fides of the defendant. "The question is not, does he have a right, but does he in good faith claim it?" *McHan v. Stansell*, 39 Ga. 199. See, also, to the same effect, *Poulan v. Sellers*, 20 Ga. 228; *Russel v. Chambers*, 43 Ga. 478; *Nichols v. Chandler*, 46 Ga. 479; *Pratt v. Fountain*, 73 Ga. 261; *Thorpe v. Atwood*, 100 Ga. 597, 28 S. E. 237; *Coffey v. Pace*, 106 Ga. 293, 32 S. E. 115. The case of *Thorpe v. Atwood*, supra, cited in the brief of counsel for the defendant in error, seems to us to be one of the strongest cases tending to establish the contention of opposing counsel that the sole question for decision in the court below was the bona fides of the defendant. In that case the defendant entered and claimed the right of possession of the land by virtue of a deed which it was alleged he had forged. The admission of evidence tending to establish the forgery was upheld by this court, not as affecting the title to the land, but as going to show the bad faith of the defendant. The court says: "Upon the trial of issues of this class, title to the premises in dispute is not involved, except in so far as it bears upon the question of possession and the bona fides of the entry." Our law has laid down certain well-defined methods for trying issues involving the title to land. This is not one of those methods. The remedy prescribed in section 4808 et seq. of the Civil Code was intended to apply only to intruders, squatters, or dispossessors, who enter in bad faith, and without any claim or shadow of right. The defendants below made a clear showing of good faith. They introduced the will of their grandfather, under which, in the absence of a counter showing, they would be entitled to enter upon the land in dispute. This will and its probate antedate by several years the first deed in the abstract of title introduced by the plaintiff, and it is worthy of note that no evidence appears in the record throwing any light upon the manner in which the grantor in that deed attained the official capacity in which it was executed. No serious attempt seems to have been made by the plaintiff to prove bad faith on the part of the defendants, and certainly, upon the face of the record, no such bad faith appears. The claim of title made by the defendants may be wholly without merit. That is not for us to say. It is sufficient that they set up in the court below ample evidence of their good faith, and hence should not have been

ejected as intruders. It follows that the direction of a verdict for the plaintiff by the trial court was error.

Judgment reversed. All the justices concurring.

(114 Ga. 185)

PEOPLE'S SAV. BANK v. SMITH et al.

(Supreme Court of Georgia. Nov. 9, 1901.)

VERDICT — UNCERTAINTY — KNOWLEDGE OF AGENT — LIABILITY OF PRINCIPAL — PLEDGE OF PARTNERSHIP CREDIT — NEW TRIAL.

1. Viewed in the light of the pleadings filed in the present case, the verdict of the jury was not void for uncertainty.

2. When the holder of a promissory note surrenders to the maker thereof collaterals given to secure its payment, in order that the latter may sell the same and apply the proceeds to the payment of his indebtedness, the relation of principal and agent exists between them, in so far as third persons are concerned. It follows that where the maker of the note subsequently reports that he has sold the collaterals to a partnership of which he is a member, and, relying upon this representation, his principal accepts as the proceeds of the collaterals a promissory note executed in the name of the partnership, it cannot be held liable thereon if, in point of fact, it never became the purchaser of the collaterals or derived any benefit therefrom. The principal had, or was, in law, chargeable with, knowledge of all facts known by the agent.

3. That a partnership may frequently have drawn checks against its funds in bank for the purpose of discharging the individual debts of its members would not constitute such "a course of dealing" as would justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its promissory note in satisfaction of a debt due by one of the partners to the bank. In no event could such "a course of dealing" be set up by the bank if it did not, as matter of fact, act upon the faith thereof.

4. That the court may have committed error in charging the jury, or in refusing to give them certain instructions, or in denying to the losing party the right to open and conclude the argument, affords no cause for ordering a new trial, when, as in the present case, the verdict returned by the jury was demanded by the evidence.

(Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by the People's Savings Bank against Henry G. Smith and F. H. Rounsaville. Judgment for defendants, and plaintiff brings error. Affirmed.

Fouché & Fouché, for plaintiff in error. J. Branham and McHenry & Maddox, for defendants in error.

LUMPKIN, P. J. The People's Savings Bank filed in the city court of Floyd county a petition in the following words: "The petition of the People's Savings Bank, a corporation, sheweth: First, that Henry G. Smith and F. H. Rounsaville, partners using the firm name and style of Henry G. Smith & Company, of said county, are indebted to the petitioner in the sum of three hundred and

twenty-four dollars and five cents, besides interest, upon a certain promissory note, a copy of which is hereto attached; second, said Henry G. Smith & F. H. Rounsaville, partners as aforesaid, [are] also indebted to petitioner in the sum of ten per cent. upon said principal and interest for attorney's fees upon said note in the event of the filing of an unsuccessful defense to this suit; third, said amounts of principal, interest, and attorney's fees are due and unpaid, and said defendant refuses to pay the same. Wherefore petitioner prays—First, judgment against said defendant for the amounts alleged to be due; second, that process may issue, requiring said defendant to be and appear at the next city court to answer petitioner's complaint. Fouché & Fouché, Plaintiff's Attorneys." Attached to the petition was a copy of an unconditional promissory note, purporting to have been signed by Henry G. Smith & Co., payable to the First National Bank of Rome, Ga., and indorsed to the People's Savings Bank. The petition was served personally upon Henry G. Smith and F. H. Rounsaville. The former filed no defense. The latter on September 11, 1900, filed an answer denying the first, second, and third paragraphs of the petition. Subsequently he filed an amendment in the following words: "The defendant F. H. Rounsaville further says that the partnership of H. G. Smith & Co. is not liable for the note sued on, nor is he, for the reason that said note was not given in the course of the business of the partnership, or on account thereof, but the same was given for the individual debt of H. G. Smith, which the said Smith owed said plaintiff and the First National Bank of Rome, and that the proceeds of said note was so applied, and of these facts the said plaintiff had notice at the time said transaction took place. J. Branham, Deft's Atty." Still later Rounsaville filed another amendment, reading thus: "And now comes the defendant Fred H. Rounsaville, and withdraws so much of his plea filed on the 11th of September, 1900, as denies the allegations contained in the third paragraph of the petition; and admits that the note sued on was signed in the firm name by Henry G. Smith during the existence of the partnership of Henry G. Smith & Co., and that the plaintiff was the holder and owner of the note sued on at the time this suit was brought. J. Branham, McHenry & Maddox, Att'ys for Rounsaville." The case went on trial on these pleadings, and the jury returned the following verdict: "We, the jury, find for the defendant." Thereupon the plaintiff made a motion for a new trial, which was overruled, and it excepted.

1. One of the grounds of this motion was as follows: "Because the verdict is contrary to law, in that it fails to find for the plaintiff against either of the defendants, and is uncertain as to which defendant the finding

is for." A consideration of this ground involves a construction of the pleadings, which present a fair illustration of the difficulty and embarrassment with which this court is too frequently confronted. It is remarkable, to say the least, that the plaintiff should complain of a verdict in favor of "the defendant," for the reason stated, when its own petition alleged that "said defendant refuses to pay" the promissory note declared upon, and prays for process requiring "said defendant" to appear and answer its complaint. In view of this averment and prayer, and of the fact that the note sued on was executed in the name of Henry G. Smith & Co., a partnership, with the name of Rounsaville nowhere appearing thereon, we are forced to the conclusion that it was the intention of the pleader to bring an action against the partnership itself, and not against the individuals composing it. It would seem, also, that the counsel managing the defense thought they were called upon to meet an action of such a character; for, while the original answer and both amendments were filed in the name of Rounsaville as "defendant," these pleadings set up a defense which could be appropriately made only by the partnership itself, and disclose a purpose on the part of Rounsaville to file a defense in its behalf, which, if successfully established, would necessarily protect him also. At any rate, the plaintiff did not demur to the answer as amended, but treated it as responsive to the petition, and allowed the case to be tried upon the theory that the "defendant" therein referred to had duly appeared and made answer to the complaint which it sets forth. As Henry G. Smith filed no answer, and as the note sued on was an unconditional contract in writing, there certainly was no issue to be passed upon by the jury as between him and the plaintiff, even if its petition was such as to warrant a judgment being taken against him individually as a partner. Under these circumstances, the best we can do with such loose and indefinite pleadings is to hold, as we do, that the issue the jury was called upon to try was whether or not the partnership of Henry G. Smith & Co. was liable to the plaintiff upon the note sued on. Our conclusion, therefore, is that the verdict in favor of "the defendant" should not be treated as void for uncertainty.

2. A careful examination of the brief of evidence convinces us that this case, viewed in the light of facts as to which there was no dispute, falls within the principle announced in the second headnote, the correctness of which is not open to serious question, and is supported by the decision in *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350. These facts required a verdict against the plaintiff. It was conceded that the savings bank had knowledge of all the facts respecting the note sued on which the National Bank knew,

or with knowledge of which the latter was chargeable, when the former took that note.

3. The court rejected certain evidence tending to show it was the custom of the firm of Henry G. Smith & Co. to draw checks against its deposit in the First National Bank in payment of debts due by the individual members of the firm. This evidence was offered for the purpose of showing that there had been such a course of dealing between the partnership and that bank as to justify the latter in assuming that it was within the scope of the partnership business to give promissory notes in satisfaction or settlement of the individual indebtedness of its members. We are clearly of the opinion the evidence was properly rejected, and have undertaken in the third headnote to formulate our view of the law governing this matter. We assume that what is there laid down will be readily accepted as sound doctrine, and do not feel called upon to submit any argument in support thereof. However this may be, the evidence was properly rejected for the reason that it clearly appears from the uncontroverted evidence that the action of the bank in accepting the note sued on was not predicated upon any such alleged course of dealing.

4. Error is also assigned upon certain instructions given to the jury, upon the refusal of the court to give in charge certain requests presented in writing, and upon its ruling that the plaintiff was not entitled to open and conclude the argument before the jury. It would be unprofitable to deal with any of the questions thus presented; for, as stated above, a verdict in favor of the defendant was demanded by the evidence, and, this being so, the finding of the jury should be allowed to stand, even if the court did, as contended, commit error in making the rulings just referred to.

Judgment affirmed. All the justices concurring.

(114 Ga. 159)

SOUTHERN RY. CO. v. WOOD.

(Supreme Court of Georgia. Nov. 8, 1901.)

CARRIERS—CONTRACT WITH PASSENGER—BREACH.

The evidence authorized the verdict, and none of the grounds of the motion for a new trial contain assignments of error which required the trial judge to set aside the verdict of the jury and award a new trial.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by Mrs. P. L. Wood against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, for plaintiff in error.
Jones & Martin, for defendant in error.

COBB, J. Mrs. Wood sued the railway company for damages which she had sustained on account of certain alleged tortious acts committed by the defendant. Her petition made in brief the following case: Desiring to go from Dalton, her home, to a certain point in Texas, she opened negotiations with the agent of the defendant at Dalton for the purchase of through tickets for herself and her three minor children to the point in Texas to which she desired to go. In consideration of the purchase by plaintiff of tickets over the defendant's line, its agent agreed to send to petitioner's house and transport her baggage to the depot, and bring to her house the tickets and checks for her baggage. The agent did send a dray, and have the baggage transported, but did not send the tickets and checks. When petitioner arrived at the depot, she was handed the tickets, for which she paid the sum of \$78.23, and also the checks for her baggage. Subsequently, however, the agent refused to transport as baggage one of her boxes, and demanded the return of the check for this box; and petitioner, being ignorant of her rights, surrendered the check upon the agent's agreeing to forward it by next freight train to her point of destination. Petitioner charges that all of her baggage did not weigh more than the number of pounds allowed to her tickets, but that, if it did, the defendant company had no right to rescind the contract which they had made to transport her baggage on these tickets. After receiving her tickets and checks, petitioner learned for the first time that her train was behind time, which fact was well known to the agent before he sold the tickets, and the information was wrongfully and fraudulently withheld from petitioner. Upon petitioner's complaining to the agent, and offering to surrender her tickets, he agreed that he would wire the defendant's connection at Chattanooga to hold the train for her, and that the train would be held. Petitioner charges that the agent willfully and fraudulently represented his willingness and ability to do something which he could not do, and which it is alleged he never attempted to do. It is alleged that the box which the agent agreed to send by freight to her was not sent promptly, but was allowed to remain exposed to the weather, and get wet, from which the contents of the box were damaged. It is further alleged that petitioner was damaged by reason of being deprived of the bedding which was contained in this box, the weather being very cold, and petitioner being unable to buy more. When petitioner reached Chattanooga, the train over which her tickets read had gone, and petitioner was damaged by reason of delay and expense incident to this fact. Petitioner paid full fare for herself and children, and was entitled to proper accommodations. When, however, she board-

ed the train in Chattanooga, and exhibited her tickets to the conductor, she was informed by him that her tickets were second-class, and she was forced to go forward into a dingy, dirty, smoking car occupied by men only, many of whom were smoking; and because of the extreme cold no ventilation was or could be given, and the smoke and fumes from the tobacco made petitioner very sick, and one of her children was made very sick, and never recovered, but finally died some months thereafter. Petitioner charges that she did not know she had second-class tickets; that she had never heard of one before; and that she would not have bought them if defendant's agent at Dalton, as it was his duty to do, had advised her as to the character of the tickets. She sues for damages on account of the treatment of her and her children, on account of the detention of her baggage, loss of time, expense incurred, sickness produced, and the death of son. In reference to the baggage the defendant denies making any contract to carry all of it, but avers that the box left weighed a number of pounds in excess of the amount which could be transported on the tickets bought by plaintiff, who requested the agent to keep the box until she could forward the money to pay for its transportation. The defendant denies that its agent made any agreement to hold the train at Chattanooga, and denies that he knew the Dalton train was behind time when he sold the tickets. In reference to the character of tickets, it is averred that the plaintiff requested the cheapest tickets that could be sold to her destination, and that she was carried safely and comfortably in the car in which these tickets entitled her to ride. It denied that it or its agents were guilty of any conduct which conduced to the sickness of petitioner and her child, or to the death of the latter. The trial resulted in a verdict in favor of the petitioner for \$250, and, defendant's motion for a new trial having been overruled, it excepted.

The main issue in the case as it was tried below seems to have been whether the plaintiff had contracted for second-class tickets. It seems from the evidence that during the negotiations for the tickets nothing was said either by the plaintiff or the agent about second-class tickets, but that plaintiff stated to the agent that she desired to purchase tickets as cheaply as possible. The plaintiff testified that she had never heard of second-class tickets, and that she never intended to buy them; that, while she wished to purchase her tickets at as low a rate as possible, she never asked for, and never expected to obtain, other than first-class accommodations. Viewing the entire evidence as to what transpired between the agent and the plaintiff on this subject, we are not prepared to say that the agent was warranted in assuming that the plaintiff wished to travel second-class. The

mere fact that she stated that she desired to buy tickets as cheaply as possible would not justify this inference. This desire and the desire for first-class accommodations are not necessarily inconsistent. A person may, and we should say generally does, want the best that can be had for as little money as the seller will take for it. There is, however, a theory of the case different from this on which a recovery on this branch of the case was warranted. That is, that, even conceding that the plaintiff contracted for second-class tickets, she was certainly entitled to ride on such a car as is usually provided for persons holding that class of tickets. There was ample evidence to sustain a finding that she was not given such accommodation as she was entitled to receive under her contract as evidenced by her tickets. The description of such a car as is usually provided for persons holding second-class tickets, as given by the defendant's witnesses, and the description by the plaintiff of the car in which she was required to ride, are totally dissimilar, and from this latter description it can be gathered that the plaintiff was required to go into a dirty, nasty smoking car, with little ventilation, with no cushions on the seats, filled with men smoking and chewing, and in which no other ladies were riding, the only female besides herself being a negro. According to the testimony of the conductor, the second-class car of the train on the day in question was one with cushioned seats, in which there was no smoking, so far as he knew; and there was evidence that there was very little difference between a first and second class car, one witness saying that the only difference was that one holding a second-class ticket could not go into a sleeping or dining car. It is manifest from this testimony that the plaintiff was not given the accommodations which a second-class ticket entitled her to have, and she has a right to recover whatever damages she sustained on this account. Under this view, if upon no other, the evidence fully warranted the verdict upon this branch of the case. The jury were fully authorized to find that the conductor compelled her to ride in the car in which she was placed, and her so doing cannot be considered as waiving her right to claim damages for not being furnished with the accommodations which her ticket, treated as a second-class ticket, entitled her to.

Upon the question of damage to baggage, the evidence, while conflicting, tended to establish the plaintiff's theory that her baggage had been negligently exposed to the weather, and had been damaged in consequence thereof; that the agent agreed to send the box by freight the next morning, and let the plaintiff pay the freight upon its arrival at her destination; and that he did not do so. We think, therefore, that the jury were authorized to award some damages on account of detention of and damage to the baggage.

The judge, in his charge, eliminated from the case all the allegations of damage growing out of the sickness and death of the plaintiff's son; and we are of opinion that a recovery was warranted for whatever damage the plaintiff reasonably and naturally sustained as a result of the failure of the company to provide her with proper accommodation on the train from Chattanooga, and also for the damages sustained by reason of the detention of and damage to her baggage. The motion for a new trial complains of a number of extracts from the judge's charge to the effect that, if the agent gratuitously, and on his own motion, furnished plaintiff with second-class tickets, without any request from the plaintiff, and without knowledge on her part that she was receiving this class of tickets, she would be entitled to ride in a first-class coach, and receive first-class accommodations. It is complained that these charges were not authorized by the evidence, but we do not think they are subject to this criticism. It was shown that the plaintiff did not ask for a second-class ticket, and that she did not know she had received such tickets until informed by the conductor of this fact after she left Chattanooga; so that the objection to the charges is not well taken, and we are not called on to decide whether they stated correct propositions of law in the abstract or not. Further complaint was made that the judge charged the jury to consider whether the agent at Dalton "guarantied" that there would be a connection in Chattanooga. It is contended that there was no evidence to authorize this charge. It is true that, if the word "guaranty" be given its strict legal signification, there was no evidence of a guaranty. The plaintiff, however, did testify that when she offered to surrender her tickets, and go by another route, "they told me that the other train would be held in Chattanooga until I got there; that I need not be uneasy." In view of this evidence, and in view of the entire record, we do not think the inaccuracy in the foregoing charge of sufficient moment to require a new trial. We have carefully read the entire record, and have reached the conclusion that the trial judge has not abused his discretion in refusing to grant a new trial. Judgment affirmed. All the justices concurring.

(114 Ga. 81)

DERRICK v. SAMS et al.

(Supreme Court of Georgia. Nov. 6, 1901.)

NOTE—CONSIDERATION—ERROR—EXCEPTIONS—EXCLUSION OF EVIDENCE—DIRECTING VERDICT.

1. Where D. sold and conveyed land to H., taking his note for the purchase money, and, after judgment had been rendered in favor of D. upon such note, H. sold and conveyed the land to S., and, subsequently to this, in settlement of the judgment, H. and S. gave to D. their joint note and a mortgage to secure the same on the land, relatively to S., the consideration of the joint note was not the purchase

money due to D. for the land; and where, upon the death of S., the land was set apart as a year's support for the benefit of his family, it was not subject to an execution issued upon the foreclosure of the mortgage.

2. An exception to the effect that the court erred in ruling that the plaintiff could not attack a designated deed as fraudulent will not be considered when it is not alleged what specific fraud was sought to be proven.

3. Alleged error in refusing to permit a witness to answer a specified question cannot be considered when it does not appear what the answer to such question would have been.

4. The other evidence which it is alleged the court erred in rejecting was immaterial.

5. There was no error in directing a verdict finding the property not subject.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. B. Estes, Judge.

Action by J. E. Derrick against A. B. Sams and others. Judgment for plaintiff, and Sarah L. Sams and others interpose a claim. Judgment for claimants, and plaintiff brings error. Affirmed.

R. E. A. Hamby and W. S. Paris, for plaintiff in error. Robt. McMillan and H. H. Dean, for defendants in error.

FISH, J. J. E. Derrick sold and conveyed certain land to J. L. Henson on January 15, 1891, and took his notes for the purchase money. The deed was recorded two days subsequently. After Derrick had obtained judgments on all the purchase-money notes except one, on which suit was pending, Henson, on December 29, 1892, sold and conveyed the land to A. B. Sams, Sr. On January 24, 1893, Derrick, in settlement both of the judgment which he held against Henson and the note on which suit was pending, took the four joint notes of Henson and Sams and their joint mortgage on the land to secure such notes. Subsequently Sams died, and the land was set apart to his family as a year's support. A. B. Sams, Jr., was appointed administrator on the estate of A. B. Sams, Sr. Derrick foreclosed the mortgage against Henson and Sams, administrator, and the mortgage *fi. fa.* was levied on the land as the property of Henson and the estate of A. B. Sams, Sr., in the hands of A. B. Sams, Jr., as administrator, to be administered. Sarah L. Sams, the widow of A. B. Sams, Sr., for herself and as next friend of certain minor children of herself and A. B. Sams, Sr., interposed a claim to the land, claiming it as their year's support. Upon the trial of the claim case the court, after the evidence was submitted, directed a verdict finding the land not subject, to which ruling Derrick, the plaintiff, excepted by a direct bill of exceptions.

1. Plaintiff in error contends that the land was subject to his mortgage *fi. fa.*, under the act of September 16, 1891, embodied in section 3472 of the Civil Code, which provides: "Whenever the vendor of land shall make a

deed thereto, and take a mortgage to secure the purchase money thereof, neither the widow nor children of the vendee shall be entitled to a year's support in said land as against said vendor, his heirs, or assigns, until the purchase money is fully paid." This contention is not sound. The facts of the case do not bring it within the operation of the statute just quoted. Derrick sold and conveyed the land to Henson in January, 1891, before the passage of the statute, which was in September of that year. Moreover, he took no mortgage from Henson, his vendee, for the purchase money, and it is not the widow and children of his vendee who are setting up a year's support in the land; but the claimants under the year's support are the widow and children of A. B. Sams, Sr., who was not the vendee of Derrick, but of Henson. But we place our judgment on another ground. When Derrick, in full settlement of the judgments and the note on which suit was proceeding, which he held against Henson for the purchase money of the land, took the joint notes of Henson and Sams and their joint mortgage on the land to secure such notes, the joint notes of Henson and Sams, with their mortgage to secure the same, were substituted for the judgments and the note which Derrick held against Henson. The transaction operated as a novation. Relatively to Sams, at least, the consideration of the joint notes of himself and Henson was not the purchase money of the land, but the extinguishment of the judgment and notes which Derrick held against Henson. Sams owed Derrick no purchase money, nor did he become Henson's surety for the purchase money, but he signed the four notes as joint principal with him. From the foregoing it follows that the year's support was superior to the mortgage, and that the land was not subject to the *fi. fa.*

2. The bill of exceptions recites that: "When plaintiff commenced to offer testimony in rebuttal, his attorney stated that he proposed to show a fraudulent scheme between Henson and Sams to defraud plaintiff out of his purchase money, and that the deed from the former to the latter was void because of such fraud. Claimant's attorney insisted this could not be done, for two reasons: (1) Because, as he alleged, Derrick took a mortgage from Sams, and held under him, and that, therefore, plaintiff was estopped; (2) because plaintiff could not make an attack on a deed without making both the

grantee and grantor parties. The court replied, 'I think that is the law,' and so ruled." The assignment of error upon this ruling is in the following language: "The court erred in ruling that plaintiff was estopped from showing that the deed from J. L. Henson to A. B. Sams, Sr., was made as part of a fraudulent scheme to prevent plaintiff from collecting his purchase money for the lands in dispute and in holding that such proof could not be made without making the grantee and grantor in the deed parties." It will be seen that the real exception is that the court erred in excluding evidence to prove that the deed from Henson to Sams was fraudulent without alleging what such evidence was. As has been frequently ruled, this is not a good exception. Whether the reason which prompted the court to exclude the evidence was valid or not cannot affect the rule that alleged error in refusing to admit evidence cannot be considered when it does not appear what the rejected evidence was. If the evidence had been set out in the exception, it might appear that it was inadmissible for reasons other than those which moved the court to exclude it, and, if the ruling were correct, the reason given for it would be immaterial.

3. Another exception is that the court erred in refusing to allow the witness F. A. Bleckley to answer certain questions propounded by plaintiff's counsel. It does not appear what the answers to such questions would have been, and for that reason, as frequently decided by this court, the assignment of error cannot be considered.

4. Complaint is made that the court erred in refusing to allow plaintiff to put in evidence the judgments which Derrick obtained against Henson on the purchase-money notes. We do not see how they were material, and, besides, Derrick was permitted to testify all about them.

5. Plaintiff contended that the land set apart as a year's support did not appear to be the same as that levied upon, and which was sold by Derrick to Henson and by Henson to Sams, and upon which Derrick held the mortgage. After carefully examining all the evidence in the record, we think that it clearly appears that it was all the same land. The evidence demanded a verdict finding the land not subject, and there was no error in the court so directing.

Judgment affirmed. All the justices concurring.

lished the proposition that Holbrook & Co. had obtained a valid judgment against Sams. It is, of course, true that, without having obtained such a judgment, the plaintiffs were not legally entitled to a judgment against the company; but the fact that the court gave judgment against it concludes it upon this very point. As matter of fact, it may be that the company was not indebted to Sams, but no one would for a moment contend it could now set up this defense by illegality. To allow this would be to permit the company to go behind the judgment rendered against it in the garnishment proceeding, which it surely cannot lawfully do. Neither can it go behind that judgment for the purpose of setting up the alleged invalidity of the plaintiffs' judgment against Sams in their suit against him. The latter of these propositions is as clear and palpable as the former. As against the railroad company, the law presumes that the court which rendered the judgment in favor of Holbrook & Co. against that company had before it proof of every fact essential to the establishment of their right to have this judgment entered. This being so, and the law being that "the plaintiff shall not have judgment against the garnishee until he has obtained judgment against the defendant" (Civ. Code, § 4726), it is in this case, so far as concerns the garnishee, to be conclusively presumed that the plaintiffs did show to the court that they had obtained a good judgment against Sams. They may not, in point of fact, have done so, but the garnishee is no longer in a position to make any such defense. It very often happens that judgments establish as true that which could, before their rendition, have been shown to be false; but this will not be allowed after judgment.

In answer to the contention that the record of "the whole case" shows that the garnishment judgment was void, because rendered in the absence of a valid judgment in favor of Holbrook & Co. against Sams, it need only be said that, even granting, for the sake of the argument, that the judgment against him was open to attack, the record of the original suit of these plaintiffs against him which resulted in that judgment is no part of the record of the garnishment case. That was an entirely separate and distinct suit, wholly independent of the action against Sams. The record of that action is, with regard to the garnishment proceeding, merely evidentiary, and nothing more. It could, if sufficient to show the existence of a good judgment against Sams, have been introduced in evidence on the trial of the garnishment case. If not sufficient to do so, it would have been worthless, even as evidence. In no view can it be considered as a part of the pleadings or record proper of the garnishment proceeding. It follows irresistibly that the garnishee cannot, by illegality, invoke an in-

spection of the record in the suit against Sams, to show either that the plaintiffs did not prove, or could not have thereby proved, that they had a valid judgment against Sams. There is nothing on the face of the record of the garnishment case showing that the judgment therein was based upon insufficient evidence as to the rendition of a judgment against the original debtor, or that the judgment against the garnishee was itself for any reason invalid.

Judgment reversed. All the justices concurring.

(114 Ga. 4)

HOLBROOK et al. v. EVANSVILLE & T. H. R. CO.

(Supreme Court of Georgia. Nov. 6, 1901.)

GARNISHMENT—SERVICE OF SUMMONS.

Due and legal service of a summons of garnishment upon a railroad company is not shown by an entry reciting that the summons was served personally upon each of three named persons, the first designated as "Gen. Sou. Agt.," the second as "Trav. Frt. Agt.," and the third as "Commercial Agt.," and that these persons were "in charge of office." Such an entry is defective in failing to disclose that the individuals served were agents of the company, and in not affirmatively showing that the "office" of which they were in charge was its office.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Garnishment proceedings by A. L. Holbrook & Co. against the Evansville & Terre Haute Railroad Company. Illegality overruled in justice court. On judgment sustaining a certiorari, plaintiffs bring error. Affirmed.

S. D. Johnson and Jas. K. Hinea, for plaintiffs in error. Westmoreland Bros., for defendant in error.

LUMPKIN, P. J. This case, upon its facts, is identical with that of Holbrook v. Railroad Co., 114 Ga. —, 39 S. E. 937, save that the return of service in the present case was in the following words: "Served the within by serving summons of garnishment issued on within affidavit and bond on Evansville & Terre Haute R. R. by serving D. H. Hillsman, Gen. Sou. Agt., S. L. Rogers, Trav. Frt. Agt., and R. L. Sams, Commercial Agt., each personally, at 3 p. m., they being in charge of office. This March 2, 1899. [Signed] R. B. Lynch, L. O." The judge of the superior court, following the decision rendered in Railway Co. v. Hagan, 103 Ga. 564, 29 S. E. 760, held that this entry of service could not lawfully be made the basis for entering up judgment against the defendant in error for failure to answer the summons of garnishment. In this conclusion we fully concur. As will have been observed, there is in this entry no recital that the individuals therein named were agents of this particular rail-

road company; or that they were in charge of its office; or, indeed, that it had any office in this state. The statement, "they being in charge of office," was entirely too general and indefinite to meet the requirements of the statute with reference to the service of summonses of garnishment on corporations. See, also, in this connection, *Hargis v. Railway Co.*, 90 Ga. 42, 15 S. E. 631; *Bank v. McCullough*, 108 Ga. 249, 33 S. E. 848; *Cathcart v. Railway Co.*, 108 Ga. 253, 33 S. E. 875. In *Insurance Co. v. Coleman*, 58 Ga. 256, Judge Bleckley took occasion to remark, "Insurance is business, and not elaborate and expensive trifling." A like observation is applicable to the matter of perfecting service and making a proper return thereof.

Judgment affirmed. All the justices concurring.

(114 Ga. 85)

STOVER v. DOYLE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CERTIORARI—FAILURE TO GIVE BOND.

1. A writ of certiorari in a civil case, unless sued out in forma pauperis, is void if the same be issued before the applicant has given the bond prescribed by section 4639 of the Civil Code; and that bond, to render it effectual, must in some manner be approved by the judge or justice of the court in which the case was originally tried.

2. The decisions of this court to the above effect in *Hamilton v. Insurance Co.*, 33 S. E. 705, 107 Ga. 728; *Wingard v. Railway Co.*, 34 S. E. 275, 109 Ga. 177; and *Carpenter v. Same*, 37 S. E. 186, 112 Ga. 152,—are, upon a review thereof, affirmed.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action between J. A. Stover and Della Doyle. From the judgment, Stover brings certiorari, and from the judgment dismissing the petition he brings error. Affirmed.

Jas. B. Conyers, for plaintiff in error. Paul F. Akin, for defendant in error.

LUMPKIN, P. J. The bill of exceptions in this case assigns error upon the dismissal of a petition for certiorari. The ground of dismissal was that the certiorari bond had

not been approved by the judge of the court in which the case was tried. Section 4639 of the Civil Code, which deals with writs of certiorari in civil cases, imperatively requires the party applying for the writ, unless he does so in forma pauperis, to give bond and security "before any writ of certiorari shall issue." The statute necessarily means an approved bond, and accordingly this court, in *Hamilton v. Insurance Co.*, 107 Ga. 728, 33 S. E. 705, held that when a writ of certiorari issues upon the filing of a bond which has not been approved by the judge or justice of the court in which the case was tried, the writ is to be treated as a nullity. This decision has been cited approvingly and followed in the later cases of *Wingard v. Railway Co.*, 109 Ga. 177, 34 S. E. 275, and *Carpenter v. Same*, 112 Ga. 152, 37 S. E. 186. These cases are conclusive upon the question now presented for determination. Counsel for the plaintiff in error was, however, granted leave to bring the decisions therein rendered under review. After due consideration, they are approved upon the reasoning to be found in the *Hamilton Case*, supra. In support of the contention that the filing of an approved bond need not precede the issuing of the writ of certiorari, counsel for the plaintiff in error cited and relied on the cases of *Memmler v. State*, 75 Ga. 576, and *Watson v. State*, 85 Ga. 237, 11 S. E. 610. These cases are not applicable to the point now before us. In the former of them, the court construed section 302 of the Code of 1882, relating to writs of certiorari in criminal cases from county courts. As will be perceived from the language used by Mr. Justice Hall on pages 581, 582, the court expressed the opinion that, while it was essential that the prescribed affidavit be filed before the issuing of the writ, this was not so as to the filing of the bond. The case of *Watson* stands upon the same foundation as that of *Memmler*, though in dealing with the former the latter was not cited. We therefore adhere to the doctrine laid down in the *Hamilton Case*, and are confident that the two criminal cases just mentioned contain nothing which should lead to a contrary conclusion.

Judgment affirmed. All the justices concurring.

(114 Ga. 148)

ALBEA v. WATTS, Town Marshal.

(Supreme Court of Georgia. Nov. 7, 1901.)

**OFFICERS—DELIVERY OF BOOKS—REVIEW
—ERROR.**

The proceeding authorized by section 272 of the Political Code for the purpose of compelling the delivery of books, papers, or other property, as required by the three preceding sections, is not, when instituted before a judge of the superior court, a proceeding in any superior court, and consequently no order passed by such officer upon such a proceeding is reviewable by a writ of error to the supreme court.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Petition by Henry B. Watts for an order to S. B. Albea to show cause. From the judgment, defendant brings error. Dismissed.

M. B. Eubanks, for plaintiff in error. Denny & Harris, for defendant in error.

FISH, J. Henry B. Watts, a marshal of the town of Cave Spring, petitioned his honor W. M. Henry, judge of the superior courts of the Rome circuit, under the provisions of section 271 of the Political Code, for an order to require S. B. Albea, the immediate predecessor of petitioner in office, to show cause why he should not be compelled to deliver to petitioner certain described books alleged to appertain to such marshalship, and to be in the possession of the defendant. After answer made, the judge, upon hearing the evidence, ordered the defendant to deliver to petitioner instant the books designated in the petition. The defendant, being dissatisfied with the granting of the order, sought by bill of exceptions to have such action of the judge reviewed by this court. The defendant in error moved here to dismiss the writ of error upon the ground that the proceeding was before the judge, and not in a superior court, and therefore this court had no jurisdiction to review the action of the judge in granting the order.

The constitution of this state (Civ. Code, § 5836) provides: "The supreme court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors from the superior courts, and from the city courts of Atlanta and Savannah, and such other like courts as may be hereafter established in other cities; and shall sit * * * for the trial of writs of error from such superior and city courts." The proceeding in which the order sought to be reviewed was granted was instituted under sections 269, 271, and 272 of the Political Code. Section 269 is as follows: "When any office is vacated, it is the duty of the incumbent, on demand made, to deliver all books, papers and other property appertaining to the office, to his qualified successor." Section 271 then

provides: "If any person neglects or refuses so to do, after demand made, the successor shall make complaint to the ordinary of the county, or to the judge of the superior court of the circuit in which the person refusing resides, or, if neither can be had, the judge of the superior court of an adjoining circuit, and if such officer is satisfied, from the oath of the complainant or otherwise, that such are withheld, he must grant an order requiring the person so refusing to show cause before him, on a day and at a place named in such order, why he should not be compelled to deliver over the same." Section 272 provides: "At the time so appointed, or at any other time to which the matter may be adjourned, a copy of such order having been personally served on the person so refusing, such officer must proceed to inquire into the circumstances, and if it appears that such books and papers are withheld, he must order the same delivered up instant to said successor, and on failing to comply with such order, he shall issue a warrant, directed to any officer of said county, or of the adjoining county, authorized to make the arrest, to arrest said officer and commit him to jail, there to remain until he complies with said order, or is otherwise discharged by course of law. At the same time, in the same way, he shall command said officer to search such places for them as may be designated in such warrant, and to seize and bring them before him or some other officer authorized to preside, and being so brought and appearing to belong to said office, he shall cause them to be delivered to the successor. The payment of costs are in the discretion of the court. Said proceedings do not interfere with the provisions of the Penal Code on this subject." It is quite evident that there is nothing in sections 271 and 272 which confers jurisdiction upon any superior court to grant either of the orders or to issue the warrant for which provision is therein made. A judge of a superior court is certainly not a superior court. He is referred to in the sections quoted simply as "the judge of the superior court" and as "such officer," and there is no direction given that the papers in the proceedings provided for shall at any time be filed or recorded in any court. It is true that section 272 says: "The payment of costs [is] in the discretion of the court"; but even granting the judge, while performing the duties imposed by these sections, to be a court, he is not a superior court, nor the city court of Atlanta, nor the city court of Savannah, nor other like city court, and therefore this court has no jurisdiction to try and determine a case brought here from him by writ of error, if he be a special court under the provisions of the sections quoted. See *Johnson v. Jackson*, 90 Ga. 389, 27 S. E. 784. It follows that the writ of error must be dismissed.

Writ of error dismissed. All the justices concurring.

(114 Ga. 110)

CLEVELAND v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

LARCENY—EVIDENCE—CONFESSIONS.

1. No evidence appears in the record upon which a charge on the subject of confessions could have been properly based.

2. The evidence clearly showing the lack of a criminal intent on the part of the defendant, all the testimony going to show that the goods alleged to have been stolen were taken under a fair claim of ownership, the verdict finding him guilty should have been set aside on motion for new trial.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Judge Cleveland was convicted of larceny, and brings error. Reversed.

Sam L. Olive, for plaintiff in error. T. J. Brown, for the State.

LEWIS, J. The evidence showed that the defendant, Judge Cleveland, went to the express office in the city of Elberton, and asked the agent in charge if there was a jug of whisky there for him. The agent asked if he was expecting any express, and the defendant replied that he was not, but that he had been informed that there was a jug of whisky there for him. The agent then said that he had a jug of whisky for J. A. Cleveland, and the defendant answered that that was his name. The agent then delivered the whisky to the defendant, taking his receipt therefor. The defendant took the jug of whisky, and carried it openly through the streets to his home. This was about 10 o'clock in the morning, and there was no attempt at concealment on the part of the defendant, who took the jug of whisky to his home through the most public street in the city. It developed that the whisky was intended for another man with the same initials and name as the defendant. The defendant was then arrested, and the greater part of the whisky recovered, and turned over to the man for whom it was intended.

1. The court gave in charge to the jury the law relating to confessions. The charge was correct in the abstract, but was wholly inapplicable to the case at bar. The evidence on which it was doubtless based was that of a witness who testified as follows: "I saw defendant soon after he was arrested, and he told me he had not ordered any whisky, and that nobody had promised to send him any. He said a negro told him there was a jug of whisky for him at the express office, and he went and called for it, and got it." This evidence, far from being ground for a charge on the subject of confessions, tended rather to corroborate the statement of the accused, and to support his contention that he called for the whisky in good faith. As was said by Bleckley, C. J., in the

case of Fletcher v. State, 90 Ga. 471, 17 S. E. 100: "There is a very wide distinction between admitting the main fact and admitting some minor or subordinate fact or series of facts which could be true whether the main fact existed or not." The charge as to confessions was not warranted by the evidence, and was therefore erroneous.

2. The evidence in its every detail negatived the idea of an intention to steal on the part of the accused. The entire transaction was aboveboard, and the express agent was plainly told that the defendant had neither ordered nor had been promised any whisky, and that he did not know who the sender was. Nothing is more natural than that one should call for a package which he is told awaits him at an express office, and the fact that the person so calling has neither ordered nor been promised any package is not inconsistent with entire good faith and honesty of purpose. See Hall v. State, 34 Ga. 208; Manufacturing Co. v. White, 63 Ga. 697; Causey v. State, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447; Lee v. State, 102 Ga. 224, 29 S. E. 284. We conclude, therefore, that under the evidence submitted on the trial in the court below the accused was entitled to a verdict of acquittal.

Judgment reversed. All the justices concurring.

(114 Ga. 113)

RUSH v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

BURGLARY—EVIDENCE.

Where an indictment for burglary charged that the accused broke and entered a designated house with intent to steal therefrom a specific article, and there was no proof that this article was ever in the house, or that the accused had any reason to believe it was, a verdict of guilty cannot stand.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

John Rush was convicted of crime, and brings error. Reversed.

Harris, Ohandler & Harris, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(114 Ga. 84)

McCONNELL v. CHEROKEE MIN. CO.

(Supreme Court of Georgia. Nov. 6, 1901.)

EJECTMENT—EVIDENCE—NONSUIT.

1. Where, in the trial of an action for the recovery of land, the plaintiff relied upon the contention that he and the defendant held under a common grantor, which was denied by the defendant, proof by the plaintiff that the defendant had in his possession a chain of title to the premises in dispute, one link of which

was a conveyance from the person claimed by plaintiff to be such common grantor, was not, without more, sufficient to authorize a verdict for plaintiff, as the defendant, for aught that appeared, may have held a valid title from a different source.

2. There was no error in granting a nonsuit in this case.

(Syllabus by the Court.)

Error from superior court, Cherokee county; Geo. F. Gober, Judge.

Action by N. V. McConnell against the Cherokee Mining Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. W. Coleman, for plaintiff in error. P. P. Du Pre, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 151)

LUMSDEN, Constable, v. LAWRENCE et al.

(Supreme Court of Georgia. Nov. 8, 1901.)

ERROR—CERTIFICATE—DISMISSAL.

The judge's certificate does not unequivocally verify the bill of exceptions, and, as a result, the writ of error must be dismissed. See *Johnson v. Security Co.*, 39 S. E. 473, 113 Ga. 1153, and cases cited.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Action by T. G. Lumsden, for use, etc., against Sarah Lawrence and others. From the judgment Lumsden brings error. Dismissed.

I. L. Oakes and J. J. Kimsey, for plaintiff in error. H. H. Dean and J. O. Edwards, for defendants in error.

PER CURIAM. Writ of error dismissed.

(114 Ga. 124)

SCOTT v. ATLAS SAVINGS & LOAN ASS'N et al.

(Supreme Court of Georgia. Nov. 7, 1901.)

SECONDARY EVIDENCE—BONA FIDE PURCHASER—VOLUNTARY CONVEYANCE—PRIORITIES.

1. The foundation for introducing secondary evidence of the contents of the papers relied on by the defendant was sufficiently laid.

2. Under the rulings of this court in *Finch v. Woods*, 39 S. E. 418, 113 Ga. 993, and cases there cited, a bona fide purchaser for value is entitled to prevail over the holder of a voluntary conveyance of previous date, though the same be duly recorded, unless the former took with actual knowledge of the existence of the previous deed. (a) Under the evidence in this case the judge was warranted in directing a verdict for the defendants, for a careful review of the whole evidence shows that there was no testimony authorizing a finding that the main defendant, or any agent of it, had actual knowledge of the deed of gift at the time of taking the security deed.

3. Under such circumstances the holder of a security deed executed in consideration of a

loan made at the time by the grantee to the grantor is entitled to the same protection as the holder of a deed of bargain and sale. See *Parker v. Bank*, 34 S. E. 865, 107 Ga. 657, and cases cited.

(Syllabus by the Court.)

Error from superior court, Catoosa county; A. W. Fite, Judge.

Action between the Atlas Savings & Loan Association and others and S. E. Scott. From a judgment Scott brings error. Affirmed.

Payne & Payne, W. H. Odell, and Jones & Martin, for plaintiff in error. T. C. Latimore and R. J. & J. McCamy, for defendants in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 104)

HANSON v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

OPPROBRIOUS WORDS—INSTRUCTIONS—QUESTION FOR JURY.

1. It is not, in a trial for the offense of using opprobrious words, erroneous to charge the jury that, if the accused used to the prosecutor the language charged in the indictment, it is for them to determine whether or not he had provocation so to do, and "whether or not the provocation, if there was any, was sufficient to justify the defendant in the use of such language." *Echols v. State*, 34 S. E. 289, 110 Ga. 257.

2. The verdict in this case was fully supported by evidence.

(Syllabus by the Court.)

Error from city court of Carrollton; W. C. Hodnett, Judge.

William Hanson was convicted of using opprobrious language, and brings error. Affirmed.

W. D. Hamrick and Oscar Reese, for plaintiff in error. S. Holderness, Sol., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 112)

HARRISON v. SIMMONS et al.

(Supreme Court of Georgia. Nov. 7, 1901.)

INJUNCTION—CONFLICTING EVIDENCE.

The evidence on the questions of fact made by the pleadings and the affidavits was conflicting, the order of the judge in relation to one of the lots of land claimed not to be fully described in the deed filed for the purpose of levy fully protected the plaintiff in that regard, and the judge did not err in refusing to grant the injunction as prayed.

(Syllabus by the Court.)

Error from superior court, Pickens county; Geo. F. Gober, Judge.

Action by J. P. Harrison against T. G. Simmons and others. Judgment for defendants, and plaintiff brings error. Affirmed.

S. A. Darnell, Isaac Grant, and Z. D. Harrison, for plaintiff in error. John W. Henley, for defendants in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 123)

WESTERN & A. R. CO. v. STRICKLAND.

(Supreme Court of Georgia. Nov. 7, 1901.)

RAILROADS—KILLING STOCK.

The uncontradicted evidence being to the effect that the plaintiff's mare, hitched to a dray, was left standing in a public street, with the bridle rein thrown loosely over a hitching post; that for some reason, not disclosed by the record, the animal ran away in the direction of the railroad track of the defendant company, and dashed into the side of a moving train, which was at the time passing over the railroad crossing; and there being no evidence of any negligence on the part of the defendant's employees in charge of the train, contributing to the damage,—a verdict in favor of the plaintiff was contrary to law and the evidence, and should have been set aside on motion for a new trial. See *Railroad Co. v. Williams*, 18 S. E. 825, 93 Ga. 253; *Railroad Co. v. Neidlinger*, 35 S. E. 364, 110 Ga. 329.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

Action by Albert Strickland against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye and J. M. Neel, for plaintiff in error. Jno. T. Norris, for defendant in error.

PER CURIAM. Judgment reversed.

(114 Ga. 117)

BAIRD et al. v. BATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

NEW TRIAL—BRIEF OF EVIDENCE.

1. When, on the hearing of a motion for a new trial, accompanied by a brief of evidence, which had been duly filed, the judge, in fact, approved the brief as correct, and then proceeded to decide the motion on its merits, a written indorsement upon the brief of the judge's approval thereof will, though entered after the date of the judgment disposing of the motion, be held to relate back to that date, and as being effectual thereon.

2. It not appearing that the verdict rendered was demanded by the law and the evidence, and this being the first grant of a new trial, the discretion of the trial judge will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action between J. M. Baird and others and R. T. Bate. From an order setting aside a verdict and granting a new trial, Baird and others bring error. Affirmed.

Sessions & Moss, for plaintiffs in error. B. T. Frey and Enoch Faw, for defendant in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 89)

ANDERSON v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

HOMICIDE—INSTRUCTIONS.

In the light of the statement of the accused, the court was authorized to state to the jury that the homicide was admitted. The evidence authorized the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Julia Anderson was convicted of murder, and brings error. Affirmed.

J. V. Kelley, for plaintiff in error. B. T. Rawlings, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 155)

THORNTON v. LEMON et al.

(Supreme Court of Georgia. Nov. 8, 1901.)

NOTE OF MARRIED WOMAN—VALIDITY—CONSIDERATION.

1. A promissory note executed and delivered by a married woman for the purpose of settling a pending action against her husband and herself, wherein the plaintiff alleged that both were liable, is binding upon her, although in point of fact the debt declared upon was exclusively that of the husband. The consideration of such a note is not the husband's debt, but the settlement of the litigation.

2. There being, on the trial in the magistrate's court, sufficient evidence to support the plaintiff's contention that the notes sued upon were given in settlement of litigation of the nature above indicated, there was no abuse of discretion in overruling the defendant's certiorari.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by Lemon, McMillan & Co. against Mrs. J. E. Thornton. Judgment for plaintiffs and defendant brings error. Affirmed.

T. C. Battle, for plaintiff in error. J. J. Northcutt, for defendants in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 19)

HOXIE v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

HOMICIDE—EVIDENCE—ARGUMENT OF COUNSEL—INSTRUCTIONS—WITNESSES UNDER RULE—RECEPTION OF EVIDENCE.

1. It is competent, in a trial for murder, for the state to prove facts occurring after the homicide, when they tend to illustrate the motive which actuated the accused in killing the deceased.

2. There is no rule of law or evidence preventing a woman from testifying that she is not the wife of a man who is on trial for an offense against the penal laws of the state.

3. The use of unfair or improper language by an attorney in arguing a case will not be held cause for a new trial when it is certain that no injury could possibly have resulted therefrom to the losing party.

4. An instruction to a jury to consider the evidence of a named witness as they "would the evidence of any other witness in the case" is not open to the criticism that its effect was to place the witness on the same footing as to credibility as other witnesses. It simply and plainly meant that the jury were to weigh and pass upon the testimony of this witness as they did that of the others.

5. A charge which, whether abstractly correct or not, is more favorable to a party than he has any right to demand, affords him no just cause of complaint.

6. A verbal inaccuracy in a charge, resulting from a palpable "slip of the tongue," and which clearly could not have misled the jury, is not cause for a new trial.

7. It is not improper for a judge to shape his general charge to a jury upon the evidence alone, but he should, at some stage thereof, appropriately instruct the jury with respect to the prisoner's statement. (a) There is no complaint that this was not done in the present case.

8. It is not erroneous to refuse to put officers of court, whose presence therein is needed, under the operation of an order requiring the separation of witnesses; nor to allow a witness who had been "put under the rule" to testify, notwithstanding the fact that he had heard a portion of the evidence. His disobedience of the rule does not disqualify him, but renders him subject to punishment for contempt.

9. It is always within the discretion of the trial judge to reopen a case for the introduction of further testimony, when no unfair advantage can result therefrom, and the supreme court will not undertake to interfere with the exercise of such discretion unless it is manifestly abused to the injury of the complaining party. (a) The use by a judge, in ruling that additional testimony might be introduced, of the words, "I will allow any testimony that will tend to elucidate the facts in this case," is not objectionable as intimating anything with respect to the probative value of the testimony thus let in.

10. The evidence fully warranted the verdict of guilty returned in the present case.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Jim Hoxie was convicted of murder, and brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Moses Wright, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. Upon a trial in the superior court of Floyd county, Jim Hoxie was

convicted of the murder of John Weems, and by bill of exceptions assigns error upon the overruling of a motion for a new trial.

1. The theory of the state was that the accused, finding the deceased in a room with the concubine of the former under circumstances indicating that they had been engaged or were about to engage in illicit intercourse, shot and killed the deceased in a fit of jealous rage. In support of this theory the state was permitted to introduce testimony to the effect that immediately after the homicide the accused pursued the woman, and gave her a violent beating. This testimony was objected to as irrelevant. We think it was properly admitted as tending to establish the correctness of the state's theory; that is to say, the testimony was competent as throwing light upon the motive actuating the accused in making a deadly attack upon the deceased.

2. The woman just referred to was allowed, over an objection interposed by the accused, to testify, "I am not the wife of Jim Hoxie." The objection was that, as she had been "shown to be, by the state's witnesses, at least prima facie, the wife of the defendant, and was reputed to be such, and that, prima facie, she was not a competent witness, and proof to make her such would have to come from some other source, and not from her." There is no merit in this objection. If the woman was the wife of the accused, she was, of course, incompetent to testify; but, if not, she could testify as any other witness. She, of all others, knew what the truth of this matter was, and there is no reason, either in law or logic, why she should not have been allowed to state under oath whether or not she had ever been married to the accused.

3. During the argument of the solicitor general in connection with the matter last above referred to, he used the following language: "If Hoxie had dared to have stated that any ordinary in Georgia or Alabama had issued him a license, I would have proven him an infamous liar." Counsel for the accused objected to this language on the ground that it was unfair, and not justified by law or the evidence. The court ruled that the objection was well taken, but did not caution the jury not to regard the improper argument of state's counsel. Upon the failure of the court so to do error is assigned. During the further course of the argument of the solicitor general, he said: "Talk about the defendant being married to this woman! Negroes, as a rule, are of a low moral status. They care nothing about the marriage relation. They just take up with each other, and stay until they get tired, or find some other one they like better, and go off and take up with another, and never think about marrying." This language was also objected to as unfair and unwarranted by the evidence, but the court held

the argument was legitimate, and proper to be considered by the jury. We take an entirely different view of the matter, and we do not hesitate to say that the jury should have been instructed not to regard any portion of the argument of the solicitor upon this line. We have, however, reached the conclusion that the grossly improper conduct on his part does not, in the present case, call for a reversal of the judgment denying the accused a new trial. There was no evidence whatever going to show that the woman with whom the accused had cohabited was in fact his wife, and in his statement to the jury he practically admitted that she was not. His precise language on this subject was: "I had done been at her home a little over two years. She had been staying with me a little over two years,—been as my wife about two years and a half. All her people knew it. Everybody in town knew it." "As far as she being my wife, she had been with me about two and a half years. Everybody here in Rome knew it." While, therefore, the objectionable remarks of the solicitor were to the effect that he could have proved that the accused had never obtained a license to marry this woman, and that negroes, as a rule, lived together in a state of unlawful cohabitation, no serious harm could have resulted to the accused, for the reason that it was an established fact that the marriage relation did not exist between himself and the woman with whom he had lived; in other words, the unwarranted argument of the solicitor could not have influenced the jury to find against the accused upon an issue as to which there was any real controversy. We nevertheless take occasion to once more condemn the reprehensible and wholly inexcusable practice of counsel seeking to sway a jury by means of an argument in no way warranted by the evidence upon which they are called upon to pass. As was said in *Ivey v. State*, 113 Ga. 1062, 39 S. E. 423, the state does not seek the conviction and punishment of any one accused of violating its laws, "unless the evidence shows his guilt beyond a reasonable doubt; nor will it permit its prosecuting officer to use any unfair means in the trial, or illegal argument in his address to the jury, to the prejudice of the accused." The argument of the solicitor general in that case being highly improper, and calculated to prejudice the minds of the jury against the accused, the judgment of the court below was reversed solely upon the ground that, "in the interest of impartiality and of justice, and of the dignity and decorum of the courts, a new trial should be had" because of the reprehensible conduct on the part of state's counsel.

4. The court instructed the jury, in substance, that, should they find the woman with whom the accused had cohabited was not in fact his wife, then the jury would be

authorized to "consider her evidence as [they] would the evidence of any other witness in the case." Complaint is made that this charge had "the effect to place this witness on a par with, and entitle her to the same credit that should be extended to," certain other named witnesses who had testified. We do not think the charge open to this criticism. The court evidently intended the jury to understand that, should they reach the conclusion that the woman was a competent witness to testify at all, they should weigh her testimony as they would that of any other witness in the case; and we have no reason to apprehend that the jury were misled by the instruction given them as to this matter. Indeed, it would be a great strain to hold that the language used by the court was susceptible of the construction placed upon it by counsel for the plaintiff in error.

5. Another charge excepted to was in the following words: "If you find, gentlemen, that the circumstances were such at the time as to reasonably lead Hoxie to believe—that is, as a reasonable man—that they had just begun, or were about to begin, or had just concluded, an adulterous intercourse, and if, by reason of that, gentlemen, and if you find, acting on that and by reason of that, Hoxie took the life of Weems, then I charge you, gentlemen, it is a question, under the law which I have read to you just now, whether or not he would be justified in so doing; that is, all other instances which stand on the same footing of reason and justice as those enumerated shall be justifiable. It then becomes a question for the jury to determine whether, under those circumstances, the defendant, Hoxie, was justifiable in taking the life of Weems or not." It will at once be perceived that this charge was more favorable to the accused than he had any right to expect, for it was framed upon the theory that the woman over whom the fatal difficulty arose might be regarded as the wife of Hoxie, when, as stated above, the evidence showed she was not, and in his statement he made no pretense that she was. This being so, it matters not whether the charge was abstractly correct or otherwise, or open to the criticism made upon it that it was not sufficiently specific in certain respects. The giving of this instruction certainly did not operate to the prejudice of the accused, but was calculated to operate to his advantage, because it gave him the benefit of a defense wholly unsupported by proof or by his statement.

6. In charging upon the law of self-defense, the trial judge inadvertently used the name of the accused, when evidently intending to refer to the deceased. It was palpably a mere slip of the tongue, and, viewed in the light of what the judge said in this immediate connection, could not possibly have misled or confused any intelligent man sitting as a juror. Upon this point, see *Wilson v. State*,

66 Ga. 591, and *Telegraph Co. v. Jordan*, 87 Ga. 69, 13 S. E. 202.

7. In two of the grounds of the motion for a new trial, error is assigned upon charges to the effect that, in determining what was the truth of the case, the jury should look to and carefully weigh the evidence before them. The objection urged against these instructions is that they practically excluded from the consideration of the jury the statement of the accused. This is not a fair criticism, for, looking to the entire charge of the court, we find that the presiding judge fully complied with the practice which, in *Vaughn v. State*, 38 Ga. 731, 16 S. E. 64, was approved; and there is no complaint that the judge failed to charge appropriately concerning the statement of the accused. As was said in the case just mentioned: "The general tenor of the charge of the court on the trial of a criminal case should be shaped by the evidence alone and the law applicable thereto, adding, or at some stage of the charge incorporating, the statutory provisions touching the prisoner's statement." See, also, in this connection, *Miller v. State*, 94 Ga. 1, 21 S. E. 128; *Lacewell v. State*, 95 Ga. 346, 22 S. E. 546; and *Sledge v. State*, 99 Ga. 684, 26 S. E. 756.

8. In several grounds of the motion for a new trial error is assigned upon the action of the court in allowing three of the state's witnesses to testify who, notwithstanding they had been "put under the rule," remained in the court room, and heard a portion of the testimony. It appears that two of these witnesses were deputy sheriffs, and that the court permitted them to remain for the reason that their services were needed. The remaining one of these witnesses heard the testimony of only one witness for the state, and was examined as to matters concerning which he did not testify. Aside from all this, it has been held by this court that, even where a witness who has been sequestered disobeys the order of the court, and hears the testimony, he is not, for this reason, disqualified from himself testifying in the case. See *May v. State*, 90 Ga. 800, 17 S. E. 108, and cases cited.

9. Another complaint in the motion is that the court, after the conclusion of the opening argument for the defense, allowed another witness for the state to be sworn and examined. In ruling upon the propriety of so doing, the trial judge said, "It is entirely within the discretion of the court, and I will allow any testimony that will tend to elucidate the facts in this case." We agree with his honor of the trial bench that reopening the case for the purpose of receiving additional evidence was a matter entirely within his discretion (*Reid v. State*, 23 Ga. 191), and we hold that there was, in this instance, no abuse of that discretion. We disagree with counsel for the accused in their contention that the remark of the judge above quoted "clearly in-

timated to the jury that, in the opinion of the court, the testimony offered and objected to tended to elucidate the facts in this case, and therefore caused the jury to attach greater weight to such testimony."

10. We have, in what has been said above, dealt with every question presented by the motion for a new trial having any semblance of merit, except that involved in the complaint that the verdict was contrary to the evidence. As to this contention it need only be said that there was ample evidence going to show that in killing the deceased the accused was guilty of the crime of murder, pure and simple.

Judgment affirmed. All the justices concurring.

(114 Ga. 96)

JAMES v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

LARCENY—INTENT.

An intention to steal is an essential element of the offense of larceny, and therefore in the trial of a person charged with this offense, and whose defense was that he had taken the goods under a bona fide claim of right, it was error for the judge to refuse to submit to the jury the question of intention, and to charge that if the accused appropriated the goods he was guilty, regardless of his intention. *Lee v. State*, 29 S. E. 264, 102 Ga. 221, and cases cited.

(Syllabus by the Court.)

Error from city court of Albany; Rich. Hobbs, Judge.

Juby James was convicted of larceny, and brings error. Reversed.

Jesse W. Walters, for plaintiff in error.
John D. Pope, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(114 Ga. 155)

WHITE v. BLECKLEY et al.

(Supreme Court of Georgia. Nov. 8, 1901.)

RES JUDICATA—PARTIES BOUND—EJECTMENT—DEFENSES.

1. When, in a case which involves title to land, an adjudication has been had that the title is in certain named persons, parties thereto, the adverse parties are concluded thereby, and none of them can lawfully raise the question of title against the prevailing parties or their privies.

2. When, as a result of such adjudication, one who claims title as administrator has prevailed over the adverse party, it is a conclusive reply to an action brought to recover the land from him as an individual that the defendant holds title in his representative character as administrator, and not individually.

3. As against the plaintiff, title to the premises in dispute has, under the records shown, been adjudicated to be in the defendants; that is to say, as to one in his own right, as to an-

other in his right as administrator, and with regard to the third as a privy in estate of the other two. See *White v. Bleckley*, 81 S. E. 147, 105 Ga. 173.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. B. Estes, Judge.

Action by S. E. White against James Bleckley and others. Judgment for defendants, and plaintiff brings error. Affirmed.

John J. Strickland and J. C. Edwards, for plaintiff in error. W. S. Paris and H. H. Dean, for defendants in error.

PER CURIAM. Judgment affirmed.

(114 Ga. 115)

BANKS v. STATE.

(Supreme Court of Georgia. Nov. 7, 1901.)

CRIMINAL LAW—BILL OF EXCEPTIONS—TIME OF TENDER—REVIEW ON ERROR—CONTINUANCE.

1. Where a demurrer to an indictment is overruled, a bill of exceptions complaining of this judgment must, under section 5540 of the Civil Code, be tendered within 20 days from the date of the judgment. If the accused is convicted, and a motion for new trial made and overruled, and a bill of exceptions complaining of the overruling of the demurrer and of the refusal of a new trial is tendered within 20 days from the date of the refusal to grant a new trial, but not within 20 days from the overruling of the demurrer, the writ of error will not be dismissed, but the exceptions relating to the refusal of a new trial will alone be considered.

2. Under the facts disclosed by the evidence of the defendant, and the counter showing made by the state, there was no error in refusing a continuance. The court did not err in the charge of which complaint is made, nor in the admission of evidence, and the verdict was authorized by the evidence.

(Syllabus by the Court.)

Error from superior court, Monroe county; M. J. Reagan, Judge.

Will Banks was convicted of crime, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 174)

SOUTHERN RY. CO. v. WATSON.

(Supreme Court of Georgia. Nov. 8, 1901.)

RAILROADS—INJURY TO STOCK ON TRACK.

The evidence discloses no negligence on the part of the railroad company in the erection

or maintenance of the stock gap in passing over which the plaintiff's mule was injured, and the verdict awarding damages to the plaintiff was therefore unwarranted.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by N. G. Watson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox, Geo. A. H. Harris & Son, and R. L. Chamlee, for plaintiff in error. Harper Hamilton, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., specially concurring.

(112 Ga. 23)

COLBERT v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

CRIMINAL LAW—ERROR—REVIEW.

There was no error in the admission of evidence, the evidence warranted the verdict, and the court did not abuse its discretion in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

George Colbert was convicted of crime, and brings error. Affirmed.

M. G. Bayne and R. D. Feagin, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 53)

IVEY v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—APPEAL.

No error of law was committed, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Henry Ivey was convicted of crime, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 45)

LOVETT et al. v. STATE

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—ERROR—REVIEW.

No error of law was complained of, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

J. M. Lovett and others were convicted of crime, and bring error. Affirmed.

Faircloth & Blount and J. K. Hinds, for plaintiff in error. F. G. Corker, for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 111)

HAYWOOD v. STATE

(Supreme Court of Georgia. Nov. 7, 1901.)

CRIMINAL LAW—CREDIBILITY OF WITNESSES—EVIDENCE—PRIVILEGED COMMUNICATIONS—GOOD CHARACTER.

1. The jury in all cases must, in the process of arriving at the truth, determine what credit shall be given to each particular witness, and, even though a witness is proven to have made statements directly contrary to his evidence, that evidence affords a sufficient basis for a verdict, if the jury believe it to be true. (a) The evidence in this case was sufficient to support the verdict.

2. No error of law appears to have been committed in the rulings of the trial judge as set out in the motion.

3. A communication which was made by a prisoner under arrest to an attorney who it is at the time anticipated will be employed to represent the cause of the person making such communication cannot, either on the trial of the person making the communication or another, be proved by the testimony of the attorney. Civ. Code, § 5198.

4. While, in the main, the request to charge as to the effect of good character stated the law in relation thereto, the charge on that subject which was given substantially stated all of the law in relation thereto necessary to be given.

5. The newly-discovered evidence, as shown by certain affidavits, presented no good reason for the grant of a new trial.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Simon Haywood was convicted of crime, and brings error. Affirmed.

Irvin Alexander and E. H. Callaway, for plaintiff in error. J. S. Reynolds, Sol. Gen., C. P. Pressly, and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 34)

GIBSON v. STATE

(Supreme Court of Georgia. Nov. 5, 1901.)

LARCENY—EVIDENCE—INSTRUCTIONS.

1. In a trial for larceny, evidence which tends to establish the identity of the property

alleged to have been stolen is not inadmissible because it embraces a more minute description than that set out in the indictment; such evidence not being inconsistent with the description laid. (a) The court did not err in the admission of evidence tending to show marks on the hog alleged to have been stolen additional to those set out in the bill of indictment.

2. As explained by the judge, there was no error in the admission of evidence by a witness for the state, giving his reasons why he had taken an interest in the prosecution of the accused.

3. There was no error in the part of the charge complained of, nor, in the absence of a request, in the failure of the judge to charge other legal propositions in connection therewith. The evidence was sufficient to support the verdict.

(Syllabus by the Court.)

Error from superior court, Stewart county; Z. A. Littlejohn, Judge.

Jerry Gibson was convicted of larceny, and brings error. Affirmed.

J. B. Hudson, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 55)

BROWN v. STATE

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—ERROR—REVIEW.

There was no error at the trial, and the verdict was fully warranted by the evidence. The case presents no new or unsettled question.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

Dean Brown was convicted of crime, and brings error. Affirmed.

Henry O. Cameron, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 30)

LORD v. STATE

(Supreme Court of Georgia. Nov. 5, 1901.)

SALE OF MORTGAGED PROPERTY.

The charge being that the accused, in violation of section 671 of the Penal Code, "did sell or otherwise dispose of" specified mortgaged property, and there being no evidence to show that he did either, the verdict of guilty was unwarranted, and ought to have been set aside.

(Syllabus by the Court.)

Error from city court of Wrightsville; V. B. Robinson, Judge.

F. O. Lord was convicted of crime, and brings error. Reversed.

A. L. Hatcher and J. L. Kent, for plaintiff in error. Wm. Faircloth, for the State.

PER CURIAM. Judgment reversed.

(114 Ga. 236)

HOBBY v. STATE.

(Supreme Court of Georgia. Nov. 16, 1901.)

CRIMINAL LAW—APPEAL—AFFIRMANCE.

This case being for decision by a full bench of six justices, who are evenly divided in opinion, the judgment of the court below stands affirmed by operation of law.

(Syllabus by the Court.)

Error from superior court, Burke county; H. M. Holden, Judge.

William Hobby was convicted of crime, and brings error. Affirmed.

E. H. Callaway, for plaintiff in error. J. S. Reynolds, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 36)

WINDOM v. STATE.

(Supreme Court of Georgia. Nov. 5, 1901.)

CRIMINAL LAW—INSTRUCTIONS—NEWLY-DISCOVERED EVIDENCE.

The request to charge which the court refused was substantially covered in the general charge. The newly-discovered evidence was merely cumulative, and it does not appear probable that, if it had been introduced upon the trial, a different verdict would have been rendered. The evidence, as a whole, fully warranted the verdict. Consequently, there was no abuse of discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

William Windom was convicted of crime, and brings error. Affirmed.

W. D. Hamrick and Oscar Reese, for plaintiff in error. T. A. Atkinson, Sol. Gen., and W. F. Brown, for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 55)

LEWIS v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

CRIMINAL LAW—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

1. There is nothing in the record to indicate that the court below misstated the contention of the solicitor general on the trial of the case.

2. The evidence was sufficient to warrant the verdict finding the accused guilty of voluntary manslaughter, and the court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Screven county; B. D. Evans, Judge.

Shep Lewis was convicted of crime, and brings error. Affirmed.

Oliver & Overstreet, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(114 Ga. 55)

VARNER et al. v. STATE.

(Supreme Court of Georgia. Nov. 6, 1901.)

LARCENY—EVIDENCE.

The evidence created only a bare suspicion against the accused, and pointed no more strongly to their guilt than to that of several other persons who had equal knowledge of the whereabouts of the stolen money and equal opportunity to steal it. The court, therefore, erred in not granting a new trial on the grounds that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

A. Varner and others were convicted of crime, and bring error. Reversed.

J. A. Darsey and T. E. Patterson, for plaintiffs in error. O. H. P. Slaton and F. D. Dismuke, for the State.

PER CURIAM. Judgment reversed.

(114 Ga. 125)

SOUTHERN RY. CO. v. ADKINS.

(Supreme Court of Georgia. Nov. 7, 1901.)

RAILROADS—STOCK KILLED BY TRAIN.

The plaintiff's prima facie right to recover for the killing of his mule depended entirely upon the presumption of negligence raised by law against the company. This being so, and that presumption having been overcome by direct, positive, and uncontradicted testimony introduced in behalf of the defendant, the verdict against it was manifestly wrong, and the trial court erred in not setting the same aside.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Stephen Adkins against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Shumate & Maddox, Geo. A. H. Harris & Son, and R. L. Chamlee, for plaintiff in error. Fouché & Fouché, for defendant in error.

PER CURIAM. Judgment reversed.

(114 Ga. 154)

STAMEY v. HILL.

(Supreme Court of Georgia. Nov. 8, 1901.)

APPEAL FROM JUSTICE—MISTAKE IN DOCKETING.

A city court cannot lawfully try upon its merits a case which had been appealed from a justice's court to a superior court; and, when such a case is for any reason entered upon the docket of a city court, its only proper course is to strike the same therefrom. *Kirkman v. Gillespie*, 37 S. E. 714, 112 Ga. 507. As was ruled in that case, "When a trial court, in a case over which it has, as to subject-matter, no jurisdiction, renders therein any judgment except one of dismissal, this court will reverse the same, whether exception to it for want of jurisdiction in the court below be taken in the bill of exceptions or not."

(Syllabus by the Court.)

Error from city court of Clarkesville.
Action between D. A. Stamey and I. N. Hill. From the judgment, Stamey brings error. Reversed.

J. O. Edwards, for plaintiff in error. Ghas. L. Bass, for defendant in error.

PER CURIAM. Judgment reversed, with direction.

(114 Ga. 159)

WESTERN & A. R. CO. v. ROBINSON.
(Supreme Court of Georgia. Nov. 8, 1901.)

RAILROADS—KILLING STOCK ON TRACK.

Where, in the trial of a suit against a railroad company for the killing of live stock, the plaintiff shows the killing by one of the defendant's trains, the law raises a presumption of negligence against the company. Where, however, the positive and uncontradicted evidence of the defendant's employes shows that the injury could not be avoided by the exercise of all ordinary and reasonable care and diligence, the presumption is rebutted, and must give way to such evidence, and a verdict against the company is contrary to law. Railroad Co. v. Beason, 37 S. E. 863, 112 Ga. 553. (Syllabus by the Court.)

Error from superior court, Catoosa county; A. W. Fite, Judge.

Action by W. S. Robinson against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Payne & Payne, for defendant in error.

PER CURIAM. Judgment reversed.

(62 S. C. 73)

WAGNER et al. v. SANDERS et al.
(Supreme Court of South Carolina. Oct. 30, 1901.)

PARTNERSHIP—EVIDENCE—LACHES.

1. On evidence that plaintiff's decedent was at one time in partnership with certain of the defendants in connection with a certain plantation, and that thereafter such partnership was dissolved, and that the decedent, by the testimony of defendants, cultivated another plantation on the same theory as the first plantation, and that the arrangement was the same as that made as to the first plantation, together with numerous circumstances tending to show the existence of such a partnership, a finding that no partnership existed between the parties was not sustained.

2. Where plaintiff's decedent died in 1872, and letters of administration were issued to plaintiff in 1873, and the rights of third parties became involved as to certain real estate claimed by plaintiff to have been a portion of the assets of a firm in which the decedent was a partner, a suit in 1898, where no fraud was alleged, for an accounting, and to determine the interest of decedent in such realty, will be dismissed for laches in the supreme court, though not pleaded.

Appeal from common pleas circuit court of Charleston county; Gary, Judge.

Action by Julia E. S. Wagner and others against Joshua C. Sanders and others. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

J. K. P. Bryan, for appellants. Theodore G. Barker, for respondent Sanders.

GARY, A. J. This action was commenced in April, 1895, by the plaintiff Julia E. S. Wagner, administratrix of the estate of Dr. Levi P. Wagner, deceased, and in her own right as distributee and heir at law of said Levi P. Wagner, and her children, as such distributees and heirs at law, against Joshua C. Sanders, H. G. Leland, and J. B. Morrison, defendants.

The complaint, omitting the formal portions thereof, alleges: "(1) That on the 19th day of December, 1868, defendants Joshua C. Sanders and Levi P. Wagner, now deceased, as copartners in planting interest, purchased a certain plantation in Charleston county, described in the complaint, formerly known as 'Doe Hall,' and now styled 'Bay View,' together with tools, implements, and other personal property. (2) That the purchase money of said plantation was paid by the said Levi P. Wagner, and the deed therefor taken in the name of Joshua C. Sanders, for the purpose of such partnership (same being in equal shares and interest among said copartners), which deed was dated 19th December, 1868, and that such property and all other property and assets was continued in the name of Joshua C. Sanders, and as property of such copartnership, until the death of the said Levi P. Wagner, on October 24, 1872. (3) That the said partnership affairs have never been settled by the said Joshua C. Sanders, and the said Joshua C. Sanders has not accounted for the assets of the same at any time, and, although demanded thereto by the plaintiff Julia E. S. Wagner on the — day of February, 1895, has refused and neglected to account, in disregard of his duty and trust as such surviving copartner. (4) That by deed dated 30th December, 1890, said Joshua C. Sanders, defendant, conveyed said plantation, and also all the personal property thereon, being a part of the partnership assets, including mill for ginning, wagons, carts, engines, boilers, hoes, and other implements, to the defendant H. G. Leland, for the consideration of \$6,000. (5) That on the 2d day of January, 1891, defendant Horace G. Leland executed his bond to the said Joshua C. Sanders in the sum of \$4,800 in part payment of the purchase money of the said plantation and personal property, and secured the same by his mortgage of said property of the same date to the said J. C. Sanders, which is not paid, and is now past due and owing. (6) That on or about the 24th day of October, 1894, said H. G. Leland conveyed said plantation and personalty to the defendant J. B. Morrison subject to the said mortgage and

mortgage debt of \$1,800, and interest thereon, as therein stated. (7) Plaintiffs claim that the said bond and mortgage executed by the said defendant H. G. Leland to the defendant Joshua C. Sanders, and now past due, is a portion of the property of the plaintiffs, to which, and proceeds of which, these plaintiffs are solely entitled upon foreclosure thereof." The prayer of the complaint is as follows: "(1) That the said Joshua C. Sanders be required to account for, all and singular, the assets of the [alleged] copartnership heretofore existing between himself and Levi P. Wagner, and that said copartnership be wound up and settled under direction of this court, and that their share of its assets be decreed plaintiffs herein. (2) That said mortgage be foreclosed and premises sold, and proceeds, to amount due on the bond aforesaid, be decreed to belong to, and to be paid wholly to, the plaintiffs herein according to their respective interests. (3) For an injunction, pending this suit, enjoining the defendant Horace G. Leland or J. B. Morrison from paying over any amount due on such bond to said defendant Joshua C. Sanders or any other person. (4) For such other and further relief as this court may deem just and proper, and to which plaintiffs may be equitably entitled." Immediately upon the filing of the complaint, the plaintiffs, on an ex parte application, obtained a temporary order of injunction.

The defendants H. G. Leland and J. B. Morrison answered the complaint, denying the allegations thereof as to a partnership between Joshua C. Sanders and Dr. L. P. Wagner, and setting up as a defense that they were purchasers for valuable consideration, without notice. The defendant Joshua C. Sanders also answered the complaint, denying all its allegations, except certain immaterial portions, which it is not necessary to mention, and setting up the following defense: "That after the death of the said Levi P. Wagner the said plaintiff Julia E. S. Wagner, his widow, recognizing the absolute and exclusive right and title of this defendant to and in the plantation mentioned and described in paragraph first in said complaint, formerly known as 'Doe Hall,' and now styled 'Bay View,' and to and in the personal property on said plantation, including saw mill, corn mill, steam engine, and other machinery, also horses, mules, cattle, farming utensils, and other implements, on the 24th day of December, in the year 1872, made and entered into an agreement in writing, under her hand and seal, and under the hand and seal of this defendant, for the purchase of said plantation and personal property, whereby this defendant Joshua C. Sanders, for and in consideration of the sum of \$6,000 to be paid to him by said Julia E. Wagner, and of the assignment to be made to him by her, as administratrix, of a certain judgment in favor of said Levi P. Wagner,

and against Isaac F. Hunt, Jacob Hunt, and others, obtained in March, 1871, in the court of common pleas for the county of Charleston, S. C., agreed to sell and convey unto the said Julia E. Wagner said plantation and property, and by said agreement the plaintiff Julia E. Wagner agreed to purchase said plantation and personal property, and to pay therefor the consideration above mentioned. That the plaintiff Julia E. Wagner failed to fulfill the terms of her said agreement of purchase, and this defendant, upon her default in paying the first installment of said purchase money, instituted suit against her in the supreme court of New York to enforce performance thereof, and obtained judgment against her in the supreme court of New York on the 26th day of September, 1877, for the sum of \$2,398.95, which debt has never been paid. That said plaintiff had also failed to assign the judgment recovered by Levi P. Wagner against Hunt Bros., according to the terms of her said agreement, and, on the contrary, attempted to assign the same to one Harris H. Beecher, who, as assignee therefor, attempted to revive and enforce the same for the benefit of himself, and in collusion with the said Julia E. Wagner, whereupon the defendant instituted suit against the said Julia E. Wagner and the said Harris H. Beecher in the supreme court of New York on the 24th day of December, A. D. 1881, to enjoin the defendants from collecting said judgment and from assigning the same, and from farther prosecuting any action thereon, and to require said defendant to assign said judgment to this defendant. Thereupon the action so instituted by said Beecher was discontinued. That thereafter, to wit, on or about the 8th day of October, A. D. 1883, defendant, at the solicitation of plaintiff Julia E. Wagner and her friends, and in consideration of the assignment by her of said judgment, and of the execution by her of a full and general release of claim and demands whatsoever against the defendant, satisfied upon the record the judgment in the supreme court of New York for \$2,398, which the defendant had obtained against Julia E. Wagner, and thereupon the said Julia E. Wagner, under her hand and seal, executed and delivered to this defendant her general release, whereby she did, for self and her heirs, executors, and administrators, remise, release, and forever discharge the said Joshua C. Sanders, his heirs, executors and administrators, of and from all manner of action and actions, cause and causes of action, suit, debts, dues, sums of money, accounts, reckonings, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claim and demands, whatsoever, in law or in equity, which against him, the said Joshua C. Sanders, she had, now have, or which she, or her heirs, executors, or administrators, hereafter can, shall, or may have, upon or by reason of any mat-

ter, cause, or thing whatsoever, from the beginning of the world to the date of said release, and particularly from any and all claims arising and growing out of a certain contract made between said Joshua C. Sanders and herself, dated December 24, 1872, relative to the purchase of the right, title, and interest of the said Joshua C. Sanders in and to a certain plantation known as 'Bay View,' in the state of South Carolina; and said Julia E. Wagner did therein farther declare that she did thereby release and discharge all claims she may have acquired in and to said plantation, stock, etc., under and by virtue of said contract." He also pleaded the statute of limitations.

It may be well to mention here that upon the former appeal in this case (49 S. C. 192, 27 S. E. 68) the supreme court held that the complaint "contains but one cause of action, —the delict or wrong of the surviving partner in refusing to account to the representatives of a deceased partner for the partnership assets. * * * The ultimate rights of all the parties depend upon the partnership accounting which is sought herein."

The findings by the circuit judge are as follows: "From the testimony as reported by the master I find that the allegations of copartnership in the planting of Doe Hall or Bay View plantation between defendant Joshua C. Sanders and deceased, Dr. Levi P. Wagner, in the lifetime of the latter, is not sustained by a preponderance of evidence. I find that the relation of partnership did not exist either in the purchase of the Doe Hall or Bay View plantation, and personal property thereon, or in the planting business which was then carried on by Dr. Wagner, and that no trust was created as to said plantation or property, constituting Joshua C. Sanders as trustee thereof for the estate of Dr. Levi P. Wagner, or for his heirs or distributees at law, the plaintiffs in the action. I am satisfied from the evidence that Doe Hall or Bay View plantation, and personal property thereon, was not purchased with money of Dr. Levi P. Wagner, or paid for by him with his own money; that the plantation and personal property was not purchased by the defendant Joshua C. Sanders with the money of Dr. Levi P. Wagner, or for the benefit of a copartnership between Joshua C. Sanders and Dr. Levi P. Wagner; that Joshua C. Sanders was not the surviving copartner of the said alleged copartnership; and so I find as a matter of fact. In my judgment, the preponderance of the proof shows that Joshua C. Sanders purchased Doe Hall plantation, and personal property thereon, with his own money, and that the title thereto was taken in his name, and held by him for his own use, and that the arrangement between Joshua C. Sanders for the planting and other business conducted upon the Doe Hall or Bay View plantation by Dr. Levi P. Wagner was that of a debtor and creditor, by which San-

ders made advances or loans of money to Dr. Wagner for the expenses of the business, upon the understanding that these sums advanced were to be repaid to him by Dr. Wagner, and after the expenses of the planting were deducted from the proceeds of the sale of the crops, sawmill, etc., the remains and proceeds of the business were to be equally divided; Sanders receiving one-half of the net proceeds as compensation for his making said advances. It follows, as a matter of law, that plaintiffs are not entitled to an undivided moiety or to any share of or interest in the Doe Hall or Bay View plantation, as claimed in the complaint, nor entitled in law to have an accounting from Joshua C. Sanders as surviving copartner, or as trustee of said plantation, or of the personal property thereon." The decretal part of his order is as follows: "It is therefore ordered, adjudged and decreed that the injunction heretofore ordered, which enjoined defendants Horace G. Leland and J. B. Morrison from paying to Joshua C. Sanders or to any other person the amount remaining due on or after the 22d of January, 1895, upon the bond and mortgage, be, and the same is hereby, dissolved, and that defendant Joshua C. Sanders have judgment for the amount of the said debt as may be ascertained by the master; that to this end it may be referred to Master G. H. Sassa, to ascertain and report the amount due upon the bond of Horace G. Leland to Joshua C. Sanders, and that said Joshua C. Sanders have execution for the same against defendants Horace G. Leland and J. B. Morrison, and for his costs in this action against the plaintiffs; said costs to be taxed by the clerk of this court."

The plaintiffs appealed upon several exceptions, but it will not be necessary to consider them separately, as the appellants' attorney contends that the only issue raised by the exceptions is whether a partnership existed between Dr. Levi P. Wagner and the defendant Joshua C. Sanders, as alleged in the complaint. We proceed to consider whether there was error on the part of the circuit judge in his finding that such partnership did not exist. The appellants' attorney, in his argument, submits that the copartnership is shown by the following evidence: "(1) By the oral testimony of plaintiff Mrs. J. E. S. Wagner as to declarations and admissions to her by the defendant Joshua C. Sanders. (2) By the articles of copartnership between one Inwood, Sanders, and Wagner January, 1866, and assignment of interest and dissolution of such copartnership 30th April, 1866, and memorandum of new copartnership between Sanders and Wagner 30th April, 1866, which is the basis of the copartnership now sued on." All of these articles are signed by the defendant Joshua C. Sanders. "(3) That this copartnership begun as to Tibwin plantation, was continued as to Doe Hall plantation by the admissions of Joshua C. San-

ders, by testimony of Mrs. Julia E. Wagner, plaintiff, and confirmed by the letters of defendant Joshua C. Sanders, before the purchase of Doe Hall plantation. (4) This copartnership was confirmed and recognized also by the letters of Joshua C. Sanders; also, after the purchase of Doe Hall, in 1868. (5) This copartnership is confirmed by the evidence of the payment of part of the purchase money by Levi P. Wagner. (6) This copartnership is confirmed by the evidence of Joshua C. Sanders dealing with the title to Doe Hall previous to the death of Levi P. Wagner. (7) Confirmed again by the attempted settlement in 1872, after the death of Levi P. Wagner, by Joshua C. Sanders with plaintiff Julia E. S. Wagner, widow of Levi P. Wagner. (8) This copartnership is again confirmed by the evidence of release and settlement by Mrs. Julia E. Wagner and Joshua C. Sanders, in 1888."

On the 26th of January, 1868, an agreement was entered into between Benjamin P. Colburn, L. P. Wagner, and Henry C. Inwood, the preamble of which was as follows: "Whereas, Henry C. Inwood and Levi P. Wagner have this day leased from Benjamin P. Colburn his sea island cotton plantation, in St. James Santee parish, containing 1,500 acres, more or less, for the sum of \$1,500 per annum, payable at such times and on such conditions as in the instrument of lease this day executed between the parties will more fully appear; and whereas, it is agreed between said parties that the said lessees shall have the right to become the purchasers of the said property at any time before the first of June next, inclusive, of their intention to do which they are to give the lessor due notice." On the 30th of January, 1868, the following agreement was signed by the parties therein named: "Articles of agreement made and entered into this 30th day of January, in the year 1868, between Joshua C. Sanders, of the city, county, and state of New York, Levi P. Wagner, of the same state, and Henry C. Inwood, of the city of Charleston, in the state of South Carolina, as follows: The said parties above named have agreed, and by these presents do agree, to become copartners in the renting or purchasing and cultivating of the plantation known as the 'Colburn Plantation,' situated on or near Bull's Bay, in the state of South Carolina, belonging to a Colburn, of said state, and the agreement entered into between said Colburn and Henry Inwood, whereby said Colburn has agreed to rent said plantation to said Inwood for the term of three years, with the privilege to said Inwood of purchasing the same within one year as per the terms and conditions in said agreement set forth, was made for the mutual and equal benefit of the said parties hereto, and by these presents said agreement is made a part of the property of said copartnership. It is further agreed between the parties that the business of the

firm or copartnership shall be conducted in the name of said Levi P. Wagner, and shall continue from the date hereof for and during the term mentioned in said lease, or until dissolved by mutual consent. It is further mutually agreed between the parties hereto that they will at once enter upon the cultivation of said plantation, in the raising of cotton, corn, or other products, and continue the same during the continuance of this copartnership; and each party hereby agrees to contribute and pay one-third of the rental of said plantation, according to the terms in said lease specified, and one-third of all the expenses required and necessary in the cultivation of said plantation as the same may be required from time to time. The said Levi P. Wagner hereby agrees to and with each of the other parties hereto that he will at times during the continuance of this copartnership devote from the date hereof his whole time, services, and attention in conducting to the best of his skill and ability the cultivation of said plantations, and all affairs pertaining to the same; that he will keep at all times just and true book or books of account, setting forth all moneys received and paid out by him in or about the business, and pertaining to the same, which book or books of account shall at all times be open to inspection of either of the other parties without hindrance; and for such services so rendered the said Levi P. Wagner shall be entitled to receive from and to be paid by said firm, for each and every month of such service rendered, dating from the 10th day of January, 1868, the sum of \$100, and such salary shall be a part of the costs and expenses of conducting said business. It is further agreed between the parties that the product of said plantation, as well as all implements, horses, or mules procured for the same, shall be the property of said copartnership, and all the receipts arising from the sale of the whole or any portion thereof shall be equally divided between the parties, share and share alike, all expenses being first paid; and such provision shall be made as often as there are any moneys thus received to be divided, and may be desired by any of the parties hereto. It is further agreed by and between the parties to these presents that, should they agree to purchase said plantation according to the terms and conditions of the agreement with Colburn, then each shall and will pay and contribute towards such purchase one-third of the money required to effect the same, and thereupon each party shall have an equal interest therein, and be the owner of one-third thereof. It is further agreed by and between the parties to these presents that neither party shall enter into any bond, note, or other obligation for and on account of said copartnership without the consent of the other parties first had and obtained, except said Wagner shall have the right to contract for all labor which he

may deem necessary to conduct such cultivation both economically and profitably without such consent."

Thereafter and at the time mentioned the following agreement was entered into: "Whereas, an indenture of lease was made and entered into on the first day of February, 1866, between Benjamin P. Colburn, of the city of Charleston and the state of South Carolina, and Henry P. Inwood and Levi P. Wagner, lessees, wherein was leased unto said Inwood and Wagner the plantation belonging to said Colburn, situated in the parish of St. James Santee, in said state of South Carolina, containing about 1,500 acres, for the term of one year, at the yearly rental of \$1,500, with the privilege to said lessees of two additional years at the same rent; and whereas, it was agreed by and between said Henry C. Inwood and Levi P. Wagner and Joshua C. Sanders to undertake the cultivation of said plantation, whereby it was agreed that each should bear mutual and equal expenses of conducting the same, and each to share equal profit or loss; and whereas, said Henry C. Inwood and Levi P. Wagner under existing circumstances find themselves unable to fulfill their part of the said agreement with the said Sanders in furnishing their respective portions of money requisite to carry on said plantation, and such moneys are furnished by said Sanders, and are being so furnished: Now, therefore, in consideration of the premises, and of one dollar to each paid by the said Joshua C. Sanders, we, the said Henry C. Inwood and Levi P. Wagner, do hereby, each for himself, set over and assign unto said Joshua C. Sanders the said indenture of lease from said Benjamin P. Colburn, and all our rights, title, and interest therein, together with an agreement made with the said Colburn, providing for the sale of said plantation to said Inwood and Wagner, a copy of which said agreement is hereto annexed. And we, the said Henry C. Inwood and Levi P. Wagner, do hereby renounce to the said Sanders our contract or agreement of copartnership made the 30th day of January, 1866, and do hereby consent that said copartnership be dissolved. Witness our hands and seals this 30th day of April, 1866. Levi P. Wagner. [L. S.] Henry C. Inwood. [L. S.]"

On the same day the following instrument of writing was executed by Joshua C. Sanders: "Whereas, Levi P. Wagner has this day assigned to me the lease and agreement to sell the plantation known as 'Tibwin Plantation,' made by Benjamin P. Colburn, together with a consent for the dissolution of the copartnership between us and Henry C. Inwood: Therefore, be it known that I accept said assignment and consent, with the express understanding that, if the same is also signed and executed by said Henry Inwood, that then the interest of said Wagner in said lease and agreement and plantation shall be equal between us, forming a new copartnership be-

tween said Wagner and myself, each bearing half expense and receiving or suffering equal profits or loss. Joshua C. Sanders." Dated 30th April, 1866.

In the letter of Joshua C. Sanders to Dr. L. P. Wagner, dated 7th August, 1866, he says: "I have not heard from Colburn's order yet. I am inclined to think the deed better be made to me only, as the arrangement between you and Inwood is so general in its nature that I am inclined to think he could claim an equal interest with you in the whole concern as partner,—both crop and plantation. So to be safe, you better consider it as belonging solely to me, unless you can secure a release from him of any interest or claim. I have, you know, both release and assignment of contract; and, if deeded to me, I will execute such papers as will secure to you your half, which you can hold. I hope your expectations may be realized. From your account, the prospects certainly look very encouraging. I would very much like to look upon your fields as they are in their present gorgeous costume. I suppose you can verily say to your eyes, 'Not Solomon in all his glory was arrayed like one of these.'" The postscript to the letter of Joshua C. Sanders to Dr. Wagner, dated 28th July, 1866, is as follows: "P. S. I have received no U. S. bonds for you, but I am bound to carry you through, whether you are able to furnish any more means yourself or not, and your half shall be secured to you. You need not fear that. Inwood I consider out of the question in the plantation." In the letter written by Joshua C. Sanders to Dr. Wagner on the 20th of January, 1868, he says: "In the meantime we will abandon Tibwin, trying to get off by first of February if I can. If they will persist in trying to crowd us off. They threaten to do so, and I think they will. So much the better. Let them do so. We shall stand better on the trial. If they have sought forcible remedy, the court would be most likely to say, 'Let them be satisfied with that;' so we conclude not to resist Hussey, but let him go on, and we suffer him to displace us, not resisting in any way whatever. Then we will quietly withdraw, leaving it to him and his disinfect-ed negroes, as you call them, to occupy. Then what shall we do, and where go? That is the question. If you are still disposed to continue, I acquiesce, and will try once more. My idea is we better, if we can, come down on one of the islands, and leave that district all together. I have been making inquiries, but have not settled upon anything yet. If you can't do anything better, had you not better move Julia and the children down to Mt. Pleasant, and try a rice plantation? There seems enough rice plantations to be had. What I would like is, whether rice or cotton. that we rent, with privilege of buying at a given price. Did you see anything that would suit? If we could find one who could move everything right to, it would be the sort. Per-

naps we better take Alston's on such terms this year. We will determine on my return." In the letter of Sanders to Dr. Wagner on the 6th of February, 1868, he says: "The Alston plantation was struck down to-day at \$2,265,—the amount of the bond and mortgage I executed and left with Gen. Simons to be delivered on ascertaining that title is right. Lockwood is to make out abstract and deliver Gen. Simons, and he is to review it, and, if correct, then the bond and mortgage is to be delivered. Then you will have to pay costs payable to attorney opposed to Alston; balance to Alston; all not to exceed \$3,000. While I think we could have done better, yet it is cheap and we can make it pay, Providence permitting." There are numerous other letters containing expressions indicating that a partnership existed both as to Tibwin and Doe Hall plantations between Sanders and Dr. Wagner. Sanders testifies that Dr. Wagner undertook the planting of Doe Hall on the same theory as Tibwin. Again, he says: "We were not partners, according to my sense of the law of the state of New York and the ruling of its highest court, but simply joint ventures, as it were. *The arrangement was the same as that we made at the Tibwin plantation*, as he asked me to come to his help. I did so with the agreement that I should first be reimbursed whatever I advanced, and, if there were a profit over and above all advances, that should be divided between us." (Italics ours.) At another time he testifies as follows: "Q. You have said here to-day that you did not consult Dr. Wagner as to the purchase of that plantation, and as to the personal property on account of that plantation. Is that true? A. Not on account of that plantation. We talked of it. We talked of my purchasing the plantation, and he to go on with it on the same terms he had been working Tibwin; and, I should say, Tibwin and Doe Hall, and he spoke of the Alston place as being desirable. I discouraged him somewhat, and thought better to go elsewhere. At the time of the sale, at the auction, he was not there present, and I, at my own motion, made the purchase." This testimony, aided by numerous other facts and circumstances, among which may be mentioned that Joshua C. Sanders did not at any time contend that the rental value of Doe Hall was to be taken into consideration in the division of the profits, satisfies us that there was a copartnership between Dr. Wagner and Joshua C. Sanders, and that Doe Hall plantation was part of the partnership property.

This finding, however, does not show that the appellants are entitled to relief. In his decree the circuit judge says that the defendant Sanders also pleaded the statute of limitations and laches. It may be argued that the decree of the circuit court cannot be supported on these grounds, as the respondents' attorneys did not give notice that

they would ask that the decree be affirmed on these additional grounds. Conceding this to be correct as to the statute of limitations, and conceding further that the statute of limitations is inapplicable as a bar to an action seeking equitable relief, the plaintiff may nevertheless be estopped by laches. It is true that laches is not formally set up as a defense, but this is not necessary. In 12 Enc. Pl. & Prac. p. 829, it is said: "According to what is considered the better practice, the defense of laches is one of which it is not necessary to take advantage of by the pleadings. If the case as it appears at the hearing is liable to such an objection, the court may, and usually will, remain passive and refuse relief or decline to entertain the suit." In a note on page 830, under the head of "Court's Own Motion," we find the following: "While the defense of laches need not be specially pleaded by the defendant, still, when not pleaded, unless it clearly and satisfactorily appears in the court from the evidence that there has been an unreasonable delay in prosecuting the suit, the court, on its own motion, should not rest its decision on that ground. *Hagerman v. Bates* (Colo. Sup., 1897) 49 Pac. 139,"—thus recognizing the power of the court, in a proper case, to raise such objection. In accordance with this doctrine the supreme court, of its own motion, in the case of *Blackwell v. Ryan*, 21 S. C. 112, raised the question of laches, and affirmed the judgment of the circuit court dismissing the complaint. The principles as to laches are well stated by his honor Acting Associate Justice Benet in *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277, as follows: "It is confessedly impossible to adopt a general rule, and fix a definite length of delay which shall justify a court of equity in refusing relief on the ground of laches. Each case must be governed by its own facts, and courts of equity must be trusted to exercise a salutary discretion. As we understand the doctrine of estoppel by laches, the facts in this case would justify us in holding that even a shorter delay than nine years and six months, inexcusable or unexplained, would have furnished the circuit court with sufficient grounds for refusing the order moved for. Delay is not the sole factor that constitutes laches. If it were so, some period fixed by statute or by the common law of the courts would afford a safe and unvarying rule. Laches connotes not only undue lapse,—lapse of time,—but also negligence, and opportunity to have acted sooner; and all three factors must be satisfactorily shown before the bar in equity is complete. Other factors of lesser importance sometimes demand consideration, such as the nature of the property involved, of the subject-matter of the suit, or the like. As a definition of 'laches,' however, it is sufficiently correct to say that it is the neglecting or

the omitting to do what in law should have been done, and this for an unreasonable and unexplained length of time, and in circumstances which afforded opportunity for diligence. This definition will be found adequate as a test to be applied to the vast majority of cases. The doctrine embraced in it is in accordance with the principles and the practice of courts of equity, which have from the beginning held themselves ready to aid suitors who come in good conscience, good faith, and with diligence; and from the beginning they have discountenanced stale demands, and refused relief from the effect of negligence and inexcusable delay. We have seen, from the very nature of equity jurisdiction, and the principles that guide and control its exercise, that it is impracticable, if not impossible, to fix a definite period of time as a bar or limitation to suits in equity; that lapse of time is not the only test of staleness; that it needs to be conjoined with negligence or inattention, and with opportunity for diligence and for acting sooner. For it is the essence of laches that the party charged with it should have had either actual knowledge, or such notice as would have put him on inquiry. It is manifest, therefore, that the period of time which shall be a bar in equity must needs vary with the varying circumstances in the different cases." In the case under consideration the testimony shows that Dr. Wagner died in 1872. Letters of administration on his estate were issued to the plaintiff Julia E. S. Wagner by the court of New York in 1873. Thereafter there were transactions relative to this property between Julia E. S. Wagner and Joshua C. Sanders, which are described in the answer of J. C. Sanders. The rights of third parties have become involved in the manner hereinbefore mentioned. In 1898, when Julia E. S. Wagner was examined as a witness, she testified that the ages of her children were as follows: Wm. S. Wagner, about 39 years; Max Wagner, about 37 years; and Clement Wagner, about 29 years. Letters of administration were not granted in this state until 1895, and no attempt was made until then to call Joshua C. Sanders to an accounting and settlement of the partnership affairs. While the facts show that the dealings between Dr. Wagner and J. C. Sanders constituted, in law, a partnership, Sanders testified that he did not so regard it; nor did any of the plaintiffs seem to have taken this view of the transaction until recent years. No fraud is alleged in the complaint. We fail to discover any good reasons why the plaintiff, by the exercise of due diligence, might not have instituted proceedings for the equitable relief many years ago. Under these circumstances, this court feels bound, by reason of laches on the part of the plaintiff, to dismiss the appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(129 N. C. 223)

In re WORTH'S WILL.

(Supreme Court of North Carolina. Nov. 12, 1901.)

WILLS — WITNESS — LEGATEE — TRANSACTION WITH DECEASED PERSON — UNDUE INFLUENCE — MATTERS CONSIDERED — INSTRUCTIONS.

1. Under Code, § 590, disqualifying parties and those interested in the result of the suit from testifying against the representative of a deceased person concerning any personal communication or transaction between the witness and deceased, on an issue as to whether a certain script was a will, a legatee therein, who was also named as legatee in a former will of deceased, is competent to testify, in the absence of proof that the legacy in such former will was larger than that given in the script in issue, as witnesses are disqualified only when they testify in their own behalf.

2. In an action to try the validity of a paper as a decedent's last will, the court charged that the jury had nothing to do with the fairness or unfairness of the disposition of decedent's property, and then, immediately after saying that the jury should take the facts from the evidence, and apply the law as given by the court to them, went on to discuss fully the question of undue influence, and its bearing on the case, but nowhere in connection with such charge, nor until the close of the instructions, told the jury that the unequal distribution of the property among his children might be considered, in connection with the other facts and circumstances, to show undue influence. *Held* erroneous, as such inequalities appearing on the face of the will should be considered.

Appeal from superior court, Randolph county; Bryan, Judge.

Proceedings by R. W. Bingham and others against Hal M. Worth and others to try an issue of *devisavit vel non*. From a judgment in favor of the propounders and an order denying a new trial, the caveators appeal. Reversed.

Bynum & Bynum, D. L. Russell, and Watson, Buxton & Watson, for appellants. J. T. Morehead and Long & Nicholson, for appellees.

MONTGOMERY, J. The first exception of the appellants is addressed to the ruling of his honor excluding the testimony of Mrs. Crocker, one of their witnesses. She was the daughter-in-law of the testator, and had received a legacy of \$2,000 under the script which was then before the court on the issue *devisavit vel non*. It appeared in evidence that the testator had made another will in 1894, in which a legacy had been given to the witness; but the amount of the legacy was not stated, and there was no evidence as to the destruction or revocation of that will by the testator. The appellants insist that the witness ought not to have been excluded under section 590 of the Code, because she was not testifying in her own behalf, but against her interest, and therefore a competent witness. Under section 843 of the Code of Civil Procedure, no party to the action or proceeding, or any persons who

had an interest which might be affected by the event of the action or proceeding, or who ever had an interest, were allowed to be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir at law, * * * when such examination or any judgment or determination in such action could in any manner affect the interest of such witness, or the interest previously owned or represented by him. There was a proviso, however, which allowed the witness to be examined if the personal representative, heir at law, etc., testified in his own behalf in regard to such transaction and communication. It seems clear to us that under that section a party or a person interested in the event of the suit (except under the proviso) was prohibited from testifying either for or against himself concerning a transaction with a deceased person, idiot, or lunatic. The appellants insist, however, that a most important change was wrought in section 343, Code Civ. Proc., by an amendment thereto, and now appearing in section 590 of the Code, by which such a witness is excluded only when he is offered in such actions or proceedings in his own behalf. The appellees contend that the witness in this case was properly excluded—First, because the witness is a legatee under the script of 1899 and also under a former will, and, as no proof had been adduced that the legacy in the former will was smaller than in the will of 1899, that she ought to be excluded on the ground of being interested in the event of the action and to her advantage; and, second, that, even if it should be conceded that she might have been allowed to testify against her interest, if it had appeared that her legacy was smaller in the will of 1894 than in the will of 1899, yet under no circumstances could she be allowed to testify against the other defendants (propounders), and that she would be in effect doing so if allowed to testify against her own interest in a case like this. The appellees rely in support of their position mainly upon the case of *Weinstein v. Patrick*, 75 N. C. 344. That case was a peculiar one. A fraudulent grantee in a deed for land, who was also a creditor of the grantor who had died, had made a voluntary deed for the land to the wife of the deceased grantor, with covenant of warranty; and in an action brought by creditors against the witness and his grantee to compel the administrator of the deceased debtor and original grantor to sell the land for the payment of his debts he was offered by the plaintiffs to prove the fraud in the transaction. This court said there that, while it might be permissible for the plaintiffs to examine the witness to testify against his own interest (connected with

the covenant of warranty in his deed to the other defendant), yet in doing that he had testified against the other defendants, which could not be allowed. It seems to us that the court in that case, when it declared that the witness might be allowed to testify against his own interest, did not follow the strict letter of section 343 of the Code of Civil Procedure, because that section excluded the testimony of all such witnesses where such testimony could in any manner (which means, we think, advantageously or injuriously) affect the interest of the witness. But the main reason given in that case for the exclusion of the witness was because that, although a defendant in form, he was a plaintiff in substance; that his interest was identical with the plaintiffs,—both being creditors of the deceased,—and, if the sale of the land to the witness should be declared void as to creditors, the witness would get his debt; and the court, citing the case of *Redman v. Redman*, 70 N. C. 257, treated the defendant as a plaintiff. The court there stated that the witness in his deed to the land to the other codefendant warranted the title, and that to that extent he was interested to support the transaction between himself and the deceased, but on which side his interest predominated the court did not know. They said in conclusion: "But under all the circumstances we do not think that he was competent to speak of the transactions between him and the deceased." It will be observed that the court in that case did not give as a reason for the exclusion of the witness the fact that they could not tell on which side the interest of the witness predominated, but they put it upon the particular circumstances of that case. We think that the rules laid down in that case do not apply to the case before us. A very satisfactory analysis of the meaning of section 590 of the Code is found in the case of *Bunn v. Todd*, opinion by Judge Clark, 107 N. C. 266, 11 S. E. 1048. There the disqualifications are shown to extend only to parties to the action, persons interested in the event of the action, persons through or under whom the persons in the first two classes who derive their title or interest when they are offered to testify in behalf of themselves, or the person succeeding to their title or interest against the representative of a deceased person, or a committee of a lunatic, or any one deriving his title or interest through them, and where the subject-matter about which they offered to testify is a personal transaction or communication between the witness and the person since deceased or lunatic. And there is an exception made in the rule of disqualification in cases where the representative of the deceased or of a lunatic introduces evidence concerning the transaction. Applying that analysis to the facts of this case, it seems clear to us that the witness (Mrs. Crocker) should have been

permitted to testify if the legacy in the former will did not disqualify her. We think, for it to have had that effect, it was necessary that evidence should have been adduced going to show that the legacy in the former will was larger than that given to the witness in the script of 1899, and that was not done. As we have seen, under section 343, Code Civ. Proc., she would have been disqualified whether her testimony was to be in her own behalf or against her; and that rule, as we have seen, if varied in the case of *Weinstein v. Patrick*, supra, was only under the special circumstances of that particular case, and even then contrary to the literal expressions of section 343, Code Civ. Proc. But under section 590 of the Code there is nothing to prevent a witness in any civil action or proceeding to testify against his own interest, even if in doing so the interest of other parties to the suit are injuriously affected. The disqualification is when they testify in their own behalf. But the appellees contend that the exceptions made by the appellants to the ruling of his honor rejecting the evidence of Mrs. Crocker were insufficiently stated. In answer to that we will say that, although the evidence which the appellants sought to bring out by the questions to the witness was not specially set out in the assignments of error, yet we think that the question itself, asked by counsel of caveators to a witness interested under the will of 1899, suggests with sufficient certainty the meaning and materiality of the evidence offered and rejected. *Watts v. Warren*, 108 N. C. 514, 13 S. E. 232.

The witness R. W. Bingham does not stand on the same footing with Mrs. Crocker. The testimony offered from him was directly in his own behalf; all the evidence going to show that, if the will had been executed by the testator through the undue influence of one of the main beneficiaries, he would have taken, as representative of his deceased mother, or as legatee under a former will, a respectable estate, whereas he got nothing under the will of 1899.

The fifteenth exception, we think, should be sustained. In his charge to the jury his honor said: "The jury have nothing to do with the fairness or unfairness or the equity or inequity of the testamentary disposition of Dr. Worth's property. The only question for them to try is this: Is the paper writing, and every part thereof, the last will and testament of J. M. Worth? and your answer to the question must be 'Yes' or 'No.'" Then his honor, after immediately saying: "The jury are to take the law in this case from the court. You must determine the facts from the evidence, and apply the law as given by the court to them as you find them to be,"

—went on to discuss fully the question of undue influence, and its bearings on the case; but he nowhere, in connection with the part of his charge above quoted, told the jury that the unequal distribution of the testator's property among his children and grandchildren, and other evidences of inequality on the face of the will, should be considered by them, in connection with other circumstances, as tending to show undue influence. This he should have done. It is true that his honor did, in the middle of a very long series of special instructions asked by the propounders (and which were all given except the last, which was to the effect that there was no sufficient testimony of the script having been executed under undue influence), read the following prayer to the jury: "(6) There is no legal presumption of undue influence on account of relationship of Dr. Worth to his daughter and her family; nor is there any legal presumption of undue influence from the fact, if you so find it, that Dr. Worth was surrounded by and lived with her and others of her family, who received large benefits under the will, whilst other of his kin lived at a distance; nor is there any legal presumption of undue influence that will arise by reason of the fact (if you so find it) that better provisions are made in the will for some of the testator's next of kin than those which he made for others. These facts and circumstances, if proved to the satisfaction of the jury, raise no presumption of law, but the jury may consider them only along with other facts and circumstances in the case, to enable them to pass upon the question of undue influence alleged by the caveators." If that prayer, which was given, and, of course, constituted a part of the charge, had been used in connection with that part which we have quoted, and as explanatory of it, no fault could have been found. But the feature of the charge which we think objectionable, having been given to the jury near the close of the charge, and without explanation, was calculated to confuse the jury, with the probabilities that they took as the law governing the case, from his honor, the part which we have called objectionable, and that they did not take into consideration the inequalities on the face of the will as evidence, together with other facts and circumstances tending to show undue influence exerted on the testator by one of the beneficiaries.

We will not discuss the many other exceptions of the appellants, because they are of such a nature that, if disposed of in this appeal, they would probably have to be considered again in other forms, or might not be raised at all.

New trial.

(129 N. C. 247)

PEOPLE'S NAT. BANK v. HODGIN.

(Supreme Court of North Carolina. Nov. 19, 1901.)

PARTNERSHIP—DISSOLUTION—INSOLVENCY
—DISTRIBUTION OF ASSETS.

Act March 13, 1901, c. 640, requiring the pro rata distribution of the assets of an insolvent firm dissolved by the death of one of the firm, and providing that when one of the partners dies the surviving partner shall within 60 days from the time of his death prepare an inventory of the firm assets, and further providing that it shall not apply to pending actions, applies only where such dissolution occurs after the ratification of the act, and does not justify the appointment of a receiver to enforce a pro rata distribution of the assets of an insolvent firm dissolved by death prior to its passage, at suit of a party who was a defendant in an action then pending between him and the surviving partner.

Appeal from superior court, Cabarrus county; Starbuck, Judge.

Suit by the People's National Bank against G. D. Hodgin, surviving partner of Hodgin Bros. & Lunn. Decree for defendant, and plaintiff appeals. Affirmed.

Glenn, Manly & Hendren, for appellant. Holton & Alexander and Shepherd & Shepherd, for appellee.

FURCHES, C. J. The defendant and L. L. Lunn composed a partnership doing business under the name and style of Hodgin Bros. & Lunn. In 1896 Lunn died, leaving the defendant the only surviving partner of the concern. Lunn at the time of his death was insolvent, the firm was insolvent, and the defendant Hodgin was insolvent. At Lunn's death he was owing the plaintiff an individual debt of \$600, due by note, with the defendant Hodgin as surety, and the firm was owing the plaintiff bank \$2,900. Hodgin, as surviving partner of the firm, deposited with the plaintiff bank \$3,037.77, money belonging to the firm. The plaintiff, thinking it had the right to do so, undertook to apply the \$3,037.77 so deposited to the two debts due the bank, mentioned above, and refused to pay the same, or any part of it, to the defendant; and the defendant, as surviving partner, brought suit against the plaintiff bank therefor. After a long litigation in the superior court of Forsyth and in this court, the defendant, Hodgin, finally recovered judgment against the plaintiff bank for the full amount of the deposit and interest thereon. On the first hearing in this court (Hodgin v. Bank, 124 N. C. 540, 32 S. E. 887, reheard and reported in 125 N. C. 503, 34 S. E. 709, 712), a new trial was awarded the plaintiff; and the case was tried again, and again came to this court by appeal, and is reported in 128 N. C. 110, 38 S. E. 294. This last appeal was from a judgment of Forsyth superior court, November term, 1900, and was affirmed by this court on the 9th of April, 1901, and a

final judgment entered in the superior court of Forsyth at — term, 1901.

On the 13th March, 1901, the legislature passed and ratified an act (chapter 640) providing for the pro rata distribution of the assets of insolvent copartnerships dissolved by the death of one of the partners. And on the 29th day of April this action was commenced by the plaintiff bank (the defendant in the former action) against Hodgin, as surviving partner (the plaintiff in the former action), in which the court is asked to enjoin Hodgin from issuing execution on his judgment, and for a receiver. There seems to be no ground alleged in the complaint in this action justifying the appointment of a receiver, unless it be the act of March 13, 1901. And this is the only ground insisted on in the argument in this court to sustain the plaintiff's contention. The plaintiff's right to have a receiver appointed is denied in the answer, which also denies the right of the plaintiff to enforce a pro rata distribution of the assets, in which the defendant specially pleads the former action, and the judgments therein of this court and of the superior court of Forsyth. It is admitted that the parties in this action are the same as those in the former action, and that the \$3,037.77 is the same fund or money as that involved in the former action. This being so, it seems too clear for argument that the plaintiff has no standing ground, unless it be the act of 1901, and we do not think this gives it any. If the defendant acquired no vested right in this fund by his judgment, as contended by him (Dunham v. Anders, 128 N. C. 207, 38 S. E. 832), still we do not think the act of 1901 applies to this case. It seems to apply only in cases where such dissolution takes place after its ratification. This is the general rule of interpretation, and will be followed by this court, unless there is something in the act itself that shows a different intention. Instead of this act showing any purpose in the legislature to give it a retroactive operation, it seems plainly to show it was not. It provides that "when one of the partners dies" the surviving partner shall "within 60 days from the time of his death prepare an inventory of the assets," etc. This could not be done in this case, and shows to our minds that it was only intended to operate in future dissolutions of the kind described. Besides, the tenth section provides that it shall not operate in cases where actions are then pending. The action of Hodgin v. Bank was then pending, and it seems to us that if by reversing the parties, thereby making the defendant in that action plaintiff in this, the plaintiff can evade the statute, this section would be to but little purpose. This cannot be done. The rights of the parties have been adjudged.

The statute of 1901 does not aid the plaintiff, and the judgment is affirmed.

(129 N. C. 250)

CLINARD v. WHITE et al.

(Supreme Court of North Carolina. Nov. 19, 1901.)

FOREIGN CORPORATIONS—ACTIONS—SERVICE—OFFICERS—APPEALABLE ORDERS.

1. Under Code, § 217, subsec. 1, providing that service may be had on a foreign corporation by delivering a copy of the summons to the president or other head of the corporation, secretary, cashier, treasurer, director, or managing or local agent, service can be had on a foreign corporation engaged in repairing an electric light and street car plant by service on one who had oversight of all the work, and had general charge of the employees of the company, and acted as its superintendent of construction.

2. No appeal lies from a refusal to dismiss a complaint.

Appeal from superior court, Forsyth county; Starbuck, Judge.

Action by A. S. Clinard, administrator of W. A. Clinard, deceased, against J. G. White & Co. From an order refusing to dismiss the complaint, defendants appeal. Appeal dismissed.

Watson, Buxton & Watson, for appellants. Jones & Patterson, for appellee.

COOK, J. The plaintiff in this action is a resident of Forsyth county, in this state, and the cause of action arose in said county. The defendant is a foreign corporation. At the time of the service of the summons defendant company was engaged in overhauling, extending, and putting in good condition the electric lights and street car plant of Winston-Salem, in said county. The summons was served upon one W. S. Turner, and defendant company entered a special appearance, and moved to dismiss the action upon the ground that he (Turner) was not such an agent as is contemplated by the statute regulating the service of summons upon nonresident corporations as would bring it into court. His honor overruled the motion, and defendant company appealed.

The affidavits show that Turner was not the president, secretary, cashier, treasurer, or a director of the company. They are somewhat conflicting as to his authority to receive or collect moneys for the company, but it fully appears without contradiction that he had an oversight of all the work, and had general charge of the employees of the company, and acted as its superintendent of the construction. Whether this constituted him its "managing" agent, within the meaning of section 217, subsec. 1, of the Code, is the question presented for our determination. It appearing that the plaintiff resides in the state, and also that the cause of action arose herein, service upon a foreign corporation is to be made in the same manner as upon resident corporations, to wit, by delivering a copy of the summons to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent;

and a local agent is defined by the said section to mean a person receiving or collecting moneys within the state for or on behalf of the corporation. No statutory definition being given to "managing" agent, we must give it that meaning generally recognized by lexicographers. To "manage" (the verb from which the adjective "managing" is derived) is defined by Mr. Webster to mean "to direct; to govern; control; wield; order," etc.; hence, "to direct affairs; to carry on business or affairs." Applying this meaning of the word to the duties, functions, and relations which Turner performed and bore to the business carried on by defendant company, the conclusion is irresistible that he was its managing agent, and therefore service of the summons made upon him brought the defendant company into and within the jurisdiction of the court. This being clearly so, it is unnecessary to discuss further whether or not he was a local agent also, for he may have acted in either one or both of those capacities.

No appeal lies from a refusal to dismiss. The cases are uniform, and are collected in Clark's Code, p. 738. We have, however, discussed the merits, as has been sometimes done in such cases. *State v. Wyde*, 110 N. C. 500, 15 S. E. 5.

Appeal dismissed.

(129 N. C. 252)

MYERS v. CONCORD LUMBER CO.

(Supreme Court of North Carolina. Nov. 19, 1901.)

MASTER AND SERVANT—PERSONAL INJURIES—SAFE APPLIANCES AND MACHINERY—EVIDENCE—SUBSEQUENT REPAIR.

1. In an action by a servant for personal injuries, it was not error to instruct that if defendant unnecessarily and dangerously permitted shavings to accumulate in a passageway, and plaintiff in obedience to orders was compelled to pass near them, and they caused him to fall and injure himself, that would constitute negligence.

2. In an action by a servant for personal injuries, it was not error to instruct that if the rip saw and molding machine were dangerously close, and that in order to comply with orders the plaintiff was compelled to pass between them with a load in his arms, and the company had permitted the regular passageway to become filled up, and failed to provide another, such acts would constitute negligence on the part of the defendant.

3. In an action by a servant for personal injuries, it was not error to instruct that if the jury found that a counter shaft or loose pulley, or a covering for the saw running naked, was a proper and reasonable safeguard for its employees, and defendant failed to provide it, that was negligence.

4. In an action by a servant for personal injuries, in which a part of the negligence alleged was the location of certain machinery, evidence of its removal by defendant subsequent to the injury complained of was erroneous.

Appeal from superior court, Cabarrus county; Brown, Judge.

Action by C. A. Myers against the Concord Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. G. Means and Jones & Tillett, for appellant. Montgomery & Crowell, for appellee.

MONTGOMERY, J. An employer owes to his employé the duty to be reasonably careful to provide sound and safe appliances and machinery, and also to see that the place prepared for him, in which he is to do his work, and the ways provided for getting to and from it, be reasonably safe. *Chesson v. Lumber Co.*, 118 N. C. 59, 23 S. E. 925. The plaintiff, a servant of the defendant, complains that the defendant neglected and failed to use such care and forethought as a reasonably prudent man would have done under the circumstances at the time of his injury by the defendant's machinery.

The defendant excepted to the following instructions given to the jury: "If you find the facts to be that the defendant unnecessarily and dangerously permitted shavings to accumulate in the passageway near the molder, and that the plaintiff, in obedience to the superintendent's orders, was compelled to pass near them, and that they caused him to fall and slip and cut himself, that would be negligence, and you should answer the first issue, 'Yes.'" "If you find the facts to be that the rip saw and molding machine were dangerously close, and that in order to comply with the superintendent's order the plaintiff was compelled to pass with a load in his arms between them, and that the defendant company had permitted the regular passageway for this lumber to become filled up with plank, and failed to provide another, that would be negligence upon the part of the defendant; and, if the plaintiff was injured thereby,—if that negligence caused his injury,—your answer to the first issue should be, 'Yes.'" "So if the jury find that a counter shaft or loose pulley, or a covering for a saw running naked, was a proper and reasonable safeguard for its employés, and the defendant failed to provide it, that is negligence; and, if the jury find that the plaintiff was injured by reason of such negligence, they will answer the first issue, 'Yes.'" We see no error in the charge. The instructions were based on repeated decisions of this court, and there was evidence upon which they were formulated.

But there must be a new trial in this case because of the admission of incompetent evidence. The plaintiff was allowed to testify, for the purpose of showing negligence on the part of the defendant, that some time after he was injured the saw by contact with which he was hurt, and which was alleged to have been negligently situated with reference to other appliances and machinery of the defendant, was removed by the defendant to another part of the room. That evi-

dence was incompetent, and it tended to prejudice the jury against the defendant. *Lowe v. Elliott*, 109 N. C. 581, 14 S. E. 51. The supreme court of Minnesota (*Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358), reversing a former ruling in which they had held that such evidence was competent, said: "But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is, on principle, wrong. * * * A person may have exercised all the care which the law requires, and yet, in the light of his new experience after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence. The same rule was adopted by the supreme court of the United States in the case of *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, and appears to be well settled in England. *Hart v. Railway Co.*, 21 Law T. (N. S.) 261, 263."

New trial.

(129 N. C. 282)

PARLIER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 19, 1901.)

CARRIERS—INJURIES TO PASSENGER—QUESTION FOR JURY.

1. Under Acts 1901, c. 594, providing that a defendant introducing evidence after moving for a nonsuit thereby waives his rights under the motion, a defendant who introduces evidence after moving for a nonsuit cannot on appeal assign as error the court's ruling thereon.

2. Plaintiff's evidence showed that she was one of the last of seven passengers to alight from defendant's train at a station, and that when she was on the last step of the car the train suddenly jerked forward, causing her to fall; that she prepared to get off as the station was called; that the conductor did not aid her, and was not there when the passengers alighted. Her witnesses were contradicted by defendant's evidence, which showed that defendant was not negligent. *Held*, that the issue of defendant's negligence was for the jury, and hence it was not error to deny defendant's motion to dismiss.

Appeal from superior court, Cabarrus county; Allen, Judge.

Action by Alice J. Parlier against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. F. Bason and A. B. Andrews, Jr., for appellant. Montgomery & Crowell, for appellee.

FURCHES, C. J. The plaintiff fell and was injured in getting off defendant's train at the station in Concord, and brings this action for damages. At the close of plaintiff's evidence the defendant moved to dismiss the plaintiff's action under the statute. But upon the court's refusing this motion the defendant introduced evidence, and the plaintiff introduced additional evidence, and at the close of the plaintiff's additional evidence the defendant renewed its motion to dismiss the action upon the ground that the evidence, if believed, did not make a prima facie case. This motion being refused, the defendant excepted, and upon appeal assigned the following as error: "(1) The ruling of the court refusing to nonsuit the plaintiff at the close of her own evidence; (2) the refusal of the court to nonsuit the plaintiff at the close of the whole evidence; (3) the refusal of the court to grant a new trial." There are no exceptions to the charge of the court, nor was there any exception to the evidence, and these assignments of error and the evidence constitute the case on appeal.

This court held in *Means v. Railroad Co.*, 126 N. C. 424, 35 S. E. 813, construing Act 1897, c. 109, as amended by Act 1899, c. 131, that, if the defendant introduced evidence after making a motion to dismiss, he thereby waived any rights he had under said motion. But at the close of all the evidence he might renew his motion to dismiss, and this motion stood upon a consideration of the whole evidence introduced by the plaintiff and the defendant. This construction has since been made the law by the legislature. Acts 1901, c. 504. As the defendant has waived its first motion by introducing evidence, it is not necessary to consider the evidence introduced before the first motion and that introduced afterwards separately, as this last motion depends upon the whole evidence in the case, and this evidence must be considered in the most favorable light for the plaintiff. Nor is it necessary that we should quote all the testimony, but only enough to show the negligence of the defendant, if believed. Taggart, a witness for the plaintiff, testified: "That he was on the train that day. There were seven passengers to get off at Concord. My wife got off first, then a little boy, then Mrs. Barringer and Aunt Flora. I was just behind Mrs. Parlier. When she was on the last step, the train jerked off like a horse when you strike him. I had my little boy in my arms, and a valise, when I got off. We prepared to get off as station was called. So did Mrs. Parlier. We did not stand and talk. Conductor did not help any of us off. He was not there trying to keep people back." There were other witnesses examined for the plaintiff, but the evidence we have quoted was the most favorable for the plaintiff. This evidence was contradicted by that of the defendant, which, if believed by the jury, showed that defendant was not neg-

ligent, and that plaintiff's injury was without fault on its part. But this contradiction was a matter for the jury to settle, and can do the defendant no good on this appeal. Upon the evidence we do not think the judge could have taken the case from the jury, as he had no more right to reconcile this conflict of evidence than we have.

There was no error in overruling the defendant's motion to dismiss, and the judgment is affirmed.

(129 N. C. 255)

FIRST NAT. BANK OF SALISBURY v. SWINK et al.

(Supreme Court of North Carolina. Nov. 19, 1901.)

APPEAL—FINDINGS OF FACT—BILLS AND NOTES—EVIDENCE—RELEASE—EXTENSION OF TIME.

1. Where the court does not make a specific finding of fact on one of the issues, but incorporates uncontradicted evidence on such issue, the evidence and facts shown thereby will be deemed a part of the findings.

2. In an action by a bank on a note, the complaint alleged that J. executed his note, and S. & T. indorsed the same. J. testified that he borrowed the money from the bank, and gave the note with S. & T. as sureties and indorsers thereon. J. was indebted to S. & T., who in turn were indebted to the bank, and the amount of this note was charged to J., and credited on the account of S. & T. J. paid the interest on the note, and no demand was ever made therefor by the bank on S. & T. S. testified that when the cashier showed him the note he told him that S. & T. were to indorse it for J. Held, that S. & T. were indorsers and sureties, and not comakers, and that plaintiff had knowledge thereof.

3. Under Code, § 440, providing that after the lapse of three years from the entry of judgment an execution can be issued only by leave of the court on motion, with notice to the adverse party, sureties on a note, against whom judgment had been entered, may interpose the defense of release by an extension of time for payment of the judgment given the maker without their knowledge, defenses arising since the judgment was entered being available on a motion to revive it.

4. Where J. borrowed money from a bank on the indorsement of S. & T., to pay a debt owing to S. & T., who in turn were indebted to the bank, and the amount was credited on the bank's books to S. & T., they will not be deemed to have lost their right to a release from liability as indorsers, on the bank's granting J. an extension of time for the payment of the judgment without their knowledge, by the fact that the money was received by them, since they received no benefit from the indorsement, J. being solvent at the time.

Appeal from superior court, Rowan county; Brown, Judge.

Proceedings to revive a dormant judgment by the First National Bank of Salisbury against D. A. Swink and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Glenn, Manly & Hendren, Overman & Gregory, and Swink & Swink, for appellants. Kerr Craige, L. H. Clement, and T. C. Linn, for appellee.

FURCHES, C. J. This is a motion to revive a dormant judgment, in which a jury trial was waived, and by consent of both parties his honor found the facts and declared the law as follows: "This is a motion to revive dormant judgment rendered and docketed in 1892 in favor of the plaintiff against Eugene Johnson, D. A. Swink, and Geo. T. Thomason, defendants. Josephine A. Thomason is administratrix for the latter, and the motion is for leave to issue execution thereon. The motion was heard by the clerk, and on appeal to the superior court a jury trial was waived of record by all parties, and motion heard by G. H. Brown, Jr., judge, on Saturday, first week of said term. The court then entered an order granting said motion, to which defendants Swink & Thomason duly excepted and appealed. (The clerk will copy and send up said order, and also a copy of the judge's notes of evidence.) On Tuesday of second week, before term had been adjourned, the court made the finding of the facts as follows, to wit: On January 23, 1899, Eugene Johnson executed his note in the sum of \$1,500 to plaintiff, payable at four months, and the defendants Swink & Thomason indorsed by signing their names on the back of said note. (The clerk will send up exact copy of said note and all entries and indorsements thereon.) Said note was made and indorsed under the following circumstances. The negotiation and arrangement to have the note discounted and to borrow the money was made by Johnson with Foust, cashier of said bank. The purpose of borrowing the money was to pay Swink & Thomason, then a tobacco firm, a debt Johnson owed them. Defendant Johnson signed the note, and left it with Foust, cashier. Johnson then went to warehouse of Swink & Thomason, and requested them to indorse said note. Swink & Thomason went to the bank, and each wrote his name across the back of said note, and then the note was discounted by the said bank, and proceeds placed by said bank to credit of Swink & Thomason on their deposit account, which was then overdrawn. This was done by consent of Swink & Thomason. The latter gave Johnson credit for said sum on his account on their books. No money was paid to Johnson by the said bank. All payments of interest on said note were made by Johnson, and none by Swink & Thomason. There is no evidence that the bank ever presented the note to Swink & Thomason, or either of them, or ever demanded payment of them, until commencement of action. Plaintiff brought suit on said note against defendants to February term, 1892, at which time judgment was regularly taken against defendants Swink & Thomason in default of answering. At May term, 1892, judgment was regularly entered against defendant Johnson. That term commenced on May 9, 1892; judgment against Johnson entered and signed May 13th. At that date Johnson was generally reported

to be solvent, and was solvent. Judgment was duly docketed as of first day of the term. (The clerk will send up copies of both said judgments and of the complaints in the cause.) On May 12, 1892, defendant Johnson and the said cashier, Foust, and W. C. Blackmer, attorney of record in the cause and general counsel for the bank, without the knowledge of the defendants Swink & Thomason, agreed on an extension of time of payment of the judgment, upon which no execution was to issue for twelve months provided Johnson paid up interest every 90 days. On May 12, 1892, said defendant Johnson paid up interest thereon for 90 days in advance to August 12, 1892, and bank accepted same without knowledge of Swink & Thomason. No execution was issued during said period in accordance with said agreement. Only execution ever issued was January 21, 1895, and returned nulla bona on February 18, 1895. Johnson is now insolvent. Defendant Johnson himself wrote the note, and left it with the cashier, and went to the warehouse of Swink & Thomason, and told them to go to bank and indorse note, and take proceeds, and give him credit for same. Johnson then owed Swink & Thomason \$1,900. Swink & Thomason first learned of the 90-days extension and payment of interest in advance heretofore set out during August, 1893. (The clerk will send up copies of entries of judgment docket, page 220, docket No. 8, page 770, and entries minute docket February term, 1892, entries and record at that term, and record of judgment against D. A. Swink and G. T. Thomason.) Said judgment has never been paid or satisfied by any one. The defendants' counsel contends that, taking the entire evidence, it clearly appears that Swink & Thomason are sureties, and have been released. The court is of opinion as matter of law: (1) That Swink & Thomason received entire consideration for their own use and benefit, and in law occupied relation of coprincipal; (2) that they were not released from the operation of the judgment rendered against them; (3) that upon the facts as found, and upon the evidence, the motion should be granted, and that leave to issue execution according to law is granted as to defendant Swink, and to take proper proceedings according to law against the administratrix of George T. Thomason to enforce payment of said judgment." To this judgment, order and findings, defendants Swink and Thomason except and appeal.

The judge does not in distinct terms, as it seems to us he might have done, find that Swink & Thomason were the sureties of Johnson. But it does seem that he has done so by necessary implication, as he incorporates in his findings the evidence in the case; and in this evidence we find that Johnson testified as follows: "I borrowed money from Foust, as cashier of the National Bank of Salisbury. It was I who bor-

rowed the \$1,500, and I gave the note sued on with D. A. Swink and G. T. Thomason as sureties and indorsers." And D. A. Swink testified as follows: "Johnson owed us \$1,900. He came by the warehouse, and told us to go by the bank, and see the cashier, and get \$1,500. I went and saw Foust, and he showed me note, and said we were to indorse it for Johnson. I did not know of this before I indorsed it, and a few days after Thomason indorsed it. Our firm owed the bank some money at that time. Bank placed this money to the credit of our firm, and we gave Johnson credit for \$1,500. I did not arrange to borrow this \$1,500. Johnson did. We knew nothing of it." This evidence of Johnson and Swink is uncontradicted, and is made a part of the judge's findings and case on appeal. We must therefore take it as a part of the findings of the court, as we must take it that it was within the knowledge of the court that we could not review the judge upon findings of fact where there was a conflict of evidence. Plaintiff alleges in its complaint "that Eugene Johnson executed and delivered his promissory note for \$1,500 borrowed money, * * * and Swink and Thomason indorsed said note." We think it is clearly shown, and the judge so finds, that Johnson negotiated the loan, borrowed the money, and gave his note therefor with Swink & Thomason as his sureties. But it is distinctly found by the court that Swink & Thomason never paid interest on said note, nor was there ever any demand made upon them for the payment of interest, or for any other amount; while the defendant Johnson several times paid the interest due on said note, which of itself created the presumption that Johnson was the principal, and that Swink & Thomason were his sureties. 1 Brandt, Sur. § 33. And it seems that, this being a fact that plaintiff must have had knowledge of, it would also create a presumption of knowledge on the part of plaintiff that Johnson was principal and Swink & Thomason were sureties. Sutton v. Walters, 118 N. C. 495, 24 S. E. 357. But Swink swore that Foust, cashier, said, when "he showed me note, that we were to indorse it for Johnson." It must therefore be taken that the plaintiff had notice of the fact that Swink & Thomason were the sureties of Johnson. This being so, the extension of time given to Johnson would have been a discharge of Swink & Thomason, if it had been before judgment was taken against them, if it had been set up by them as a defense on the trial. Sutton v. Walters, supra, and cases there cited. It remains to be seen whether Swink and Thomason can avail themselves of this defense since judgment. The judgment having become dormant, this

proceeding was commenced under section 440 of the Code to revive the same. This could not be done without notice to the defendants, giving them a day in court to show cause why the judgment should not be revived, and execution issue thereon. On the hearing of this motion, defendants are entitled to set up any defense or reason why the judgment should not be revived against them that have arisen or accrued since the judgment was taken. Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529 (opinion by Judge Cooley); Am. & Eng. Enc. Law (1st Ed.) 748; 2 Brandt, Sur. §§ 742, 743; Freem. Judgm. (3d Ed.) § 226. And it is expressly said by this court that in applications to revive judgments under section 440 of the Code the defendant may avail himself of any defense to which he may be entitled arising since the judgment was taken. McLeod v. Williams, 122 N. C. 451, 30 S. E. 129, citing McDonald v. Dickson, 85 N. C. 248, and Lytle v. Lytle, 94 N. C. 683, as authority for so holding. It therefore seems that the defendants Swink & Thomason were entitled to the benefit of this defense in this proceeding. But it is contended by the plaintiff that, if all this should be so as to principals and known sureties, it is not so in this case, and that the defendants Swink & Thomason are not entitled to this defense, for the reason that they received or got the benefit of the money paid for said note; that this made them principals to the plaintiff, whatever relations may have existed between them and Johnson. And for this position they cite what is said by the court in the case of Bank v. Sumner, 119 N. C. 591, 26 S. E. 129, and Hoffman v. Moore, 82 N. C. 313. The paragraph referred to in Bank v. Sumner is but a suggestion, and, while we think it was correct as applied to the facts of that case, it does not seem to us to sustain the contention of the plaintiff in this case. In that case Sumner got the full benefit of his indorsement. He paid his own debt with a note of Bostic and Cobb, and it was of no benefit to them that he should have indorsed it. In this case the indorsers, Swink & Thomason, got no benefit from the indorsement, but Johnson did. He paid Swink & Thomason a debt he owed them. Johnson was solvent at that time, and, if he had not paid them in this way, or some other way, they would have made their debt out of him. But after he paid them by the money received on this note, and they gave him credit on his debt for that amount, they had no debt against him. They would hardly have done this if it had been their note and their money. We therefore do not think the suggestion made in Bank v. Sumner applies, and the judgment of the court is erroneous, and is reversed.

MEMORANDUM DECISIONS.

ABERNATHY v. WILKINS. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Dismissed under rule 17 (27 S. E. vii.).

ANDERSON v. ANDERSON. (Supreme Court of North Carolina. Feb. Term, 1901.) W. A. Smith, for plaintiff. Merrimon & Merrimon, for defendant. No opinion. Affirmed.

BESSEMER CITY COTTON MILLS v. ODELL. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Dismissed under rule 17 (27 S. E. vii.).

BRADLEY v. JOHNSTON. (Supreme Court of North Carolina. Feb. Term, 1901.) Appeal from superior court, Pasquotank county. No opinion. Settled by the parties.

CHASTAIN v. PLATT. (Supreme Court of North Carolina. Feb. Term, 1901.) Shepherd & Shepherd, for plaintiff. Busbee & Busbee and Dillard & Bell, for defendant. No opinion. Affirmed.

COCHRAN v. IMPROVEMENT CO. (Supreme Court of North Carolina. Feb. Term, 1901.) Davidson & Jones and Bourne & Parker, for plaintiff. Chas. A. Moore and Geo. A. Shuford, for defendant. No opinion. Motion of defendant to have amount of printing recovered under the rule in this court applied to the judgment in favor of defendant in McDowell superior court allowed.

DEBNAM v. TELEPHONE CO. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Settled by the parties.

DICKSON v. ALEXANDER. (Supreme Court of North Carolina. Feb. Term, 1901.) S. J. Ervin, for plaintiff. No opinion. Affirmed.

In re DILLARD'S WILL. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Dismissed under rule 17 (27 S. E. vii.).

EATMAN v. LAMB. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Dismissed under rule 17 (27 S. E. vii.).

EDWARDS v. PATE. (Supreme Court of North Carolina. Feb. Term, 1901.) L. V. Morrill and Swift Galloway, for plaintiff. G. M. Lindsay, for defendant. No opinion. Affirmed.

FAISON v. HICKS. (Supreme Court of North Carolina. Feb. Term, 1901.) H. E. Faison, for plaintiff. Stevens & Beasley, for defendant. No opinion. Motion to retax costs denied. See 37 S. E. 511.

FLEMING v. LUMBER CO. (Supreme Court of North Carolina. Feb. Term, 1901.) Appeal from superior court, Pasquotank county. Skinner & Whedbee, for plaintiff. J. L. Fleming, for defendant. No opinion. New trial.

GEE v. HILL. (Supreme Court of North Carolina. Feb. Term, 1901.) C. M. Cooke, for plaintiff. Bickett & Sprull, for defendant. No opinion. Affirmed.

HICKS v. BURROUGHS. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Dismissed under rule 17 (27 S. E. vii.).

KEENER v. MOTZ. (Supreme Court of North Carolina. Feb. Term, 1901.) L. D. Wetmore and A. L. Quickel, for plaintiff. D. W. Robinson, for defendant. No opinion. Affirmed.

KILBY v. CEDAR WORKS. (Supreme Court of North Carolina. Feb. Term, 1901.) Appeal from superior court, Pasquotank county. Bond & Smith and Skinner & Whedbee, for plaintiff. Mr. Aydlott and Shepherd & Shepherd, for defendant. No opinion. Affirmed.

KRAMER v. SOUTHERN RY. CO. (Supreme Court of North Carolina. Feb. Term, 1901.) E. J. Justice, for plaintiff. G. F. Basson, for defendant. No opinion. Affirmed.

MARSHBURN v. LASHLIE. (Supreme Court of North Carolina. Feb. Term, 1901.) Battle & Mordecai and H. E. Norris, for plaintiff. Argo & Snow, for defendant. No opinion. Affirmed.

NORTH CAROLINA MIN. CO. v. ENLOE et al. (two cases). (Supreme Court of North Carolina. Feb. Term, 1901.) C. C. Cowan, C. A. Moore, and Shepherd & Shepherd, for plaintiff. Ferguson & Son, J. J. Hooker, and Merrimon & Merrimon, for defendant. No opinion. Affirmed.

NORTH CAROLINA MIN. CO. v. O'DONNELL et al. (two cases). (Supreme Court of North Carolina. Feb. Term, 1901.) C. C. Cowan, C. A. Moore, and Shepherd & Shepherd, for plaintiff. Ferguson & Son, J. J. Hooker, and Merrimon & Merrimon, for defendant. No opinion. Affirmed.

PALMER v. BARNARD et al. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Dismissed for failure to print record.

In re PENDLETON. (Supreme Court of North Carolina. Feb. Term, 1901.) Appeal from superior court, Pasquotank county. E. F. Aydlott, for petitioner. No opinion. Affirmed.

PIPKIN v. WILMINGTON & W. R. CO. (Supreme Court of North Carolina. Feb. Term, 1901.) Allen & Dortch and T. B. Womack, for plaintiff. F. A. Daniels, for defendant. No opinion. Affirmed.

SIMMONS et al. v. MUTUAL RESERVE FUND LIFE ASS'N. (Supreme Court of North Carolina. June 4, 1901.) Appeal from superior court, Wake county; Moore, Judge. Action by F. G. Simmons and others against the Mutual Reserve Fund Life Association. From a judgment for plaintiffs, defendant appeals. Affirmed. Hinsdale & Lawrence and Shepherd & Shepherd, for appellant. W. W. Clark, T. B. Womack and Simmons & Ward, for appellees.

DOUGLAS, J. This is an action brought to recover the assessments which the plaintiff, F. G. Simmons, has paid the defendant on a contract of insurance which the plaintiffs allege has been unlawfully canceled by the defendant. Viewed in the light of the original contract, the facts of this case seem to bring it within the principles decided in *Strauss v. Association*, 126 N. C. 971, 36 S. E. 352, and on rehearing at this term, 38 S. E. 55. It seems that the plaintiffs on November 10, 1895, commenced an action based on the alleged breach of the original contract, which terminated in a compromise agreement dated October 31, 1896. What might have been the proper construction of that compromise, or its legal effect, is not before us, as it seems to have been repudiated by both parties. This being so, the parties are relegated to their former contract. Even if the second contract were otherwise in force, it has been admittedly violated by the defendant, who cannot be allowed to "approve and reprobate" the same instrument in the same breath. Such being the case, we see no error in the judgment of the court below. Affirmed.

STATE v. FORT. (Supreme Court of North Carolina. Feb. Term, 1901.) Brown Shepherd and Geo. Rose, for the State. T. H. Sutton, for defendant. No opinion. Affirmed.

STATE v. NEWSOME. (Supreme Court of North Carolina. Feb. Term, 1901.) Appeal from superior court, Pasquotank county. The Attorney General, for the State. R. B. Peebles, for defendant. No opinion. Affirmed.

STATE v. WHITAKER. (Supreme Court of North Carolina. Feb. Term, 1901.) The Attorney General, for the State. J. C. L. Harris, for defendant. No opinion. Affirmed.

STATE v. WILDER. (Supreme Court of North Carolina. Feb. Term, 1901.) The Attorney General, for the State. B. C. Beckwith, for defendant. No opinion. Affirmed.

VANDERBILT v. PICKELSIMER. (Supreme Court of North Carolina. June 7, 1901.) Appeal from superior court, Transylvania county; Allen, Judge. Suit by G. W. Vanderbilt against R. J. Pickelsimer for the possession of real estate. From a decree in favor of the plaintiff, the defendant appeals. Reversed. Geo. A. Shuford, for appellant. Merrimon & Merrimon, for appellee.

MONTGOMERY, J. The plaintiff undertook to show title in himself to the tract of land described in the complaint, not by proving title out of the state by grant and mesne conveyances to himself, but by showing that he and the defendant each claimed the land from a

common source. Owing to the confusion in the arrangement of the evidence, the absence of several deeds and papers which are of importance, and some inconsistency in his honor's rulings, we are not prepared to say that the plaintiff made out his claim, and we think the case ought to go back for a new trial. It must be said that his honor, in making up the case on appeal (counsel having disagreed), was without his notes of the trial or other papers, and without the assistance of counsel, who were notified of the time and place, but did not attend. Without fault on his part, months elapsed after the trial and before the case was made up. He states all these matters, and concludes by saying: "I have, after the lapse of so long a time after the hearing of the case, under the circumstances, labored under much difficulty in preparing a statement, which is not satisfactory." New trial.

WILLIAMS v. NORFOLK & C. R. Co. (Supreme Court of North Carolina. Feb. Term, 1901.) Appeal from superior court, Pasquotank county. F. D. Winston and Alex. Lassiter, for plaintiff. Geo. Cowper, for defendant. No opinion. Affirmed.

WILLIAMS v. TATHAM. (Supreme Court of North Carolina. Feb. Term, 1901.) Bourne & Parker, for plaintiff. Dillard & Bell and Busbee & Busbee, for defendant. No opinion. Affirmed.

WILLIAMS v. WEST ASHVILLE & S. S. RY. CO. (Supreme Court of North Carolina. Feb. Term, 1901.) No opinion. Settled by the parties.

BAKER v. IRVINE. (Supreme Court of South Carolina. July 13, 1901.) Appeal from common pleas circuit court of Greenville county; Aldrich, Judge. Action by J. A. Baker against W. H. Irvine. From a judgment of the circuit court reversing a judgment for plaintiff, he appeals. Reversed. Blythe & Blythe, for appellant. Carey & McCullough and Shuman & Mooney, for respondent.

POPE, J. The action below was commenced before the magistrate appointed for Bates and Paris Mountain townships of Greenville county to recover a certain sum of money. After one postponement of trial by the defendant, the cause was heard on December 6, 1899. Judgment was rendered for the plaintiff. Thereupon an appeal was taken to the circuit court for Greenville. Upon due notice, the defendant, at the trial before his honor, Judge Aldrich, raised the question of jurisdiction in the magistrate who heard the cause, because such magistrate was appointed for Bates and Paris Mountain townships, while the defendant resided, not in Bates or Paris Mountain townships, but resided in Greenville township. The circuit judge sustained the question of jurisdiction and ordered the judgment of magistrate's court reversed and annulled. Thereupon the plaintiff appealed to this court from such judgment. The proceedings and grounds of appeal were identical with those just disposed of in the action of *Baker v. Irvine* (this day filed) 39 S. E. 252. Our judgment in the present action must be the same as it was in the case just cited. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court to hear and determine the questions presented by the defendant's appeal from the judgment of the magistrate's court.

BAKER v. IRVINE. (Supreme Court of South Carolina. July 13, 1901.) Appeal from common pleas circuit court of Greenville county; Aldrich, Judge. Action by W. C. Baker against W. H. Irvine. From a judgment of the circuit court reversing a judgment of the magistrate for plaintiff, he appeals. Reversed. Blythe & Blythe, for appellant. Carey & McCullough and Shuman & Mooney, for appellee.

POPE, J. This action was commenced in the magistrate's court for Bates and Paris Mountain townships of Greenville county for the recovery of money. After one postponement at the instance of the defendant, the trial was held on the 6th December, 1899, and resulted in a judgment for the plaintiff. Thereupon an appeal was taken to the court of common pleas for Greenville county, and came on for a hearing before his honor, Judge James Aldrich. At this juncture the defendant raised the question of the magistrate's jurisdiction, because he was the trial justice for Bates and Paris Mountain townships, while the defendant resided in Greenville township. The circuit judge sustained the objection of the defendant, and reversed and vacated the judgment of the magistrate. Thereupon the plaintiff appealed to this court; but, inasmuch as the proceedings, the judgment of Judge Aldrich, and the grounds of appeal are precisely similar to those fully set out in the case of *Baker v. Irvine* (S. C.) 39 S. E. 252, our judgment in this case must be necessarily the same as the case just cited, and in which our decision has been filed this day. It is therefore the judgment of this court that the judgment of the circuit court be reversed, and that the action be remitted to the circuit court to hear and determine the questions presented by the appeal of the defendant from the judgment of the magistrate's court.

BURNET, County Treasurer, v. ISRAEL et al., County Com'rs. (Supreme Court of South Carolina. July 22, 1901.) Action by Barnwell R. Burnet, county treasurer of Charleston county, against Israel and others, county board of commissioners of Charleston county, to enjoin defendants from auditing certain claims against the county. Submission of controversy without action. Petition dismissed. G. Duncan Bellinger, Atty. Gen., for defendant.

JONES, J. In this controversy without action, in the original jurisdiction of this court, the plaintiff seeks to enjoin the defendants, claiming to act as county board of commissioners of Charleston county, from auditing, approving, or preparing to pay claims against the county of Charleston, on the ground that the defendants are not a legally constituted board. Having in the case of *Grocery Co. v. Burnet* (just filed) 39 S. E. 381, determined that the said county board of commissioners is legally constituted, for the reasons therein stated, this is controlled thereby. It is therefore ordered and adjudged that the petition for injunction be dismissed.

DONALDSON v. NESBIT et al. (Supreme Court of South Carolina. June 22, 1901.) Appeal from common pleas circuit court of Charleston county; Gary, Judge. Action by Sydney T. Donaldson against Mitchell Nesbit and others. From an order of reference, defendants appeal. Reversed. Smythe, Lee & Frost and Walter Hazard, for appellants. Bryan & Bryan, for respondent.

GARY, A. J. The facts of this case are similar to those in the case of *Alston v. Limehouse*, 39 S. E. 192, in which the opinion has

just been filed; and, as the principles therein stated are applicable to this case, it is only necessary to announce the judgment of this court, which is that the order of the circuit court be reversed.

DONALDSON v. NESBIT et al. (Supreme Court of South Carolina. June 22, 1901.) Appeal from common pleas circuit court of Charleston county; Gary, Judge. Action by Sydney T. Donaldson against Mitchell Nesbit and others. From an order granting a temporary injunction, and from an order of reference, defendants appeal. Appeal from order granting injunction dismissed, and from order of reference reversed. Smythe, Lee & Frost and Walter Hazard, for appellants. Bryan & Bryan, for respondent.

GARY, A. J. The facts of this case are similar to those in the case of *Alston v. Limehouse*, 39 S. E. 192, in which the opinion has just been filed; and, as the principles therein stated are applicable to this case, it is only necessary to announce the judgment of this court, which is that the appeals from the orders of Judge Gage be dismissed, and that the order of Judge Gary be reversed.

WILLIAMS, Sheriff, v. RICHLAND COUNTY. (Supreme Court of South Carolina. July 13, 1901.) Appeal from common pleas circuit court of Richland county; Townsend, Judge. Action by R. B. Williams, sheriff of Richland county, against Richland county. From an order reversing the judgment of the county board of commissioners disallowing the claim, the county appeals. Reversed. Melton & Belser, for appellant. John P. Thomas, Jr., for respondent.

POPE, J. The following is extracted from the statement in the "case of appeal": "On the 3d day of April, 1899, a bill of indictment was found by the grand jury for Richland county, charging W. R. Crawford with the murder of one Mrs. Stewart, alleged to have been committed in the said county of Richland. Subsequently, on motion of the defendant, Crawford, an order was obtained, changing the venue from Richland county to Kershaw county, and the case so removed was thereafter tried at the June term of the court of general sessions in and for said Kershaw county. On the — day of June, 1899, R. B. Williams, sheriff for Kershaw county, presented an itemized claim, duly verified, to the county supervisor for the county of Richland, for the mileage, fees, and expenses of the said R. B. Williams on account of and incident to said trial, amounting in the aggregate to the sum of \$24.29, all of which accrued subsequent to the order changing the venue as aforesaid. The following is a copy of the account as presented: 'State v. W. R. Crawford. Murder. Account for Witnesses Arrested in Richland County and Brought to Camden in the W. R. Crawford Case: Camden, S. C., June 7, 1899. County Board of Commissioners of Richland County, to R. B. Williams, Sheriff, Dr. To 124 miles travel at 6 cents per mile, \$7.44; railroad fare for deputy from Camden to Columbia, \$1.85; railroad fare for deputy and four witnesses from Columbia to Camden, \$9.25; to board and lodging for deputy, \$1.50; to 4 arrests, \$4, and telegram, 25 cents, \$4.25,—\$24.29.' This claim was disallowed by the county board of commissioners for Richland county in the following order: 'Upon hearing the testimony in regard to this claim, payment of the same is refused.' An appeal was then taken to the circuit court for Richland county, which came on to be heard by his honor, Judge Townsend, who passed the following judgment: 'The above-entitled case, like the case of Ker-

shaw County v. Richland County, was an appeal from the decision of the county board of commissioners of Richland county. The appeal raised the same question as was raised in the appeal in the last-mentioned case, to wit, the liability of Richland county for the expenses of the trial in Kershaw county of the case of the State against William R. Crawford, and, in fact, the two cases were heard together. The claim in this case was for the fees and mileage of the sheriff of Kershaw county incurred in connection with said trial. The conclusion which I have reached in the said case necessarily controls this case, and the appeal must be sustained. It is accordingly adjudged and decreed that the decision and judgment below be set aside, and that the county board of commissioners of Richland county do audit the said claim, and order the same to be paid as a valid and legal claim against Richland county.' Whereupon the defendant appealed to this court upon the single ground: 'Because his honor erred in finding as matter of law that the claim of R. B. Williams, sheriff of Kershaw county, herein, constitutes a legal and valid claim against Richland county, and that the county board of commissioners for Richland county erred in declining to allow and pay the same, whereas, it appearing that all of the items of said claim accrued after the order changing the venue from Richland county to Kershaw coun-

ty and during the trial of the cause so transferred in said Kershaw county, his honor should have held that the same does not constitute a legal and valid claim against said Richland county, and, so holding, should have dismissed the appeal.' We have determined, for the reasons set out in the case of Kershaw County v. Richland County, 39 S. E. 263, this day filed, to sustain the appeal and reverse the circuit judgment. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be recommit- ted to the circuit court, with direction that a judgment be there formulated dismissing the appeal of R. B. Williams, as sheriff, etc., from the order of the board of county commissioners for Richland county disallowing his claim pre- sented to said board.

In re JOHNSTON. (Supreme Court of North Carolina. Feb. Term, 1901.) Baylus Cade, for petitioner. Busbee & Busbee and Argo & Snow, for respondent. No opinion. Judgment affirmed.

STATE v. COUNCIL. (Supreme Court of North Carolina. Feb. Term, 1901.) Brown Shepherd (N. A. Sinclair, by brief, with the Attorney General), for the State. T. H. Sutton, for defendant. No opinion. Motion for new trial denied. Judgment affirmed.

END OF CASES IN VOL. 39.

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